

October 25, 2001

Ms. Wendy Hutchinson  
Chairman  
Environmental Quality Council  
Herschler Bldg., Rm. 1714, One West  
122 West 25th Street  
Cheyenne, WY 82002

Mr. Dennis Hemmer  
Director  
Department of Environmental Quality  
Herschler Bldg., Four West  
122 West 25th Street  
Cheyenne, WY 82002

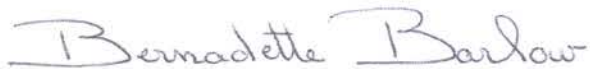
**FILED**  
OCT 26 2001  
Terri A. Lorenzon, Director  
Environmental Quality Council

*Re: Petition for Review of NPDES Permit No. WY0043818*

Dear Ms. Hutchinson and Mr. Hemmer,

Please accept this timely appeal of the decision of the Wyoming Department of Environmental Quality to issue National Pollutant Discharge Elimination System Permit No. WY0043818.

Sincerely,



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Cc: Yates Petroleum, Inc.

**BEFORE THE  
WYOMING ENVIRONMENTAL QUALITY COUNCIL**

**FILED**

OCT 26 2001

IN RE: APPEAL OF )  
NPDES PERMIT NO. WY0043818 )  
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Terri A. Lorenzon, Director  
Environmental Quality Council

DOCKET NO. \_\_\_\_\_

**PETITION FOR REVIEW**

Come now the Petitioners, Bernadette Barlow and Eric Barlow, and hereby appeal the decision of the Wyoming Department of Environmental Quality (WDEQ) to issue a National Pollutant Discharge and Elimination System (NPDES) permit, Permit No. WY0043818, to Yates Petroleum of Artesia, N.M. The petitioners protested this permit to the WDEQ on June 27, 2001. The permit was issued on August 27, 2001. The Petitioners hereby file this timely appeal of the decision of the WDEQ to issue this permit.

**INTRODUCTION**

The permit issued to Yates Petroleum is flawed for several reasons. The petitioners wish to challenge the permit, its conditions and the administration of the NPDES permit process to the Environmental Quality Council (EQC). In general, the issues are as follows: (1) total containment of the wastewater within in-channel reservoirs, (2) accumulation of salts and metals in containment facilities (reservoirs); and (3) clarification of the rules and procedures utilized by the WDEQ. There are additional issues that the WDEQ defers to the State Engineer's Office (SEO) which need to be addressed by state agencies. These issues are extremely pertinent to the water quality matters described herein.

**FACTUAL BACKGROUND**

The Bluebird coalbed methane (CBM) facility, for which NPDES Permit No. WY0043818 was issued, is "located in Section 36, Township 48 North, Range 75 West in Campbell County. The wastewater will be discharged to and contained in reservoirs on Dead Horse Creek (class 4) in the Powder River (class 2ww) drainage... The permittee has chosen option 2 of the coal bed methane permitting options as defined in the WDEQ's Coal Bed Methane NPDES Guidance Document dated October 22, 1999. Under this permitting option, the produced water is immediately discharged to a Class 4 water which is a tributary of a Class 2 or 3 water. In this case, the permittee will be discharging to in-channel reservoirs, constructed to contain the discharge water, run-off and natural precipitation up to a 25 year 24 hour storm event." (WDEQ-Statement of Basis, May 2001)



The Bluebird CBM facility, as applied for by the NPDES permit herein appealed, consists of 14 CBM wells completed to the Wyodak coal. The wells are expected to produce 20 gallons per minute (gpm) initially and then decline to 6 gpm by the end of the first year. The water will be gathered at five outfalls and will be totally contained in three in-channel reservoirs. The water budget indicates that losses from the reservoirs will be due to evaporation and seepage. A single point of compliance (POC) has been established below the reservoirs. The applicant has committed to constructing additional storage or implementing best management practices (BMP's) if there is an exceedance of effluent limitations established by the NPDES permit. (Hydrology Supplement to NPDES Application, December 2000)

The property we own and operate as a cattle ranch is the adjacent downstream property to the property upon which the Bluebird CBM facility is located. Our family has ranched on this portion of Dead Horse Creek for over seventy years. Our ranching operation is dependent on the year-round availability of native forage. The bottoms of Dead Horse Creek within our ranch provide both a good quality and an adequate quantity of forage which are essential to our agricultural operation. Downstream from the Bluebird development and within our ranch, the length of the Dead Horse Creek channel is approximately nine miles.

We are concerned that the upstream discharge of CBM effluent will have negative effects on the productive capacity and value of our creek-bottom grasslands. The vegetation along Dead Horse Creek is primarily native grass and forb species. These plants have adapted and thrived under soil and water conditions that have developed over many centuries. The introduction of CBM effluent to the surface or subsurface will alter the ecological balances in place and degrade the health of our rangelands.

It is worthwhile to note this appeal addresses a single NPDES permit. We are also very concerned with existing and draft NPDES permits associated with CBM development upstream of our ranch. In fact, according to the Wyoming Oil and Gas Conservation Commission (WOGCC) web site, 32 CBM wells have been permitted by the WOGCC *on the same section of land* as the NPDES permit in question. Our interests will be harmed by the negative impacts of a single NPDES permit, and most assuredly by the cumulative impacts of upstream CBM development.

Over the past three years, we have spent a significant amount of time and money educating ourselves about the scientific, technical, regulatory and legal issues related to CBM development in Wyoming and on our ranch. We do not intend to stop or impede the development of mineral resources. However, we insist that CBM development proceed in a sustainable and prudent manner. To date, the vast majority of our negotiations with private companies and state and federal agencies have been unproductive and unacceptable.

### **STATEMENT OF BASIS FOR APPEAL**

First, the WDEQ's practice of permitting "total containment" in-channel reservoirs is flawed. In the Statement of Basis (May 2001), the WDEQ states, "the permittee has the option of meeting limits for these parameters at each outfall or at the designated POC." The WDEQ cannot



profess commitment to total containment when the permit allows for discharge to the POC, which is located outside of the containment structures (reservoirs). Total containment is further compromised as seepage (infiltration) is anticipated and budgeted to occur. Given the establishment of a POC and the probability of infiltration to groundwater, water quality standards at each reservoir should be enforced without exception.

Second, because the reservoirs are designed to allow infiltration to groundwater, a permit allowing such a discharge to groundwater must be issued before construction can be allowed. W. S. 35-11-301(a) prohibits the discharge of pollution to waters of the state without a permit. Although a discharge to groundwater will occur, the WDEQ has not attempted to regulate this discharge at all.

Third, the applicant's water budget relies on evaporation and infiltration of CBM effluent stored in reservoirs. The evaporation of pure water (H<sub>2</sub>O) from CBM effluent will lead to the accumulation of salts and metals within the reservoirs. Infiltration will allow the resultant water of unknown quality to seep out of the "total containment" (but unlined) reservoirs. The WDEQ fails to require groundwater monitoring to determine whether the water infiltrating from reservoirs to groundwater will be acceptable. This is a clear violation of W. S. 35-11-301(a)(i). The applicant must be required to address the destination and quality of the infiltrating water. We believe that infiltration into alluvial aquifers will influence downstream surface and ground waters. As the adjacent downstream landowners, we believe that infiltrating water will adversely impact the agricultural use of our lands because they will receive poor quality water in volumes that the native plant community will not tolerate. This would result in a violation of Chapter 1, Section 20 of the Wyoming Water Quality Rules and Regulations.

Fourth, the permit establishes and justifies a sodium adsorption ratio (SAR) of 6 and a specific conductance of 2,000 micromhos/cm for the Powder River drainage. The two representative samples submitted by the applicant have SARs of 8.7 and 14, and specific conductances of 1,420 and 2,300 microhms/cm, respectively. Clearly, there is a discrepancy between the standard for the Powder River and these samples. It is our contention that this difference will only increase as evaporation takes place. We believe it is unlikely that the SAR standard of 6 will be achieved at the POC based on the applicant's submissions.

Fifth, the September 14, 2001, letter from the WDEQ in response to our initial objections claims that the accumulation of salts and metals within the reservoirs is not subject to NPDES authority. This is not correct. It is a violation of Chapter 1, Section 15 of the Wyoming Water Quality Rules and Regulations as they apply to settleable solids, particularly with respect to in-channel reservoirs. The WDEQ must reexamine this issue. Such a review should include organic and inorganic accumulation and appropriate mitigation upon termination of the containment activities.

Sixth, reservoirs that are constructed "in-channel" are implicitly within the waters of the state. As such, water quality standards must be applied to each outfall. The WDEQ must determine whether "in-channel" reservoirs are dams or waste water reserve pits. If they are waste water reserve pits, these reservoirs should not be constructed within the waters of the state.



Allowing the reservoirs to be built, without requiring a permit to construct, violates W. S. 35-11-301(a)(iii). The WDEQ is required to permit any facility, such as these reservoirs, which are capable of causing or contributing to pollution. The reservoirs in this case meet the definition of "treatment works," as defined by W. S. 35-11-103(c)(iv). In fact, the WDEQ knows that this is a failure on their part. The WDEQ is now developing regulations that would permit off-channel reservoirs under a "general permit" concept. That system is not in place. The current system of no permits required for the construction of these "in-channel" reservoirs is clearly a violation of state law.

Seventh, in the September 14, 2001, response to our original objections, the WDEQ referred us to the SEO on several issues. We request that the EQC examine the issues contained herein that may be convoluted by various authorities and their regulatory responsibilities and yield a cohesive approach that is protective of water quality standards and water use standards. As one example, if the SEO is the authoring agent for reservoirs then it should review and approve hydrology reports that are related to capacities, inflows and outflows of containment structures (e.g., reservoirs). These activities would seem to be both within SEO's realm of authority and fit the responsibility of protecting and conserving water resources and uses. Certain issues, furthermore, cannot be ignored by the WDEQ just because it may contain a component involving the volume of water, along with the quality of that water. If the surface water or the groundwater will be impacted by a discharge to the extent that it will affect existing uses of that water, the WDEQ must address that issue, as required by their regulations. This examination must consider whether or not the cause of a degradation of the existing use is due to water quality or water quantity issues.

Eighth, within the NPDES application, the commitment is made that in case of an exceedance of protective effluent limitations, "additional storage will be installed or appropriate BMP's will be implemented for the exceedance [sic]. This may include land application of the water." Land application does not appear to fall under the NPDES authority, therefore we request that the EQC review such a land application and determine its validity as a BMP and whether solid waste disposal regulations or other regulations apply.

Ninth, the WDEQ public notice upon which our objection was submitted states that "the staff attempts to resolve the issues through open and informal discussions with the proposed permittee and the person(s) objecting to the permit." We received no such invitation from the WDEQ. The NPDES permit was issued August 27, 2001 and we received the response to our objections in a WDEQ letter dated September 14, 2001. Hence, we were denied approximately three weeks of appeal time, which includes postal delivery time. Moreover, the WDEQ letter did not state the date on which the permit was issued, although it did inform us of the 60-day appeal period. We had to inquire of the WDEQ as to the date of issuance of the permit. We were thus further put at a disadvantage by losing precious time during the appeal period.

The public notice also failed to notify us that we had a right to request a public hearing. This is a violation of 40 CFR 124.10(d)(v), which requires that the notice contain a 'statement of procedures to request a hearing.' It also violates Chapter 2, sec. 14 of the Wyoming Water Quality Rules and Regulations, which states that the WDEQ water quality administrator shall



“provide an opportunity for ... any interested person... to request a public hearing with respect to any permit application.” We were never notified of our right to request a public hearing and would have done so had we been informed of this right.

The WDEQ also violated 40 CFR 124.17(a). It provides, in part:

...States are only required to issue a response to comments when a final permit is issued. This response shall:

- (1) specify which provisions if any of the draft permit have been changed in the final permit decision and the reasons for the change; and
- (2) briefly describe and respond to all significant comments on the draft permit or the permit application (for Section 404 permits only) raised during the public comment period, or during any hearing.

This provision of federal regulations clearly requires that the WDEQ notify any commenters, and respond to their comments on the permit, at the time that the NPDES permit is issued. The WDEQ did not do this.

At this point, we do not have an attorney. It is possible that with 60 days of time, an attorney could have been retained to handle this matter. We have retained a Professional Engineer and received guidance regarding technical issues. The time to prepare this appeal that was denied us by the WDEQ actions would have been well used. Furthermore, there is a requirement (see 40 CFR 124.10(d)(v)) that the WDEQ include a “brief description of the comment procedures, as required by 40 CFR 124.11 and 124.12,” as part of the public notice. The WDEQ did not do this.

Due to these procedural defects, the EQC should remand this matter to the WDEQ with directions to comply with all procedural requirements of the NPDES permit program, prior to issuing any permit to Yates Petroleum and all other applicants. The EQC should also rule on all matters addressed herein, with instructions to the WDEQ to issue an NPDES permit, should it choose to do so, in conformance with the requirements of the NPDES permit program, the construction permit program, the Federal Clean Water Act, and the Code of Federal Regulations.

### **REQUEST FOR HEARING**

We request a hearing before the EQC for its consideration of the above-referenced issues.

### **PRAYER FOR RELIEF**

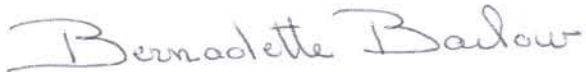
The Petitioners respectfully request that the EQC grant the following relief:

1. Deny the issuance of NPDES Permit No. WY0043818.
2. Remand the matter of this permit to the WDEQ with instructions to correct all procedural defects that have occurred both prior to and following the issuance of the permit, and make a new

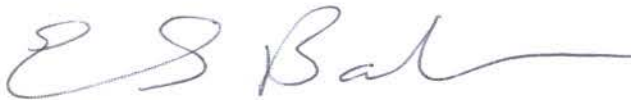
determination, after adequate opportunity for public participation, comment, and public hearing, whether to issue the said permit.

3. Modify the permit issued to Yates Petroleum to require that:
  - a. There shall be no in-channel reservoirs allowed.
  - b. All reservoirs that are allowed shall be off-channel and shall be permitted pursuant to W. S. 35-11-301(a)(iii), and the requirements of Chapter 11, Wyoming Water Quality Rules and Regulations.
  - c. All reservoirs shall be lined.
  - d. There shall be no infiltration to groundwater allowed unless and until a monitoring program is established that will allow the operator to document that no pollution is occurring to groundwater.
4. Grant any other relief that it may deem just and equitable.
5. Any combination of the above.

Dated this 25th day of October, 2001.



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