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FILED

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**Jim Ruby, Executive Secretary
Environmental Quality Council**

**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' RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT**

Petitioners, by and through their undersigned counsel, respectfully submit this Response to Respondent's Motion to Dismiss and Motion for Summary Judgment.

Stephens Energy Company, LLC (Stephens) asks the Council to throw out Petitioners' appeal of Permit WY0094056 on the basis that the "Petitioners provide no evidence that the specific limits set by the Permit will cause harm to agricultural use." (Respondent's Motion to Dismiss Petitioners' Appeal and Motion for Summary Judgment, p. 4) Stephens' argument puts the same legal questions raised by the Petitioners in their Motion for Summary Judgment squarely before the Council:

1. Can the EQC approve a permit that has been issued by DEQ without a valid scientific basis?

2. Can discharges made under permits issued by DEQ without valid scientific basis continue unless and until an injured landowner is able to prove the discharges will or have caused a measurable decrease in crop or livestock production?

Petitioners rely upon the facts and argument presented in their Summary Judgment motion already filed regarding these questions. In addition, certain factual assertions made by Stephens must be corrected:

1. **This is not a “containment” permit.**

Stephens repeatedly states that the discharges under this permit will be fully contained, and that water will not be discharged into the drainage. (Stephens’ Brief, pp. 3, 6, 7, 11, 14, 15; Logan Affidavit, ¶8). This position is contrary to the fact that Stephens applied for, and DEQ issued, an “Option 2” permit. *See* WYPDES Permit Application dated 1.13.2009, Exhibit 11. Option 2 “includes any on-channel discharge (including discharge into an on-channel reservoir) that does not meet the impoundment requirements specified in options 1A or 1B above.” Options 1A and 1B provide for containment. The Stephens permit, however, is not an Option 1A or 1B permit. Instead, DEQ issued an Option 2 permit, which, in order to fulfill its duty to issue permits that are protective under Chapter 1, § 20, requires an Evaluation of Downstream Irrigation Practices. *See* DEQ’s **Updated Permitting Options for Coalbed Methane Permit Applications**, Exhibit 12, p.3, which requires applicants for Option 2 permits to “develop an irrigation use protection plan. . .” That plan is to be developed under the Agricultural Use Policy; in this case the now disgraced Tier 2 of the Ag Use Policy.

The permitting at issue in this case followed this permitting structure, as is apparent in DEQ's discussion in the Statement of Basis for WY0094056 attached as Exhibit 1 to Petitioners' Motion for Summary Judgment. Under "Facility Description," DEQ states:

The permittee has chosen option 2 of the coal bed methane permitting options for discharges from this facility. Under this permitting option, the produced water is immediately discharged to a class 2 or 3 receiving stream which is eventually tributary to a class 2AB perennial water of the state. . . .

The permittee is required to contain all effluent from the outfalls in the on-channel reservoir(s) at this facility, unless prior written authorization is granted by the WYPDES program for reservoir release, in association with use of assimilative capacity credits for the Powder River Basin. In the event that such an authorization for release is granted for this facility, the authorization letter will specify the release volume, duration and individual reservoir(s) covered. In the absence of such written authorization for release, the following containment requirements will apply at the reservoir(s): **The permittee will be required to contain all produced water within the reservoir(s) during "dry" operating conditions, and discharge of effluent from the reservoir(s), except during periods of time in which natural precipitation causes the reservoir(s) to overtop and spill, is prohibited.** Intentional or draw-down type releases from the reservoir(s) will constitute a violation of this permit. Discharge from the reservoir(s) is limited by the permit to natural overtopping and shall not extend beyond a 48 hour period following commencement of natural overtopping. It is the responsibility of the permittee to adequately demonstrate the circumstances in which reservoir discharges occurred, if requested to do so by the WYPDES Program.

Exhibit 1 (emphasis added). The Statement of Basis goes on to describe the Permit effluent limits, which have been set based on the Section 20 Tier 2 analysis. Exhibit 1, pp. 2-3.¹

Stephens' contention that the water discharged under this Permit will be fully contained is neither factually correct nor consistent with the Permit terms. The three reservoirs at issue are on-channel reservoirs, which may overtop with natural

¹ Respondent, Stephens, asserts that the Permit establishes an effluent limit for SAR. Respondent's Brief, p. 11. The Permit does not establish an effluent limit for SAR. It instead requires monitoring of SAR downstream of the discharges, and allows DEQ to reopen the permit or automatically impose an effluent limit for SAR under specified conditions. Petitioners' Motion for Summary Judgment, Exhibit 1, SOB, pp. 2-3.

precipitation according to the Permit terms (whether they have yet overtopped is irrelevant). The reservoirs are unlined and “the probability is” that the water will infiltrate² from them. Paige Deposition, Exhibit 7, p 23, lines 4-11. Paige testified:

Water moves into the soil just based on pressure head and the fact that water has polarity and gravity acting on it, and the soils actually have what they call matrix potential. They actually pull water into them, they actually have charge. So that’s how water moves into the soil. So if you put enough water on top of soil it will actually move in, unless it’s treated to not infiltrate in. It’s just what happens.

Q. Okay.

A. As to how it moves through the soil, a lot of our water in Wyoming moves not over the surface but subsurface. This is how a lot of our base flow occurs within our drainage systems. Our snow melt will slowly melt into the soils, move through the soil system into our channels and streams and surface water. It’s very common. And this moves by a mix of gravity flow and matrix, so it will move both vertically and horizontally, and it will move to the easiest route. So as water moves through, if it meets something that has sort of less infiltration capacity it will actually then move in the direction of least resistance, which is usually downstream. And if it’s – Common here is we have usually coarser texture soils above more infiltration limited soils, so water will often sort of – sort of build up along that interface, and then move horizontally through the system. It’s very common.

...

So there’s two methods that water can – discharge water cannot be contained, right? So there’s leaching out of the bottom of the unlined pond or there’s overflow. ...

Paige Deposition, p. 23:15-25:21. This Permit allows water to leave the on-channel reservoirs both by infiltration and by overtopping. This may be why DEQ issued an Option 2 Permit for these discharges. Since this is an Option 2 Permit which envisions water affecting downstream agriculture, and which contains Tier 2 analysis in order to provide for protection of that downstream agriculture, it is simply disingenuous for the permittee to now argue that there will be no impact on downstream agriculture after all.

² Stephens’ predecessor, like many other CBM producers, relied on an infiltration rate for a related permit in the Spotted Horse Creek drainage, stating that: “The initial infiltration rate of 5 acre-ft/acre/year, or 106.38 bwp/acre was used.” Exhibit 8, p.2.

2. The Wests, Downstream Irrigators, Have Standing to Appeal this Permit

Stephens' Motion to Dismiss is an argument that Marge and Bill West, who ranch on Spotted Horse Creek downstream of the permitted discharges, do not have standing to contest this Permit because, Stephens says, the harm to them is merely speculative, and not "substantial, immediate, and pecuniary." (Stephens' Brief, p. 8).

It is simply astounding for the permittee to assert that the harm to the Wests is not substantial, immediate, and pecuniary in the face of their clear and uncontroverted testimony. Marge West testified:

It's -- you know, in some areas of Wyoming this methane water, the discharge water is good water. And people can irrigate with it; they can grow things with it. However, where we're located in the northeastern part of Wyoming it is not good water. It has very high total dissolved solids. It has very high SARs. When it -- in the past when it has come down Spotted Horse Creek, the channel has frozen -- well, they don't stop the water just because the channel is frozen. The water keeps coming down. It floods our land. It has destroyed approximately 100 acres of prime hay meadow which was native grasses and alfalfa combined. It killed over 200 old-stand cottonwood trees; and everybody says, too bad.

Q Now, which permits are you referring to that discharged all of this water?

A I am referring to this permit, which is in question. I am referring to the Devon permit, and I am referring to all of the permits on the lands up above us. We are at the bottom of the drainage and, therefore, water from numerous companies ends up on our land.

Q So you said that this permit -- you are aware that water from this permit has impacted your land?

A I'm sure it has. Numerous times when I go to Gillette there is a tributary of Spotted Horse Creek that crosses the highway in a culvert. And during the winter, not this year -- this year I think the wells are shut off -- but in previous years the water flows through this culvert, and you can see it right from the highway. I mean, it's no big secret. And it goes into the Spotted Horse Creek drainage. We are at the bottom of the Spotted Horse drainage, and it impacts our lands. Bill has spent untold hours trying to mitigate the damages caused by methane water. He has not had any help from anyone. He has hauled more than 500 truckloads of sediment that was washed into an old reservoir years ago -- it had nothing to do with methane -- onto this land and has leveled it out, trying to get the

land back where it would grow something. From 2000 to 2004 this land didn't grow anything. And these truckloads that he hauls are not dump-truck loads. They are not cattle-truck loads. They are semi-belly-dump trailer loads. That's a lot of work. And here he's trying to solve a problem that he did not cause.

Exhibit 10, Marge West Deposition, p. 6:20-8:22.

Apparently Stephens is not attempting to argue that the Wests cannot prove their ranch has been damaged by CBM water; instead they rely on the fact that the Wests are unable to prove that this particular water is the cause of their harm. This argument misconstrues the nature of Petitioners' burden. This is not a civil liability case in which a Plaintiff must prove which of five cars is the one that hit him and broke his leg. This is a regulatory matter in which the agency³ has a duty to issue permits that result in no measurable decrease in crop production, based on appropriate scientific methods. *See* Petitioners' Motion For Summary Judgment, pp. 7-9. The Petitioner has established there is no disputed issue of fact that the DEQ has failed to do that, because this Permit is based on Tier 2. Paige, Hendricks and Buchanan have stated that Tier 2 is not an appropriate scientific method. Respondents have presented no testimony or evidence of any sort to dispute that. Petitioners have met their burden. *See* Petitioners' Motion For Summary Judgment, pp. 14-16. What Stephens is now attempting to argue is that Petitioners have the additional burden of proving that they have or will suffer specific harm as a result of DEQ's failure to issue a Permit that complies with the law and its own regulations.

Such a standard is contrary to the law, and would set the bar for Petitioners so high that the result would be that DEQ could continue to issue permits on an invalid scientific basis until such time as a Petitioner can prove that a measurable decrease in crop or livestock production has or will occur as a result of the permitted discharge. Such an approach completely releases DEQ from compliance with the law. *See* Petitioners' Motion For Summary Judgment, pp. 14-16.

³ The DEQ has filed no motion to assert its position.

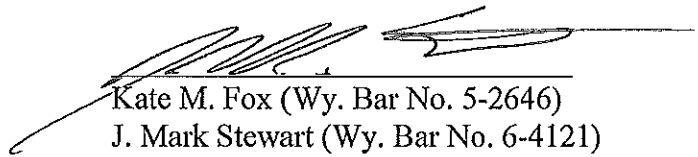
Further, as a practical matter, to require Petitioners to prove damage in order to have standing would make any permit appeal pointless. It would be far too late to achieve the statutory and regulatory objective of preventing a decrease to crop or livestock production. As Hendrickx and Buchanan have pointed out, the problems “do not occur immediately after the start of irrigation but take time to develop.” Hendrickx & Buchanan, *EXPERT SCIENTIFIC OPINION ON THE TIER-2 METHODOLOGY*, Report to the Wyoming Department of Environmental Quality, September 2009, p.13. Once the problems from discharged water have manifested themselves (even assuming they can be traced to the particular discharge, as Stephens would contend they must), the measurable decrease has already occurred and may be irreparable. Perhaps then, Stephens might concede, the Wests could file a permit appeal, if the permit were being renewed, and if the permittee were still in business, but by then the damage would be done.

Although Respondent may argue that Petitioners could prove damage through expert scientific reports prior to the damage occurring, the truth is very few ranchers have the resources for that. They rightly rely upon the DEQ to issue permits only “upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with.” W.S. 35-11-801(a). The Wests have proven that the DEQ issued this Permit without proof by the applicant that it had complied with the EQA and the rules and regulations promulgated thereunder. It is not their burden to also prove the damage that will result from DEQ’s failure.

CONCLUSION

Petitioners have met their burden of establishing there are no genuine disputes of material fact that the effluent limitations in Permit WY0094056 was not derived using appropriate scientific methods as required by WWQR, Chapter 2, Section 5(c)(iii)(C)(IV). Petitioners therefore request that the Council deny Stephens' Motion to Dismiss and Motion for Summary Judgment, grant Petitioners' Motion for Summary Judgment, and revoke Permit WY0094065.

DATED this 23rd day of February, 2010.



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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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