

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**F I L E D**

DEC 03 2007

Terri A. Lorenzon, Director  
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF )  
PENNACO ENERGY, INC. OF )  
CONDITIONS IN RENEWAL OF )  
WYPDES PERMIT NO. WY0039632 )

DOCKET NO. 07-3622

**NOTICE OF APPEAL AND PETITION FOR HEARING**

Pennaco Energy, Inc. ("Pennaco"), through its undersigned counsel, hereby appeals certain conditions contained in WYPDES Permit No. WY0039632 ("the Permit") issued by the Department of Environmental Quality ("DEQ") to Pennaco on October 2, 2007 and requests a hearing pursuant to the Environmental Quality Act ("EQA"), the Wyoming Administrative Procedure Act ("WAPA"), and the Rules of Practice and Procedure of the Environmental Quality Council ("EQC"). In support of this appeal, Petitioner advises the EQC as follows:

**I. Information About the Petitioner**

The petitioner filing this appeal is:

Pennaco Energy, Inc.  
3601 Southern Drive  
Gillette, Wyoming 82718

Petitioner is represented in this matter by Brent Kunz of Hathaway & Kunz, P.C., 2515 Warren Avenue, Suite 500, Cheyenne, Wyoming 82003 and by Duane Siler and John Martin of Patton Boggs LLP, 2550 M Street NW, Washington, D.C. 20037. Correspondence and information related to this appeal should be served on the undersigned counsel and on Mr. David T. Hill at Pennaco Energy, Inc. at the Gillette address above.

## II. Action Being Appealed

1. Pennaco appeals the proposed permit limitations for Outfalls 003-009 and 014-028 on the following grounds:

(A) The Agricultural Use Policy, by means of which DEQ is implementing Section 20 of the Water Quality Regulations, and upon which these limits are based, and as in effect when this permit was issued, is not applicable to permit renewals for existing produced water discharges, absent a showing that existing discharges are harmful to humans or animals. The permit in question is the combination of three prior permits which had all been in existence since 1999, and hence this is a permit renewal for existing water discharges. Moreover, no evidence suggests that the existing discharges under this permit are causing harm to humans or animals. Consequently, the proposed new and more stringent effluent and flow limits and impoundment requirements for Outfalls 003-009 and 014-028 are unauthorized and contrary to the Section 20 policy as in effect when the permit was written.<sup>1</sup>

(B) DEQ could not lawfully apply the requirements of the Agricultural Use Policy to this permit because DEQ was required to first adopt the “policy” as a rule in accordance with the procedural requirements of the WQA and the WAPA.<sup>2</sup>

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<sup>1</sup> In the DEQ Response to Comments Related to Gibbon Draw Proposed Permit WY0039632, October 3, 2007, the response to this argument was to say that “a broad exemption [for existing CBM discharges] from ag use protection does not exist.” *Id.*, at 1. The exemption, however, certainly exists, as indicated by the Agricultural Use Protection Policy’s express exclusion of “historic discharges.” As to how far this exemption extends, DEQ’s response does not even attempt to address Mr. Wagner’s prior express representations to the EQC that the policy would cover historic discharges precisely like the CBM discharges that have been occurring for years under the Gibbon Draw permit. Consequently, DEQ has so far failed to directly address this legal argument.

<sup>2</sup> The DEQ’s response to this argument has been to ignore its merits or to cite the functional difficulty of complying with the WAPA:

Alternatives to applying the Agricultural Use Protection policy now would include either placing a moratorium on further permitting in affected areas, until the pending ag protection rulemaking is finalized; or in the interim, setting agricultural protection effluent limits through some tentative, unknown alternate process. Clearly, neither of these alternatives would be desirable to the applicants or to WQD.

(C) For the twenty-two authorized discharges, the renewal permit eliminates the existing requirement for water quality compliance at a downstream irrigation compliance point (ICP), and imposes end-of-pipe effluent limits on these discharges. This is irrational because it presumes the effluent from these outfalls would impact irrigated lands or aquatic life, even though the discharges are completely impounded during dry season and cannot be released except during precipitation events with attendant dilution, and even then for not longer than 48 hours.<sup>3</sup>

(D) Additionally, Pennaco objects to the proposed permit limitations for Outfalls 003-009 and 014-028 on the ground that DEQ has improperly coerced Pennaco to adopt a cascading dry season water management strategy. To require an applicant to maintain such an impoundment as a condition of relief from the default end-of-pipe limits under the Section 20 Policy, is arbitrary, unreasonable and unlawful.

### III. Relief Requested

Petitioner respectfully requests that the EQC grant the following relief:

1. Grant Petitioner a contested case hearing on the challenged provisions of WYPDES Permit No. WY0039632 pursuant to the EQA, the WAPA, and the EQC's Rules of Practice and Procedure.

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*See, e.g.*, DEQ Response to Comments Related to Gibbon Draw Proposed Permit WY0039632, October 3, 2007, at 1.

Certainly, predictability in application of the Section 20 mandate would be desirable, and indeed, that is precisely why a rulemaking to establish such a rule would be appropriate. But DEQ cannot excuse failure to comply with the WAPA's requirements for rulemaking on the ground that the challenged rule is needed for orderly permitting. That would be true of many rules in many areas, and the WAPA does not contain an exemption from rulemaking procedures for rules simply because the agency needs the rule in question in order to administer some statutory program. DEQ cannot sidestep the legally required process for adopting this rule simply because, in DEQ's view, the Agricultural Use Policy will facilitate WYPDES permitting.

<sup>3</sup> DEQ says case-by-case permitting through an alternate process during rulemaking would be "undesirable," but in fact an interim alternate procedure for implementing Section 20 could take into account precisely such conditions specific to the discharge being permitted, including water quality at the point of actual irrigation.

2. Finally determine Pennaco's application for renewal of WYPDES Permit No.WY0039632; reject the permit provisions referenced herein; and order that the renewed permit shall be finally issued without those provisions.

3. Consolidate this appeal with the related consolidated appeals, cases numbers 07-3616 to 07-3620, pursuant to the scheduling conference held in those appeals on November 26, 2007.

4. Provide such other relief as the EQC determines just and reasonable under the circumstances.

Respectfully submitted,



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Dated: December 3, 2007

## CERTIFICATE OF SERVICE

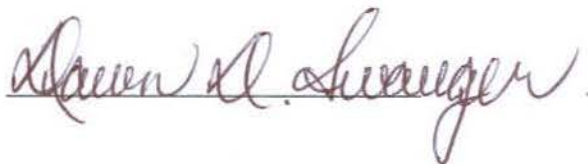
The undersigned certifies that on December 3, 2007, the foregoing Notice of Appeal and Petition for Hearing was served by hand as follows:

*Original and 10 copies to:*

Terri Lorenzon, Director  
Environmental Quality Council  
Herschler Building, Room 114  
122 West 25<sup>th</sup> Street  
Cheyenne, Wyoming 82002

*Two copies to:*

John Corra, Director  
Department of Environmental Quality  
Herschler Building, 4<sup>th</sup> Floor West  
122 West 25<sup>th</sup> Street  
Cheyenne, Wyoming 82002

A handwritten signature in dark ink, reading "Dawn M. Shrago", written over a horizontal line.