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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

Keith A. Lorenzon, Director
Environmental Quality Council

STATE OF WYOMING

IN THE MATTER OF THE APPEAL)
OF J.M. HUBER CORPORATION)
OF TERMS AND CONDITIONS IN)
NPDES PERMIT NOS.: WY0047376)
and WY 0047384)

Docket No. 02- 3604

**APPEAL OF NPDES PERMIT TERMS AND CONDITIONS
AND REQUEST FOR HEARING**

The permittee, J.M. HUBER CORPORATION ("Huber"), by and through its undersigned counsel and pursuant to WYO. STAT. ANN. § 35-11-112 (a) (iii) and (iv), the Environmental Quality Council ("EQC") Rules of Practice and Procedure, and Rule 15 W.R.C.P., hereby files its Appeal in the above-referenced matter relating to certain terms and conditions imposed by the Department of Environmental Quality, Water Quality Division ("DEQ/WQD") in NPDES Permit Numbers WY0047376 and WY0047384 and issued to Huber on October 28, 2002 ("Permits"). In support hereof, Huber states as follows:

SECTION I - FACTS

1. The name and address of the Petitioner is: J.M. Huber Corporation, 1050 17th St., Suite 700, Denver, CO 80265. Counsel's address appears on the signature block below.

2. Huber is the permittee under the Permits, which allow the discharge of produced water from coalbed methane ("CBM") operations in Campbell County.

Wyoming, into various draws and tributaries of Wildcat Creek, a tributary of the Little Powder River. Wildcat Creek is an ephemeral or intermittent stream.

3. Huber's application for NPDES Permit WY0047376 was dated November 14, 2001, and its application for NPDES Permit WY0047384 was dated November 14, 2001. Huber proposed NPDES Option 2 (surface discharge to class 2 or 3 receiving streams of the Powder River or Little Powder River) and a containment plan for its CBM produced water consisting of three on-channel stock watering reservoirs. Huber anticipated the periodic release of CBM produced water from its reservoirs.

4. Huber's draft NPDES permits were sent out for public comment in January, 2002. The draft permits contained numerous terms and conditions not proposed by Huber in its application. The DEQ/WQD issued final permits on October 28, 2002.

SECTION II - CONTENTIONS

Permit Effluent Limits for Specific Conductance (EC) at Irrigation Compliance Point During the Irrigation Season are Unreasonable

5. In the Permits, the DEQ/WQD required effluent limits for specific conductance (EC) at the irrigation compliance point of 2300 micromhos/cm during the alleged irrigation season (April 1 through September 30).

6. The Permits state that these effluent limits are one of the "modifications made to this permit [that] will aid in maintaining protection of downstream irrigation uses of Wildcat Creek, as required in Chapter I, Section 20 of the Wyoming Water Quality Rules and Regulations." (Statement of Basis, Page 1).

7. Huber does not believe the effluent limits at the irrigation compliance point during the irrigation season are reasonable or supported by legal, technical, or

scientific evidence. These effluent limits are not based on actual water quality analysis of the natural water in Wildcat Creek. Rather, the effluent limits are based on published scientific literature referenced in a third party's NPDES permit (NPDES Permit No. WY0036188—Redstone Resources, Jamison Prong A CBM Facility) (Page 1). Huber has no interest in NPDES Permit No. WY0036188, nor was any information relating to downstream irrigated lands from said third party NPDES permit part of the DEQ/WQD's record of decision for the Permits.

8. Huber contends that the effluent limits required at the irrigation compliance points during the period April 1 through September 30 should be revised to reflect the water quality of the natural water in the Wildcat Creek drainage.

9. The soils in the Wildcat Creek drainage contain high levels of salts, particularly gypsum. When these salty soils come into contact with surface water, high concentrations of sulfate from the soil dissolve into the water. This sulfate from the soils contributes significantly to specific conductance (EC) levels in the natural water of Wildcat Creek.

10. As is typical of CBM produced water in the Wildcat Creek drainage, Huber's CBM produced water does not contain sulfate and it is relatively low in salinity. However, as CBM produced water flows across the salty soils in the creek-beds of the Wildcat Creek drainage, it picks up sulfate from the soils just as natural water does. The salinity level, or specific conductance (EC), of CBM produced water naturally increases as the water flows over the salty soils, reaching 4000 and 6000 $\mu\text{mhos/cm}$. It is the salt, particularly gypsum, in the soils of the creek-beds that contributes salinity to both natural water and CBM produced water in the Wildcat Creek drainage.

11. Given the naturally occurring salts in both the soils of the creek-beds and the natural water in the Wildcat Creek drainage, the effluent limit for specific conductance (EC) of 2300 $\mu\text{mhos/cm}$ is unreasonable. Natural runoff in the drainage far exceeds a specific conductance (EC) of 2300 $\mu\text{mhos/cm}$ under normal flow conditions. Only when increased water volume in exceptionally high runoff allows for dilution of the sulfates picked up from the soils, will the specific conductance (EC) level approach 2300 $\mu\text{mhos/cm}$.

12. The DEQ/WQD failed to present technical or scientific information to demonstrate that the specific conductance (EC) levels in the natural water of the Wildcat Creek drainage are equal to or lower than 2300 $\mu\text{mhos/cm}$. The DEQ/WQD's decision to require effluent limits in the Permits for specific conductance (EC) of 2300 $\mu\text{mhos/cm}$ must be supported by credible scientific data from the Wildcat Creek drainage. This data should include actual data of soil salinity in the creek-beds over the stream length, actual data of natural water salinity over the stream length, historical water quality and soil data from adjacent drainages, and technically reliable publications related to irrigation and salinity. The DEQ/WQD failed to give adequate consideration to credible scientific data in determining the effluent limits for specific conductance (EC) in the Permits.

13. The Permits state that the effluent limits for specific conductance (EC) are required pursuant to Chapter 1 § 20, Wyoming Water Quality Rules and Regulations (hereinafter "WQRR"). That regulation provides that "degradation" of natural water quality shall not be of an extent to cause a "measurable decrease" in crop or livestock production. It also requires that the quality of natural water be "maintained" at a level that allows continued use for agricultural purposes.

14. Chapter 1 § 20 is a narrative standard and, as such, requires the DEQ/WQD to make its decision based on site-specific data of natural water quality and soils from the Wildcat Creek drainage at the following locations, at a minimum: end of pipe, irrigation compliance point, and downstream along the drainage to and or downstream irrigators' lands. It is improper for DEQ/WQD to assign a numeric effluent limit (i.e. specific conductance (EC) limit of 2300 $\mu\text{mhos/cm}$) where the natural water quality exhibits wide fluctuations due to the volume or flow, the level of salt (particularly gypsum) in the soils of the creek-beds, the distance of flow, the timing of natural runoff, and other factors. In NPDES permits of third parties, DEQ/WQD acknowledged that a back-calculation of natural irrigation water quality could range from a specific conductance (EC) of 2325 $\mu\text{mhos/cm}$ to 4650 $\mu\text{mhos/cm}$. The variability in natural water quality is due to naturally existing conditions in the Wildcat Creek drainage, rather than the discharge of CBM produced water.

15. The DEQ/WQD erred when it interpreted Chapter 1 § 20 to require the imposition of effluent limits in the Permits that are more restrictive than the quality of the natural water in the Wildcat Creek drainage. The effluent limits in the Permits render the "degradation" and "maintenance" language of Chapter 1§ 20 null and void, and in fact require Huber to improve the natural water quality in the Wildcat Creek drainage, which is inconsistent with state and federal law.

Salinity in Wildcat Creek Drainage is Naturally Occurring, and is Not a Point Source Addition or Discharge of Pollution to be Regulated under State or Federal Law

16. It is inappropriate for DEQ/WQD to set effluent limits in the Permits that are violated by naturally occurring pollutants. Under Chapter 1 of the WQRR, ephemeral

and intermittent drainages such as Wildcat Creek are classified as "surface waters of the state." WQRR Chapter 1 §2 a(xlv). The presence of naturally occurring salinity in the natural water in the Wildcat Creek drainage is not a result of Huber's point source discharges or any "addition of pollution" or "wastes" to waters of the State. (See, WYO. STAT. ANN. § 35-11-103 (c)(i) (ii) and (vii)). The naturally occurring salinity (gypsum) in the soils in the creek-beds of the Wildcat Creek drainage contributes equally to specific conductance (EC) levels in the natural water and in CBM produced water.

17. As a matter of law, the natural accumulation of salinity in the water is not an "addition" or "discharge" of pollution from a point source, and thus is not subject to regulation under State and Federal NPDES programs. Stated another way, DEQ/WQD's regulatory program, and its requirement of effluent limits for specific conductance (EC) in Huber's Permits, must take into account the naturally occurring salinity in the Wildcat Creek drainage and the fact that the existing quality of these intermittent or ephemeral waters of the State is subject to significant variation.

18. DEQ/WQD erred when it set an effluent limit that requires Huber to, in effect, improve the quality of the natural water in the Wildcat Creek drainage. Huber should not be placed in a position where it is subject to a DEQ/WQD enforcement action for a violation of the Permits where the "exceedence" is caused by natural conditions in the drainage.

19. The effluent limits for specific conductance (EC) in the Permits should be increased to a level consistent with the salinity levels of the natural water in the Wildcat Creek drainage or, in the alternative, so that naturally occurring salinity is subtracted from all measurements of total specific conductance (EC) in the Wildcat Creek drainage.

Permit Effluent Limits for Sodium Adsorption Ratio (SAR = 7) at the Irrigation Compliance Point During the Irrigation Season are Unreasonable

20. In the Permits, the DEQ/WQD required an effluent limit of SAR = 7 without appropriate consideration of actual soil data from the Wildcat Creek drainage or available technical information and literature relating to the effects of SAR on soil permeability. As a result the effluent limit for SAR is below that which is reasonably required to meet the narrative standards and objectives of Chapter 1 § 20 WQR.

21. The effluent limits for SAR should be revised to reflect appropriate SAR levels for the Wildcat Creek drainage, using scientifically accepted and technically defensible published methodologies.

DEQ/WQD's Requirement to Contain CBM Produced Water is Inappropriate and Exceeds its Statutory Authority

22. Due to the quality of the natural water in the Wildcat Creek drainage, DEQ/WQD erred in its requirement that Huber contain CBM produced water in reservoirs during the alleged irrigation season (April 1 through September 30). The DEQ/WQD exceeded its authority when it required such containment in the Permits. The quality of Huber's CBM produced water (at the end of pipe and at the point of compliance) is superior to the quality of the natural water in the Wildcat Creek drainage.

23. At a maximum, the irrigation season for agricultural producers in the Wildcat Creek drainage is the three-month period, May through July. In the event containment of CBM produced water is required by the EQC, such containment should be limited to the period May through July.

***Effluent Limits at the Irrigation
Compliance Point are Unreasonable During a
25-Year/24-Hour Storm Event and are Contrary to the State Engineer's Requirements***

24. To comply with requirements prescribed by the State Engineer, all on-channel reservoirs constructed by Huber to contain CBM produced water must allow the release of stored water upon a call for water by downstream owners of senior water rights.

25. The Permits prohibit Huber from discharging its CBM produced water from on-channel reservoirs during the alleged irrigation season (April 1 through September 30) except in the event of a 24-hour/25-year storm event. The Permits state:

Part I.A.1 Discharge is to be contained in reservoirs and is not authorized to intercept the first downstream irrigation compliance point from April 1 through September 30 unless due to reservoir spills resulting from a 25-year/24-hour storm event or greater.

26. The requirement to contain all CBM produced water in reservoirs except in a 24-hour/25-year storm event is contrary to requirements imposed by the State Engineer, is not supported by scientific or environmental evidence, and will likely result in Huber's violation of the Permits due to an act of nature.

***Permit Requirements to Contain CBM Produced Water in Reservoirs that Meet the
Specifications for a 25-Year/24-Hour Storm Event are Inconsistent with Landowner
Requests and Negatively Impact on Livestock, Wildlife, and the Environment***

27. The requirement in the Permits that all on-channel reservoirs constructed by Huber meet the specifications to contain runoff flows up to that of a 24-hour/25-year storm event will eliminate the use of existing smaller reservoirs that surface landowners have requested be used to store CBM produced water.

28. Most landowners consider a reservoir that meets these specifications to be "oversized" and they do not want them constructed on their lands. Instead, they want the benefit of the direct discharge of CBM produced water into the Wildcat Creek drainage, which enhances forage. They also want numerous small reservoirs that provide widely dispersed water sources water for livestock and wildlife.

29. The DEQ/WQD's requirement that Huber contain its produced water together with all surface water in the drainage (except the runoff from a 24-hour/25-year storm event or greater) will deprive landowners of the beneficial use of CBM water in their ranching operations.

30. The construction of large reservoirs will cause more surface disturbance than the construction of numerous small reservoirs, negatively impacting both the environment and surface landowner.

31. The substantial additional capital investment required to construct the large "oversized" reservoirs required by the Permits will severely impact the economic feasibility of Huber's CBM development in the Wildcat Creek drainage.

***Effluent Limits at Irrigation Compliance Point are Unreasonable
During a 25-Year/24-Hour Storm Event***

32. The Permits require that, in the event Huber's reservoirs are overtopped by run-off from a 25-year/24-hour storm event during the irrigation season, the runoff water must comply with the effluent limits at the irrigation compliance point.

33. There is considerable data demonstrating that the natural water in the Wildcat Creek drainage picks up salts and sediments from the soils. The runoff water from a 25-year/24-hour storm event will pick up so much salt and sediment from the soils

that the natural water is unlikely to comply with the effluent limits at the irrigation compliance point.

34. Even though the CBM produced water meets the effluent limits at the end of pipe, the runoff water, having picked up salt and sediments from the soil, will cause the commingled water to exceed the effluent limits at the irrigation compliance point.

Requirement to Contain all Water Flows Up to that of a 25-Year/24-Hour Storm Event is Inconsistent with State Engineer Requirements and Exceeds the Statutory Authority of DEQ/WQD

35. The Permits require Huber to contain all CBM produced water, as well as all flows of natural water, in its on-channel reservoirs during the alleged irrigation season (April 1 through September 30). Huber can release water from its reservoirs only in the event of a 25-year/24-hour storm event and only if the runoff water will meet effluent limits at the irrigation compliance point.

36. The DEQ/WQD provided no legal, technical, or scientific evidence or support for its requirement that all CBM produced water be contained in reservoirs constructed to meet specifications to contain all natural water flows less than the runoff from a 24-hour/25-year storm event.

37. The law requires that CBM produced water not degrade the natural water quality to such an extent that it causes a measurable decrease in crop or livestock production. If Huber complies with effluent limits set at a level to prevent such degradation of the natural water quality, the DEQ/WQD has no statutory authority to prohibit discharges of CBM produced water.

38. The Permits should be modified to include provisions which allow Huber the flexibility to directly discharge its CBM produced water in the Wildcat Creek drainage at any time, provided reasonable effluent limits are met.

No Evidence of a Measurable Decrease in Crop or Livestock Production

39. Chapter I, § 20 of the WQRR applies only to "surface waters which have the natural water quality potential for use as an agricultural water supply".

40. Section 20 prohibits degradation of surface waters which have the natural water quality potential for use as an agricultural water supply to "an extent to cause a measurable decrease in crop or livestock production."

41. Each of the Permits states that the "modifications made to this permit will aid in maintaining protection of downstream irrigation uses of Wildcat Creek, as required in Chapter I, Section 20 of the Wyoming Water Quality Rules and Regulations." (Statement of Basis, Page 1).

42. Huber denies that the natural water in the Wildcat Creek drainage has the water quality potential for use as an irrigation water supply due to naturally occurring elevated sulfate concentrations the water picks up from the soils.

43. The DEQ/WQD erred in its finding that the natural water in the Wildcat Creek drainage has the water quality potential for use as an irrigation water supply, despite substantial evidence to the contrary.

***Requirement to Keep a Daily Log of Reservoir Releases
Exceeds DEQ/WQD's Statutory Authority***

44. Part I. A. 2. e. of the Permits requires Huber to keep a daily log of releases from its reservoirs. The requirement does not provide the DEQ/WQD with any meaningful information as it does not differentiate between CBM produced water and natural flows. This requirement imposes an unnecessary regulatory burden on Huber.

45. The requirement to keep a daily log of all releases from reservoirs exceeds the statutory authority of the DEQ/WQD. Water flow measurements are within the purview of the State Engineer.

Routine Monitoring for Dissolved Iron and Radium 226

46. Part I A. 2. b. of the Permits requires routine end of pipe water quality monitoring. The DEQ/WQD's decision to require routine monitoring at the end of pipe for Dissolved Iron and Radium 226 is not reasonable or supported by technical or scientific evidence.

47. These constituents precipitate and attenuate rapidly. Routine monitoring for Dissolved Iron and Radium 226 should be done at the reservoirs. It will not adversely affect waters of the state to monitor these constituents at the reservoir.

***DEQ/WQD Exceeded its Statutory Authority –
Groundwater is Not a Pollutant***

48. According to DEQ/WQD Water Quality Rules and Regulations, which are patterned after the Federal Clean Water Act,

“Pollutant” shall mean the same as, and be included within, the meaning of “wastes”. It shall include, but not be limited to the following: dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge,

munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.

Chapter 1, Section 2(n) Wyoming Water Quality Rules and Regulations; *see also* 33 U.S.C. § 1362(6) (1987).

49. Unaltered groundwater discharged in conjunction with CBM production is not "pollution" as defined by the Environmental Quality Act (WYO. STAT. ANN. § 16-3-114 (Lexis 2001)) or the Federal Clean Water Act (33 U.S.C. § 1362(6) (1987)).

50. The DEQ/WQD lacks statutory authority to establish effluent limits for the discharge of unaltered groundwater. As a matter of law, no NPDES permit is required for the discharge of unaltered groundwater incident to CBM production.

51. Agency actions should be held unlawful or set aside where they are "[i]n excess of statutory jurisdiction, authority or limitation or lacking statutory right[.]" WYO. STAT. ANN. § 16-3-114 (Lexis 2001).

52. "If any agency lacks subject matter jurisdiction, any proceeding conducted by it has a fundamental defect which cannot be cured by waiver or consent of the parties." Amoco Prod. Co. v. Wyo. St. Bd. of Equalization, 882 P.2d 866 (Wyo. 1994).

53. The DEQ/WQD's requirement of an NPDES permit and effluent limits for Huber's CBM produced water exceeds its statutory authority. As such, the requirement for a NPDES permit should be set aside.

***DEQ/WQD Exceeded its Statutory Authority –
Interference with Jurisdiction of State Engineer***

54. WYO. STAT. ANN. § 35-11-1104(a)(iii) prohibits the DEQ from interfering with the jurisdiction or duties of the State Engineer.

55. The imposition of the requirement to contain CBM produced water and natural water in the Wildcat Creek drainage in reservoirs violates the statutory limitation on the DEQ's authority and interferes with the State Engineer's authority under Wyoming law.

56. One of the policies and purposes of the Environmental Quality Act is to "secure cooperation between agencies of the state". WYO. STAT. ANN. § 35-11-102 (Lexis 2001). Similarly, the Director of the DEQ is charged with the duty to "advise, consult and cooperate with other agencies of the state." By failing to coordinate and cooperate with the State Engineer in its requirement that CBM produced water and natural water be contained, the DEQ/WQD has violated this expressly stated policy and purpose.

57. The State Engineer requires that Huber's reservoirs be equipped to allow the release of stored water upon a call for water by downstream owners of senior water rights. The DEQ/WQD's requirement that Huber contain its CBM produced water, together with natural water is in direct conflict with the State Engineer's written policy for permitting reservoirs. (See State Engineer Policies of May 19, 2001 and August 2, 2002).

***DEQ/WQD's Action is Arbitrary and Capricious and
Not Supported by Substantial Evidence***

58. Even if the DEQ/WQD's action did not exceed its statutory authority, the ultimate decisions made by the agency in the Permits are arbitrary and capricious because they are unreasonable and not supported by legal, technical, or scientific evidence.

59. WYO. STAT. ANN. § 35-11-302(a)(vi) requires that the Administrator consider all of the facts and circumstances bearing upon the reasonableness of the pollution involved when recommending permits. Several specific considerations are referenced in the statute, including, among others, technical practicality and economic reasonableness. Among other errors, the DEQ/WQD failed to give adequate consideration to Huber's particular facts and circumstances in the final provisions of the Permits.

60. Furthermore, the effluent limits in the Permits are not based on actual water quality analysis of the natural water in Wildcat Creek. Rather, the proposed limits are based on published scientific literature referenced in a third party's NPDES permit (NPDES Permit No. WY0036188—Redstone Resources, Jamison Prong A CBM Facility) (Statement of Basis, Page 1).

61. Agency actions should be held unlawful or set aside where they are arbitrary and capricious or unsupported by substantial evidence.

***DEQ has Statutory Authority to Enter and Inspect and Permit Requirements
That Huber Deliver Written Certification from Landowners
Exceeds DEQ's Statutory Authority***

62. The DEQ has the legal authority, pursuant to WYO. STAT. ANN. § 35-11-109 (Lexis 2001) to designate authorized officers to enter upon and inspect any property, premises or place at which an air, water, or land pollution source is located or installed.

63. Part II. B. 1. requires that Huber provide written certification from the surface land owner(s) that the administrator or his authorized agent has access to all physical locations associated with the Permits.

64. Huber does not have the legal authority to require a surface landowner to provide written certification that the administrator or the administrator's authorized agent has access to all physical locations associated with this permit and any waters of the State. Under no circumstances can Huber require a landowner to give written permission to the DEQ, or any other party, to enter upon his property.

65. There is no basis for DEQ to condition Huber's permits upon obtaining written permission from a surface owner for DEQ personnel to enter upon the surface owner's land.

SECTION III - RELIEF REQUESTED

66. WHEREFORE, Huber respectfully requests that the Environmental Quality Council grant Huber a contested case hearing, and following said hearing, grant the following relief:

67. Find that the DEQ exceeded its statutory authority in requiring an NPDES permit for the discharge of unaltered groundwater produced in conjunction with CBM production and that no NPDES permit is required.

68. Find that the DEQ exceeded its statutory authority and interfered with the State Engineer's statutory authority.

69. Find that the effluent limits for specific conductance (EC) of 2300 micromhos/cm at the irrigation compliance point during the alleged irrigation season (April 1 through September 30) are unreasonable. They should be consistent with the specific conductance (EC) of the natural waters in the Wildcat Creek drainage. In the alternative, the naturally occurring salinity should be subtracted from all measurements of total specific conductance (EC) in the Wildcat Creek drainage.

70. Find that salinity in the Wildcat Creek drainage is naturally occurring and is not a point source addition or discharge of pollution.

71. Find that the sodium adsorption ratio (SAR=7) at the irrigation compliance point during the alleged irrigation season is unreasonable as it is more restrictive than that reasonably required to meet the narrative standards and objectives of Chapter L, § 20 WQRR.

72. Find that DEQ/WQD's requirement to contain CBM produced water exceeds its statutory authority.

73. Find that DEQ/WQD's requirement that effluent limits must be met at the irrigation compliance point during a 25-year/24-hour storm event is unreasonable, not supported by substantial evidence, and is contrary to requirements of the State Engineer.

74. Find that DEQ/WQD's requirement to contain CBM produced water in reservoirs that meet the specifications for a 25-year/24-hour storm event negatively impact livestock, wildlife, and the environment.

75. Find that routine monitoring for Dissolved Iron and Radium 226 should be done at Huber's reservoirs and that doing so will not adversely affect the waters of the state.

76. Find that the DEQ/WQD's decisions and actions are arbitrary and capricious because they are unreasonable and not supported by legal, technical, or scientific evidence.

77. Find that DEQ has the statutory authority to enter upon and inspect any property, premises, or place at which an air, water, or land pollution source is located or installed and that DEQ requirement that Huber obtain written permission from a surface

owner for DEQ to enter upon his land exceeds DEQ's statutory authority and is arbitrary and capricious.

78. Providing such other and further relief as the EQC deems just and equitable in this matter.

RESPECTFULLY SUBMITTED this 27th day of December, 2002.

J.M. HUBER CORPORATION

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ATTORNEYS FOR J.M. HUBER
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CERTIFICATE OF SERVICE

The undersigned certifies that a true, full and correct copy of the foregoing APPEAL OF NPDES PERMIT TERMS AND CONDITIONS AND REQUEST FOR HEARING was served upon the following via U.S. Mail, postage prepaid, first class, on this 27th day of December, 2002:

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