



Exhibit C

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October 14, 2005

VIA FEDERAL EXPRESS

John Corra, Director
Wyoming Department of Environmental Quality
Herschler Building -4W
Cheyenne, WY 82002

John Wagner
Administrator Water Quality Division
Herschler Building -4W
Cheyenne, WY 82002

Re: Second Copperleaf Subdivision Application, dated August 31, 2005

Dear Mssrs. Corra and Wagner:

As you know, this office represents the North Fork Citizens for Responsible Development and David Jamison, an adjoining landowner (hereafter collectively referred to as "Northfork Group"). Thank you for providing me a copy of Mr. Hermansky's letter to Jeremy Easum, Professional Engineer, for the developers of Copperleaf Subdivision ("Developers"). While I applaud Mr. Hermansky for the questions and comments he raises in relation to the Copperleaf Subdivision Application ("Application") I am surprised by the large number of mandatory items that he fails to identify as missing in the Application.

In an effort to address the breadth of the problem with the Application, I have organized this response in two parts: procedural review mandated by law and areas in which the Application fails to comply with Chapter 23 requirements.

Procedural review mandated by law:

I can find no legal grounds for any type of intermediate review of the Application by the Wyoming Department of Environmental Quality ("DEQ"). The law appears to be very clear that the Application at this first opportunity for review by the DEQ must meet or exceed the minimum standards of DEQ Rules and Regulations Chapter 23: Subdivision Applications (hereinafter referred to as "Ch 23"). Ch 23 § 5(a). It is important to establish the legislative trail of authorizing statutes that give validity to the DEQ, Ch 23 standards. The starting point is the Wyoming Environmental Quality Act

("Act"). The Act mandates that the administrator of the Water Quality Division of the DEQ shall propose "rules and regulations, standards and permit systems to promote the purpose of the Act." W.S. § 35-11-302(a). Said rules and regulations must include standards for subdivision applications submitted to the DEQ under W.S. § 18-5-306. Chapter 23 of the DEQ Rules and Regulations are the rules authorized by the Act.

Chapter 23 mandates that prior to subdivision permitting, subdivision applications shall be reviewed by the DEQ. Ch 23 § 4(a). Critical to the Application currently before the DEQ is the following mandate: "**All plans, specifications, reports, maps, and other documentation submitted under this chapter must meet or exceed the standards contained within these regulations to be deemed complete.**" (emphasis added) Ch 23 § 5(a). Nowhere in the subdivision application rules of Chapter 23 is any intermediate level of review offered to developers. Developers are mandated to comply in all applicable respects with the requirements of Ch 23 or be deemed incomplete. Id.

Again, while I applaud the list of questions that Mr. Hermansky submitted to the Developer in his September 28, 2005 letter, the Application is incomplete in other substantive areas.

The Application fails to comply with the Ch 23 requirements.

Without addressing all areas of inadequacy in the Application, this letter will focus on six substantive areas in which the Application is incomplete.¹

1. Pursuant to Ch 23 §§ 4 and 5 the Application should be returned without review.

The Application contains plans, reports, maps and other documentation provided by engineers other than Sage Engineering and not one of those documents is signed or sealed by a professional engineer. The only seal and signature in the entire Application is on the front cover and it is by Professional Engineer, Jeremiah A. Easum. While Mr. Easum can certify his work or the work of his firm, he is not able to certify the work of another professional engineer. Maps, studies, and reports that are provided by other engineering firms, must be signed and sealed by that firm. The DEQ rules mandate that an Application that fails to contain the appropriate signatures and seals will be "returned to the applicant without further review." Ch 23 § 4(b)(ii)(B), § 5(b).

The fact is that the entire wastewater system proposed in the Application: The Copperleaf Sheaffer System For Wastewater Reclamation and Reuse is not signed or sealed by any professional engineer. This is a separate document referenced in the Application and it contains no certification by a professional engineer. Pursuant to state statute, such documentation should not even be considered by a

¹ A detailed list of the areas in which the Application is incomplete, from a geologic standpoint, is provided by Professional Geologist, Gretchen Hurley. Her Final Written Comments, dated 10/12/05 is attached hereto as "Appendix 1".

governmental agency. W.S. § 33-29-129(b) and (d).² Both Wyoming Statutes and Ch 23 deem the failure to sign and seal necessary documents no small matter. Documents that are not properly and legally certified are to be returned without further review. That is the case in this Application.

Also, as we indicated in previous correspondence, this subdivision application openly violates the current SUP that the Developer has obtained from Park County. It provides for a system that includes numerous multi-family town homes. The Park County SUP that governs this proposal expressly prohibits town homes. Again, the DEQ cannot give a favorable recommendation of a subdivision application that openly and intentionally violates the Park County SUP permit that governs this development.

2. Pursuant to Ch 23 § 7 insufficient information is provided regarding the waste disposal system.

Despite the fact that this is the Developer's second subdivision application, the current Application is woefully inadequate in terms of information regarding the wastewater disposal system. In addition to the questions raised by Mr. Hermansky in his 9/28/05 letter, Ms. Hurley's report itemizes, in detail, other information that is missing from the Application. See "Appendix 1". Additionally, Professional Engineer, Joe Tamburini of Rothberg Tamburini Winsor, has reviewed, in detail, the proposed Sheaffer System and also laments the lack of detailed information mandated by Ch 23. Mr. Tamburini will also highlight the serious deficiencies of the Sheaffer System as proposed in his report. At this time his report is still being drafted, but it will be forwarded to the DEQ upon completion.

For purposes of this response I will focus on three areas of specific Ch 23 § 7 violations regarding waste disposal.

a. Failure to demonstrate no threat of discharge to groundwater.

Ch 23 § 7(b)(iv)(A) requires documentation that the proposed facility will pose no threat of discharge to groundwater. In violation of Ch 23 § 7, no documentation is provided on this issue. Mr. Hermansky's 9/28/05 letter raises the issue, but where is the review by state geologist and geohydrologist, John Passehl? Safety of the groundwater appears to be an area that requires Mr. Passehl's review. Even though this new Application is allegedly a "closed system" geologic and geohydrologic review is still necessary. The Northfork Group requests that the Application be submitted to Mr. Passehl for such review.

b. Failure to demonstrate design standards that will comply with DEQ Rules and Regulations Chapter 11 § 6.

While this is a subdivision application, Ch 23 § 7(b)(ii) requires that even at this stage of review the applicant "demonstrate" that various technical requirements and design standards mandated in DEQ

² W.S. § 33-29-124 (b) and (d) require the signature and seal of a professional engineer on all "nonelectronic plans, specifications, plats or reports".

Rules and Regulations Chapter 11 § 6 (hereafter referred to as "Ch 11") be documented. Despite this requirement, no such documentation is provided. While not exhaustive, the list of missing data includes: no engineering design report (Ch 11 § 6(a)), no downstream impact analysis (Ch 11 § 6(b)(iii)), no letter of acceptance by affected downstream facilities (Ch 11 § 6(b)(iv)), no 25-year flood elevation material (Ch 11 § 6(c)(i)(B)), no data on groundwater elevations in the area of the proposed lagoons (Ch 11 § 6(c)(i)(H)), no data on how sludge removal from lined lagoons will be handled or stored (Ch 11 § 6(c)(iii) and no proposed effluent standards (Ch 11 § 6(c)(v)(A).

c. Failure to provide sufficient information on wastewater irrigation.

Mr. Hermansky's 9/28/05 letter touches on the inadequacy of the Application in regards to its failure to provide sufficient information regarding irrigation with wastewater. See Hermansky letter, dated 9/28/2005, page 2 ¶¶ 2 and 3. Ch 23 requires via Ch 11 that the Application provide a "**detailed** description of the disposal technique for effluent and solids". (emphasis added) Ch 11 § 6(c)(iii). No such information is provided. In fact the information provided regarding wastewater irrigation raises more questions than it answers.

In addition to the issues Mr. Hermansky raised, the Application maintains that the entire wastewater system will be non-discharging; yet at the same time it states that subsurface irrigation will be used. This means that treated effluent will be placed back into the vadose zone and thus eventually into the alluvial aquifer. Why is there no mention of the need for a DEQ Chapter 16 Underground Injection Disposal Permit? This is yet another area in which review by the DEQ's state geologist and geohydrologist is necessary.

3. Pursuant to Ch 23 § 8 insufficient information is provided regarding the water supply system.

Pinning down the applicant on the issue of a reliable year-round water supply has proven to be a real challenge. We are concerned that the DEQ has not scrutinized the applicant's ever-changing representations on this issue carefully or fully. Critical to Ch 23 review is the mandate that an applicant must accurately and fully demonstrate that the proposed water supply system is based on an available and legal water supply that is: "sufficient in terms of quality, quantity and dependability and will be available to ensure an adequate water supply system for the type of subdivision proposed." Ch 23 § 8(c)(i).

a. Historical attempts to obtain a dependable water source.

Initially, the Developer represented that it would use groundwater wells for all domestic water. At the same time, it was planning to install more than one hundred thirty septic systems in the same area. After the obvious problems with that proposal became clear, the Developer suggested that it would likely seek State Engineer's Office/Board of Control permission to convert existing water rights in the North Fork Valley Ditch to domestic use. After some North Fork Valley Ditch users began to express opposition to the idea and indicated that they would oppose them and likely litigate that proposal before the Board of Control, the Developer again abruptly switched plans. Next, Developer proposed that it

would apply for a new 2005 direct flow water right. Obviously, such a water right will be the most junior water right on the North Fork of the Shoshone River. When questions were raised about the fact that such a junior water right can never guarantee a reliable year-round flow of domestic water for such a large subdivision, the Developer introduced the idea that it would pursue an exchange petition with the Wyoming Water Development Commission. The exchange petition would allow Developer to use State of Wyoming stored water to supplement the proposed 2005 direct flow water right. Ultimately, an Exchange Petition was granted illegally and incorrectly by the State Engineer's Office. That petition has been appealed to the district court and the matter is pending. Downstream water users are prepared to litigate the validity of the exchange petition and seek to have it thrown out.

b. Current attempt to obtain a dependable water source.

The Application states that Developer has obtained an appropriation of water (Permit No. 33288) from the Wyoming State Engineer's Office to divert up to 200 gallons per minute for domestic use. Application at unnumbered page 4. Mike Ebsen of the Wyoming State Engineer's Office attempts to confirm that the Developer appears to have obtained a water supply. See Ebsen Letter to Hermansky, dated 9/30/05. However, the Application and Mr. Ebsen ignore three salient facts:

i. The North Fork of the Shoshone has been regulated.

Developer recognizes that a 2005 right is relatively recent and therefore suspect in terms of dependability in water short years. Therefore Developer attempts to assuage this fear by claiming that the North Fork of the Shoshone River has "never been regulated for water right priorities due to water shortage including periods of low flow or drought conditions." Application at unnumbered page 4. Unfortunately, the Developer is incorrect; the North Fork River has been regulated.

Craig Cooper, of Cooper Consulting, has provided sworn testimony that both the North and South Forks of the Shoshone River have been regulated above and below the Buffalo Bill Reservoir several times. A copy of Mr. Cooper's Affidavit is marked as "Appendix 2". See also the 1977 notes of Water Commissioner Blackburn evidencing the date of regulation. Blackburn's notes are attached to the Cooper Affidavit as "Attachment A". Note that the North Fork Valley Ditch was particularly hit hard in terms of regulation in 1977. See Attachment B to Cooper Affidavit.

Developer specifically relies upon false information, that the river has never been regulated, to support the position that a 2005 priority is dependable. Specifically, Developer states in the Application: "Based upon this information [non-regulation of the river] we believe the above water right satisfies the dependability requirement for a public water system." Application at unnumbered page 4. The converse should also be true: evidence that the North Fork River has been regulated is evidence of lack of dependability as a source for a public water system. In short, Developer is back to the same old issue: no dependable source of water.

ii. **Permit 33288 is dependent upon an exchange.**

Ignoring the facts let us assume that the 2005 water right granted by Permit 33288 is on a river that has never been regulated.³ Permit 33288 was applied for and granted based upon the representation that Developer was seeking an exchange. A copy of Developer's Application For Permit To Appropriate Surface Water is marked as "Appendix 3". See Appendix 3 at page 2 "REMARKS" and page 4. Since the filing of Developer's water application, Developer has changed its mind. Developer has decided **there will be no exchange**: "The developer is proposing to utilize this appropriation without the benefit of an exchange from the Buffalo Bill Reservoir to serve the Copperleaf Subdivision." Application at unnumbered page 4.

It is important to note that Developer's 2005 direct flow water right from Permit 33288 is **expressly conditioned and tied to the proposed water exchange proposal**. In other words, if the exchange proposal is struck down or fails to be finalized, the Developer's 2005 water right is suspect. Recently, the Developer learned that the proposed exchange, which Permit 33288 is conditioned upon, will be subject to review under the National Environmental Policy Act ("NEPA"). This is because such an exchange involves federal action by the Bureau of Reclamation as the operator of the Buffalo Bill Dam.⁴ The Developer is very concerned about undergoing any serious NEPA review of their water exchange proposal because they know that it will invite the scrutiny of many significant senior water rights holders and users below the Buffalo Bill Dam. These senior water users are concerned about the impact Developer's on-again-off-again exchange will have on them. Perhaps just as important is the trend that such an exchange could ultimately have on irrigation water supplies.

iii. **Developers have no alternate source of water.**

No application has been made to the State Engineer's Office or to the Board of Control to convert any existing water rights, held by the Developer, to domestic water use. Mr. Ebsen seems to believe this will happen and assumes that application will be granted. Given the fact that the Developer has changed its proposed water source so many times, reliance upon an assumption of what will happen is ill advised. Developer's history is one of constant change. Even if Developer ultimately does attempt a change of use from agricultural to domestic use, there is no guarantee that the request will be granted.

In reviewing Developer's first Subdivision Application, Mr. Hermansky correctly highlighted the need that the applicants "demonstrate that an appropriation of water . . . will be available under **all flow conditions**." (emphasis added) Hermansky Letter dated 4/28/05. The standard for review of the water supply system has not changed between Developer's first and latest Application; nor has it been met. In

³ As shown above this would be an incorrect assumption, since the river has been regulated.

⁴ Question regarding the application of NEPA should be directed to Mr. John Lawson at the Bureau of Reclamation. Mr. Lawson has been copied with this mailing. Contrary to what is said in the Application, Developer is currently engaged in litigation in District Court regarding the validity of the exchange permit.

this Application, data on water quality does not meet the Ch 23 requirements. There is insufficient data on water quantity, and erroneous information on water dependability.


Conclusion.

These many issues, along with the issues raised in our previous correspondence to the DEQ, by Mr. Hermansky in his 9/28/05 letter, Ms. Hurley's 10/12/05 Final Written Comments, and Mr. Cooper's Affidavit are overwhelming evidence that the Application must be given an adverse recommendation by WDEQ.

If we can provide any follow up information about any of these many concerns, please contact this office.

Very truly yours,

WENDTLAND & WENDTLAND, LLP



for Debra J. Wendtland

DJW/jkb

Enclosures

cc: Client

Jeff Hermansky

Brian Skoric/Park County Commissioners

Lawrence Besson, Wyoming Water Development Commission

John Lawson, Bureau of Reclamation

Lawrence Stinson