

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JAN 10 2008

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. WY0048631)

DOCKET NO. _____

NOTICE OF APPEAL AND PETITION FOR HEARING

Pennaco Energy, Inc. ("Pennaco"), through its undersigned counsel, hereby appeals certain conditions contained in WYPDES Permit No. WY0048631 ("the Permit") issued by the Department of Environmental Quality ("DEQ") to Pennaco on November 30, 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 001-002 on the following grounds:¹

(A) The Agricultural Use Protection Policy, by means of which DEQ is implementing Section 20 of the Water Quality Regulations, and upon which these limits are based, is not applicable to permit renewals for existing produced water discharges, absent a showing that existing discharges are harmful to humans or animals.² The permit in question has been in existence since 2002, 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 001-002 are unauthorized and contrary to the Section 20 policy as in effect when the permit was written.

¹ The present appeal includes legal objections to the DEQ permitting process that are common to prior Pennaco permit comments and appeals. Given the similarity of Pennaco's permit objections, DEQ has of late adopted generic responses (as to grounds (A) and (B)) to Pennaco's comments on proposed permits. The DEQ Response to Comments for the present permit merely incorporated the reasoning of prior Responses to Comments. It should be noted, however, that the Comments to the DEQ for the present permit included additional views on the agency's prior generic response. Nonetheless, DEQ failed to respond to or even acknowledge Pennaco's new points. Instead, the agency merely stated "[Pennaco's] comments on these draft permits were not substantially different than ... comments submitted on previous draft permits. ... Therefore please refer to [prior response letters]." DEQ Response to Comments Related to Longhorn Lease and Beaver Creek Proposed Permits WY0038326, WY0048631, December 7, 2007.

² On May 15, 2007, DEQ issued a proposed Appendix H to Chapter 1 of the Water Quality Rules entitled "Agricultural Use." The proposed rule would make any discharge not in existence for at least 10 years subject to the rule. This would be a significant change from the current policy, as approved by EQC, and will be subject to public comment in the rulemaking process.

One reason, among others, to reject a decade-long requirement for grandfathering is that it fails to accomplish the main rationale for the provision in the first place—to provide a safe harbor for ranchers who have come to rely on produced water for stock watering. Some of those ranchers rely on CBNG water which has become available to them only recently. Analysis of Comments from Water and Waste Advisory Board Meeting, June 15, 2007, at 9, *available at* <http://deq.state.wy.us/wqd/watershed/surfacestandards/index.asp>. Consequently, the DEQ's selected date of 1998 fails, in significant part, to achieve the intended purpose of the grandfather provision. It does not provide any safe harbor for ranchers who have come to rely on CBNG produced water. *Compare* Environmental Quality Council Hearings Transcript, February 16, 2007, Docket No. 06-3819, Chapter 1, Surface Water Standards for Rulemaking, Volume 2, p. 292 (comments of Mr. John Wagner suggesting permits from as late as 2002 would be protected as "existing uses.")

(B) DEQ could not lawfully apply the requirements of the Agricultural Use Protection Policy to this permit because DEQ was required to first adopt the “policy” as a rule in accordance with the procedural requirements of the EQA and the WAPA.³

(C) For the two authorized discharges, the renewal permit drastically limits flow, imposes new containment requirements, and tightens the end-of-pipe effluent limit for specific conductance (SC) on these discharges within the containment. 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.

(D) Finally, the renewal permit imposes reduced flow rates, new impoundments, and much more stringent SC limits based on newly-discovered downstream “naturally irrigated bottomlands.” Irrigation-based restrictions are proper only where the waters relate to agriculture. Because only “artificial” or man-made irrigation constitutes agriculture, DEQ lacks the regulatory authority to impose irrigation-related restrictions for “natural irrigation,” such as it attempts to do in this case. Consequently, the Agricultural Use Protection Policy is invalid at least to the extent that it purports to apply to almost all waters that reach vegetated land—be they forms of intentional irrigation or not.

III. Relief Requested

³ The DEQ’s response to this argument has been to cite the functional difficulty of complying with the WAPA. *See, e.g.*, DEQ Response to Comments Related to Gibbon Draw Proposed Permit WY0039632, October 3, 2007, at 1 (“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 those alternatives would be desirable to the applicants or to WQD.”) Pennaco has pointed out that 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. Nonetheless, as noted *see supra* note 1, DEQ has chosen not to acknowledge or respond to this argument.

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. WY0048631 pursuant to the EQA, the WAPA, and the EQC's Rules of Practice and Procedure.
2. Finally determine Pennaco's application for renewal of WYPDES Permit No. WY0048631; 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,

for Lucas Buckley
for Brent R. Kunz

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Dated: January 10, 2008

CERTIFICATE OF SERVICE

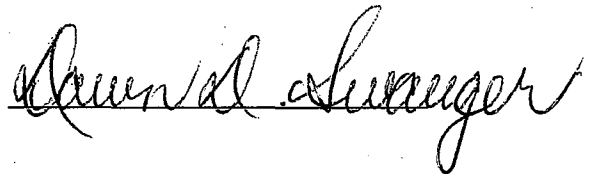
The undersigned certifies that on January 10, 2008, the foregoing Notice of Appeal and Petition for Hearing was served by hand as follows:

Original and 10 copies to:

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

Two copies to:

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

A handwritten signature in black ink, appearing to read "Dawnal Swanger". The signature is written in a cursive style and is positioned on the right side of the page.