

**BEFORE THE  
WYOMING ENVIRONMENTAL QUALITY COUNCIL**

Wyoming Outdoor Council,	)	
	)	
Petitioner	)	
	)	
vs.	)	
	)	
Wyoming Department of Environmental	)	
Quality, Water Quality Division,	)	
	)	
Respondent	)	Docket No. _____

**PETITION FOR REVIEW OF WILLOW CREEK  
WATERSHED GENERAL PERMIT**

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Comes now the Petitioner, Wyoming Outdoor Council and hereby petitions the Environmental Quality Council to hear the matter of the issuance of an "Willow Creek Watershed General Permit For Surface Discharges Related To Coal Bed Methane Production" by the Department of Environmental Quality, Water Quality Division, and for their Petition for Review, hereby state the following:

**PETITIONERS**

1. The Wyoming Outdoor Council (WOC) is a non-profit, tax-exempt conservation advocacy organization working statewide in Wyoming. Established in 1967, WOC works to protect and enhance Wyoming's spectacular national parks and protected areas, vast national forests and other public lands, world-renowned wildlife and its habitat, blue-ribbon fisheries, its enviable air and water quality, and the human and natural environment of Wyoming. WOC uses a comprehensive array of strategies, including mobilizing grassroots campaigns, organizing and leading coalitions of conservation groups, advocating progressive public policies and pursuing administrative and legal remedies to prevent or mitigate environmental harm. As part of keeping WOC's membership informed of pressing environmental issues, WOC publishes a quarterly newsletter, *Frontline*, which is also available to the general public on its website, <http://www.wyomingoutdoorcouncil.org/>.

3. The address of the Wyoming Outdoor Council is:  
262 Lincoln  
Lander, WY 82520

4. By virtue of its mission and purpose in advocating for the protection of the environment, Wyoming Outdoor Council is adversely affected by the actions of the Respondent Department of Environmental Quality, Water Quality Division (DEQ/WQD) in issuing the Willow Creek Watershed General Permit, WYG290000, described above.
5. The undersigned attorney will represent the Wyoming Outdoor Council in this matter.

#### RESPONDENT

6. The Respondent is the Wyoming Department of Environmental Quality, Water Quality Division (DEQ/WQD).

#### THE DEQ/WQD ACTION BEING PROTESTED BY THE PETITIONERS

7. On Sept. 11, 2006, the Wyoming Department of Environmental Quality (DEQ), Water Quality Division (WQD) issued a general permit allegedly in accordance with DEQ Wyoming Water Quality Rules and Regulations (WWQR&R), entitled "Willow Creek Watershed General Permit for Surface Discharges Related to Coal Bed Methane Production (hereinafter the "general permit"), Permit No. WYG290000, attached hereto as Exhibit 1.
8. This action is brought within 60 days of the action taken by the Administrator and the Director to issue the general permit, pursuant to Section 16(a), Chapter 1, Department of Environmental Quality Rules of Practice and Procedure.
8. The Petitioner filed comments objecting to the issuance of this general permit. The comments from the Petitioner are attached hereto as Exhibit 2.
10. As of the date of this Petition, to the best of the Petitioners' knowledge and belief, there are no persons, partnerships, corporations or other business entities that have notified the DEQ/WQD of their intention to be covered by the above-referenced general permit for any particular discharge point or site.

#### ISSUES PRESENTED FOR REVIEW

##### **I. The General Permit is a Rule, But Was Not Promulgated as a Rule.**

10. The general permit meets the definition of a rule under the Wyoming Administrative Procedure Act. That act defines a rule as an "agency statement of general applicability that implements, interprets, and prescribes law, policy or ordinances of cities or towns, or describes the organization, procedures or practice requirements of any agency." W.S. 16-3-101(b)(ix).
11. The general permit does not apply to any particular permittee, nor to any particular site. It is, therefore, a statement of general applicability, and must go through the rule-making process required by the Wyoming Administrative Procedure Act in order to be

legally effective. It has not gone through such a process.

12. The DEQ/WQD did not propose or attempt to promulgate the general permit as a rule, even though it is a statement of general applicability that implements, interprets and prescribes law.

13. The DEQ/WQD did not take any of the following actions necessary to promulgate a rule pursuant to the Wyoming Administrative Procedure Act and the Wyoming Environmental Quality Act:

a. The general permit was not submitted to the Water and Waste Advisory Board for review and approval as required by W. S. 35-11-114(b).

b. The general permit was not submitted to the Wyoming Environmental Quality Council (EQC) by the DEQ/WQD, as a proposed rule to be promulgated by the EQC, as required by W. S. 35-11-112(a)(i).

c. The general permit was not promulgated by the EQC, as required by W. S. 35-11-112(a)(i).

d. The general permit was not submitted to the governor for his approval and signature as required by W. S. 16-3-103(d).

e. The general permit was not submitted to the Wyoming Secretary of State's office, either during the promulgation process, or after the purported adoption of the general permit, by the agency (DEQ/WQD). The general permit is not on file with the Wyoming Secretary of State, as is required by W. S. 16-3-104.

14. The Willow Creek Watershed General Permit is null and void and does not have the force and effect of law unless and until it is properly promulgated as a rule, pursuant to the requirements of the Wyoming Administrative Procedure Act and the Wyoming Environmental Quality Act.

## **II. Issuance of the General Permit Does Not Meet the Requirements of Chapter 2, WWQR&R.**

15. The general permit is violative of Chapter 2, Section 4, Water Quality Rules and Regulations (WWQR&R). Chapter 2 sets forth the criteria for the issuance of general permits. Those criteria are not met in the case of the Willow Creek Watershed General Permit.

16. Under the Chapter 2, Section 4(a)(iii), a general permit cannot be used unless all discharges have the same effluent limitations and operating conditions, and the same or similar monitoring requirements. These criteria are obviously not met.

17. The general permit has five separate categories of discharges, with important distinctions between them. Notably, there are differences in SAR limits, EC limits, and iron limitations. Furthermore some constituents have limitations set forth for some categories, and yet are entirely left out of consideration by other categories.

18. The operating conditions for the discharges described in the general permit clearly vary between categories: some involve direct discharges to streams, others involve on-channel reservoirs, and still others involve off-channel reservoirs. There are also different monitoring requirements for the different categories of discharges.

19. The significant differences in effluent limitations and operating conditions contained within the general permit make it abundantly clear that the Willow Creek Watershed General Permit violates Chapter 2, Section 4, WWQR&R, and should not have been issued.

### **III. The Environmental Quality Act Does Not Authorize The Issuance of General Permits.**

20. There is no statutory authorization in the Environmental Quality Act (EQA), which was passed in 1973, that authorizes or instructs the DEQ/WQD to issue general permits.

21. The EQA enumerates the authority of the Director of the Department and the Water Quality Administrator (see W. S. 35-11-109, and W. S. 35-11-302 and -303, respectively). It does not refer to any authority to issue general permits. The EQA is fairly specific as to the types and varieties of permits that DEQ/WQD can issue. See W. S. 35-11-302.

22. It is clear from a reading of W. S. 35-11-801(b) that any permit must have an application. The general permit herein does not require an application. Rather, notices of intent are all that is required. While the authority to issue permits is specified in the EQA, the context makes it clear that it is referring to individual permits, not general permits.

### **IV. The On-Channel Reservoirs Authorized by the Willow Creek Watershed General Permit Must be Authorized as Treatment Works.**

23. These on-channel reservoirs described in the permit, constitute "treatment works disposal systems or other facilities capable of causing or contributing to pollution." See W.S. 35-11-301(a)(iii). As such facilities, they must obtain a permit to construct pursuant to Chapter 3, WWQR&R. They are being built to "treat, stabilize or hold wastes." See W. S. 35-11-103(c)(iv).

24. Permits to construct for these on-channel reservoirs, and not discharge permits, are the proper permitting device to allow the construction of these facilities. See W.S. 35-11-301(a)(iii). But no permit to construct has been authorized or issued by DEQ/WQD for the on-channel reservoirs covered by this general permit.

25. There is no regulation authorizing the issuance of a general permit to construct. The DEQ/WQD cannot use the device of an WYPDES general permit to authorize construction of on-channel reservoirs that must be permitted under W.S. 35-11-301(a)(iii).

26. Issuance of this general permit does not legitimately come under Chapter 2, WWQR&R, and is therefore illegal and contrary to state law and regulations.

**V. A Different Category of Discharge For On-Channel Reservoirs Than For Direct Discharges To Willow Creek Is Arbitrary and Capricious and Should Not Be Allowed.**

27. This general permit provides for five categories of discharges (three of which are "sub-categories").

28. Category II discharges, which are discharges to on-channel reservoirs, allow less stringent effluent standards than Category I discharges, which are direct discharges to Willow Creek or its tributaries stream. Many of the constituents that are listed with effluent limitations in the other categories of discharges, are not even listed for Category II.

29. The discharges, in both categories, is being made to the drainage, just as with all the other categories of discharges. The discharge will affect the same class of water in either case. The effluent from a Category II discharge will leave the "non-discharging" reservoir somehow. It will either over-top the reservoir when there is a big enough precipitation event, or it will leak into the groundwater and then seep out back into the stream channel a little further downstream.

30. While the DEQ/WQD may have the power to require different effluent limitations (in the context of individual permits -- but not general permits) for different beneficial uses of water, and for different classifications of water, it does not have the power to make such distinctions arbitrarily and capriciously.

31. By providing for different categories of discharges for the same class of waters of the state, DEQ/WQD has acted arbitrarily and capriciously in setting up its categories of discharges in this general permit.

**VI. Agricultural Uses Will Not Be Protected By This General Permit**

32. The only category of discharges in the general permit where any effort is made to protect agricultural uses is Category 1C. Discharges below all existing irrigation are not covered, nor are discharges to reservoirs (either off-channel or on-channel).

33. There is an assumption being made by DEQ/WQD that if no irrigation is occurring, there is no agricultural use to protect. This is not true. Ranchers make use of

bottomlands to graze and water their livestock and the grass that grows in these bottomlands is often crucial to their operations. Irrigating should not be the sole criteria used to determine whether the DEQ will protect the water for agricultural uses. The DEQ should also (in any event) protect the water even if it is only for potential uses -- i. e. the water could be put to agricultural use in the future -- and not just for actual on-going uses that are currently documented. See Chapter 1, Section 20 , WWQR&R.

34. Bottomlands, rangelands, and other lowlands will be negatively and permanently injured by the lax or non-existent effluent limits in this general permit. These levels will result in vegetative alterations to salt tolerant less palatable species. These bottomlands capture natural moisture events and capitalize on this by exhibiting vegetative production far in excess of uplands. These lowland areas in question are important component in sustaining rangeland use by livestock and wildlife.

35. Effluent limits on SAR and EC for these bottomland areas, as well as any irrigated areas, should be set no higher than 6 and 1300 respectively. The effluent limits now set in this general permit for non-irrigated areas (7500 for EC and no limit for SAR) are totally inappropriate for native plants, for aquatic life, and for wildlife.

36. The effluent limits in this general permit violate the agricultural use protections required by Chapter 1, Section 20, WWQR&R.

#### **VII. Erosion Control Protections In The General Permit Are Not Adequate.**

37. The primary effort that DEQ makes in this permit to address erosion concerns is found in Part 1, Para 6.1, concerning headcuts.

38. Monitoring will only occur if there is a determination of head cut movement of more than four feet within a calendar year. DEQ/WQD will then process this data over a several month period. The permittee may then be required to submit a mitigation plan to DEQ/WQD. Several more months of review would undoubtedly follow. Assuming a plan approval, operator is given three months to implement corrective action. Any damage from a head cut originally noted as greater than four feet may well have increased to far greater damage in eighteen months or longer.

39. Head cuts damage of any type caused by CBM discharges should be immediately identified and corrected. A time line for action after identification should be no greater than three months. Monthly identification of changes to head cuts should be required, with immediate follow-up for correction.

40. The present language of the permit allows downstream landowners to waive the need for correction and remediation of channel damage. No waivers should be allowed. Resource damage may have greater impacts than only upon one individual's property. This, in effect, allows upstream users to condemn downstream users land and property. Furthermore, the landowner may be willing to sign a waiver for monetary reasons (i. e. compensation) having nothing to do with a concern for the water quality of the stream in

question. To put it in legal jargon, damages may make a landowner whole, but it does not make waters of the state whole, nor the people of the state of Wyoming, who own the water.

### **RESERVATION OF RIGHTS**

41. The Petitioner reserve the right to raise as an issue in this Petition for Review any issue set forth in Wyoming Outdoor Council's comments provided to the DEQ/WQD in this matter, as set forth in Exhibits 2.

42. The Petitioners reserve the right to amend this Petition for Review, to clarify, amend or supplement the existing objections to the general permit, or to add new objections to the general permit.

43. The Petitioners reserve the right to file a legal memorandum of points and authorities in support of their Petition for Review in this matter.

### **REQUEST FOR HEARING**

44. THE PETITIONER HEREBY REQUESTS that the EQC hold a hearing in this matter, on the subject of the general permit, and at such hearing allow the Petitioner to present witnesses and exhibits, and cross-examine witnesses testifying for the Respondent at such hearing.

### **REQUEST FOR RELIEF**

For all of the foregoing reasons, the Petitioners request that the EQC:

A. Determine the above-referenced general permit is null and void and does not have the force and effect of law.

B. Determine that the general permit cannot be utilized by permittees on the ground that it was not properly promulgated, violates the provisions of the Wyoming Administrative Procedure Act (W.S. 16-3-101 et seq), the Wyoming Environmental Quality Act (W.S. 35-11-101 et seq), and rules and regulations promulgated thereunder.

C. In the alternative, modify the general permit in accordance with the objections of the Petitioner in such a manner that the general permit will conform to the requirements of the Wyoming Environmental Quality Act, and the rules and regulations promulgated thereunder, so that the provisions of the general permit will not be harmful to the environment, or the water quality and the hydrology of Willow Creek, its tributaries, and the Powder River.

D. Grant such other and further relief as the EQC may deem just and equitable.

Dated this 9th day of November, 2006.

Respectfully submitted,

*Steve Jones*

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## CERTIFICATE OF SERVICE

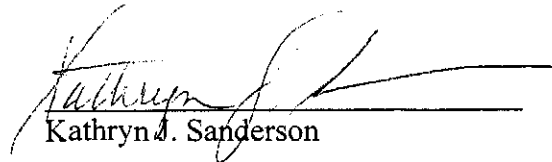
I, Kathryn J. Sanderson, hereby certify that I served a copy of the foregoing Petition for Review, together with attached exhibits, on the 9<sup>th</sup> day of November, 2006, upon the following:

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