BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

APR 0 3 2008

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL)
AND REVIEW OF THE ISSUANCE)
OF WYOMING POLLUTANT DISCHARGE)
ELIMINATION SYSTEM (WYPDES)) Docket No. 08-3801
PERMITS WY0056146 AND WY0056201)
(Yates Permits, Gauge and Wormwood))
DATED February 4, 2008)
)

NOTICE OF APPEAL AND REQUEST FOR HEARING CONCERNING ISSUANCE OF WYPDES PERMIT NUMBERS WY0056146 and WY0056201

Comes now the Petitioner, Yates Petroleum Corporation (Yates), pursuant to the Department of Environmental Quality (DEQ) Rules of Practice & Procedure, Chapter 1, Section 3, and hereby files this Notice of Appeal and Request for Hearing concerning the WDEQ's issuance of two individual WYPDES permits, permit numbers WY0056146 and WY0056201. Yates objects to the individual permits as issued as several conditions in the permits are unjustified and unduly burdensome in light of WDEQ's own policies and regulations. In support of this appeal, Yates advises the Environmental Quality Council (EQC) as follows:

I. Information About the Petitioner

1. The Petitioner filing this appeal is Yates Petroleum Corporation, located at 105 South 4th Street, Artesia, NM, 88210 and is qualified to do business in Wyoming.

2. Petitioner in this matter is represented by Eric L. Hiser and Matthew Joy, of Jorden Bischoff & Hiser, P.L.C., 7272 East Indian School Road, Suite 360, Scottsdale, Arizona, 85251. Correspondence and information related to this appeal should be served on Yates attorneys and on the company, c/o Lisa Norton, at the address above.

3. Yates is the owner of the two coal bed natural gas (CBNG) facilities at issue in this appeal: Gauge POD – Pumpkin Creek, WYPDES permit number WY0056201 (Gauge POD); and Wormwood CS State, WYPDES permit number WY0056146 (Wormwood).

II. Action Being Appealed

4. WDEQ issued two individual WYPDES permits, permit numbers WY0056146 (Gauge POD) and WY0056201 (Wormwood), to Yates on or after February 4, 2008

authorizing discharge of produced water from the facilities to several on-channel reservoirs located on various ephemeral tributaries of Pumpkin Creek, in the Powder River Basin.

5. Yates appeals the issuance of the Gauge POD permit on the grounds that it requires the permittee to comply with effluent limits for specific conductance (EC) and sodium adsorption ratio (SAR) of 2,200 µmhos/cm and 13, respectively, despite the fact that an irrigation waiver has been signed and submitted by a downstream landowner requesting that these limits be waived.

6. Yates appeals the issuance of the Gauge POD permit on the grounds that the permit requires headcut and channel stability monitoring despite the fact that the permits require containment of all produced water in on-channel reservoirs except in the event of precipitation runoff.

7. Yates appeals the issuance of the Gauge permit on the grounds that the permit requires end-of-pipe monitoring for dissolved cadmium, dissolved lead, dissolved copper, dissolved zinc and chlorides. End-of-pipe monitoring for these constituents is unwarranted given the fact that a mixing zone must be allowed when limits are based on protection of aquatic life and the fact that water quality samples of similar discharges in close proximity to the proposed outfalls demonstrate that constituents contained in produced water are below the effluent limits set forth in the permits and are also below the most conservative surface water quality standards set forth under the chronic aquatic life values.

8. Yates appeals the issuance of the Gauge permit on the grounds that the permit provides inconsistent reporting dates for submitting various monitoring data. The permit requires that quarterly outfall monitoring data be submitted by the 28th of the following month, while quarterly channel stability monitoring data and water quality monitoring data are required to be submitted by the 15th of the following month.

9. Yates appeals the issuance of the Wormwood permit on the grounds that the permit requires headcut and channel stability monitoring despite the fact that the permits require containment of all produced water in on-channel reservoirs except in the event of precipitation runoff.

10. Yates appeals the issuance of the Wormwood permit on the grounds that the permit requires end-of-pipe monitoring for dissolved cadmium, dissolved lead, dissolved copper, dissolved zinc and chlorides. End-of-pipe monitoring for these constituents is unwarranted given the fact that a mixing zone must be allowed when limits are based on protection of aquatic life and the fact that water quality samples of similar discharges in close proximity to the proposed outfalls demonstrate that constituents contained in produced water are below the effluent limits set forth in the permits and are also below the most conservative surface water quality standards set forth under the chronic aquatic life values.

11. Yates appeals the issuance of the Wormwood permit on the grounds that the permit provides inconsistent reporting dates for submitting various monitoring data. The permit requires that quarterly outfall monitoring data be submitted by the 28th of the following month, while quarterly channel stability monitoring data and water quality monitoring data are required to be submitted by the 15th of the following month.

III. Basis for the Appeal

A. Procedural Background

12. Yates submitted the Gauge individual permit application and supporting documentation on or around November 13, 2007 and the Wormwood application and supporting documentation on or around October 9, 2007.

13. DEQ issued the draft permits for comment in public notice on December 17, 2007.

14. During the public notice period, Yates submitted comments concerning the inclusion of the permit conditions at issue in this appeal.

15. WDEQ issued the final permit, without addressing the concerns raised by Yates in its comments, on or after February 4, 2008.

B. Effluent Limits for EC and SAR (Gauge POD Permit)

16. This appeal does not involve whether the proposed effluent limits for EC and SAR set forth in the permits are technically justified, but, rather whether it is justifiable to require effluent limits for EC and SAR where the downstream landowner has submitted a waiver of the effluent limits in favor of having water.

17. The Gauge POD permit sets forth effluent limits for EC and SAR of 2,200 µmhos/cm and 13, respectively for those outfalls located above irrigation. Gauge Permit, Part I.A.1b. (Attached as Exhibit "A".)

18. The Gauge permit sets the above effluent limits for outfalls located above downstream irrigation.

19. WDEQ's own Section 20 Agricultural Use Protection Policy provides that "An exception to EC or SAR limits established under the Tier 1, 2 or 3 procedures may be made when affected landowners request use of the water and thereby accept any potential risk to crop production on their lands." WDEQ Agricultural Use Protection Policy (Chapter 1, Section 20), p. 63 (the Section 20 Policy). (Relevant portion attached as Exhibit "B".)

20. The Gauge POD facility is located upstream of the Iberlin Ranch LP, which is the only downstream irrigator in the North Prong, Pumpkin Creek.

21. The Iberlin Ranch, through Mr. John Iberlin, submitted an irrigation waiver to WDEQ, dated December 1, 2006. In relevant part, that waiver states:

> I respectfully request the irrigation use associated with the spreader dikes on Iberlin Ranch LP properties not be protected by Wyoming Department of Environmental Quality – Water Quality Division when authorizing discharges of produced water from coal bed methane wells to the North Prong Pumpkin Creek watershed upstream of SWNW Section 7, Township 46 North, Range 75 West.

Letter from John Iberlin, Iberlin Ranch LP, to Mr. John Wagner, Wyoming Department of Environmental Quality, Water Quality Division, dated December 1, 2006. (Unsigned version attached as Exhibit "C".)

22. WDEQ has failed to comply with the Section 20 Policy in that the Policy provides that where a downstream landowner has submitted an irrigation waiver, default limits should not be imposed on the permittee.

23. At the February, 2007 hearing, the EQC expressed its desire that the Policy be converted to a rule to provide for uniformity in its application and sanctioned use of the Policy in the interim.

24. Despite the EQC's instruction to DEQ to apply the Policy uniformly to give certainty, DEQ has failed to do so, thus further injuring both discharger and land owner.

C. Headcut and Channel Stability Monitoring (Gauge POD and Wormwood)

25. The final permits require that Yates conduct annual and quarterly headcut and channel stability monitoring for "all identified headcut(s) within the stream channel located between their proposed outfall location(s) and the Powder River." Permits, Parts I.A.1c & I.A.2. (Gauge); Parts I.A.1a & I.A.2. (Wormwood) (Attached as Exhibit "D").

26. The permits require the permittee to contain all effluent from the permitted outfalls in on-channel reservoirs "except during periods of time in which natural precipitation causes the reservoirs to overtop and spill." Permits, Part I.A.1c (Gauge); Part I.A.1a (Wormwood).

27. If produced water is discharged from an on-channel reservoir during "dry" conditions (i.e., a release occurs in the absence of a precipitation event which causes

overtopping), it is a violation of the permits. Permits, Part I.A.1c (Gauge); Part I.A.1a (Wormwood).

28. Effectively, the permits require the permittee to conduct headcut monitoring even though the only amount of water that is permitted to be discharged down the waterbody is that amount produced by precipitation runoff, which is a natural condition. Requesting the permittee to undertake the expense of headcut monitoring for natural conditions is unwarranted and arbitrary and capricious.

C. Metals and Chloride Monitoring (Gauge POD and Wormwood)

29. The permits require end-of-pipe monitoring and establish effluent limits for dissolved cadmium, dissolved lead, dissolved copper, dissolved zinc and chlorides. Permit, Part I.A. (Gauge); Permit, Part I.A. (Wormwood).

30. The permits provide that the monitoring requirements are based on the application of the anti-degradation provisions set forth in Chapter 1, Wyoming Water Quality Rules & Regulations (WWQRR). Statement of Basis, page 2 (Gauge and Wormwood).

31. The conditions requiring end-of-pipe monitoring and setting effluent limits for these constituents are unjustified given WDEQ's regulations, the nature of the permit and the facts on the ground.

1. Anti-Degradation is Unjustified Where Water is Contained in On-Channel Reservoirs

32. The anti-degradation provision provides that "water uses in existence on or after November 28, 1975 and the level of water quality necessary to protect those uses shall be maintained and protected." 1 WWQRR § 8(a).

33. As stated above, the permits require the permittee to contain all produced water in on-channel reservoirs unless there is a precipitation runoff event which causes the on-channel reservoirs to overtop.

34. The *only* time produced water is authorized by the permit to flow down the waterbody is when produced water is commingled with precipitation runoff.

35. To the extent the anti-degradation process has been implemented to protect downstream uses (i.e., downstream of the on-channel reservoir), the only time monitoring should be required is when there is commingled flow large enough to reach that waterbody for which the anti-degradation process is intended to protect.

36. To the extent the anti-degradation process is intended to protect water quality in the on-channel reservoir, it should be noted that *but for* the existence of the discharge into

the reservoir, there would be no "use" within the reservoir and, in fact, no on-channel reservoir.

37. Finally, neither the final permits nor the earlier draft permits provide any justification for requiring monitoring or imposing effluent limits for dissolved cadmium, dissolved lead, dissolved copper, dissolved zinc and chlorides. Under the anti-degradation provisions, the water quality of the receiving stream must be determined in order to develop effluent limits protective of that water quality. In this case, the water quality of the receiving streams (or, in fact, Pumpkin Creek itself) with respect to these constituents has not been determined. Without this determination, effluent limits putatively based on anti-degradation cannot be imposed.

38. For these reasons, end-of-pipe monitoring of constituents (dissolved cadmium, dissolved lead, dissolved copper, dissolved zinc and chlorides) for which WDEQ has determined it necessary to impose effluent limits in order to provide anti-degradation protection for downstream uses is unjustified and should be removed from the permit.

2. If Monitoring is Required, A Mixing Zone Must be Utilized to Determine Compliance

39. 1 WWQRR § 9 provides that "compliance with water quality standards *shall* be determined after allowing reasonable time for mixing." 1 WWQRR § 9 (italics added).

40. A "water quality based effluent limit" is defined as a "permit effluent limit derived by selecting the most stringent of the effluent limits calculated using all applicable water quality criteria as set forth in Wyoming Water Quality Rules and Regulations, Chapter 1 for a specific point source to a specific receiving water for a given pollutant." 2 WWQRR § 3(a)(xcix).

41. "Water quality standards" are defined as

> regulations as established by Wyoming Water Quality Rules and Regulations, Chapter 1 which describe the designated uses of surface waters of the state, the numeric and narrative criteria that are necessary to protect the uses of surface waters of the state, and an antidegradation provision which protects the natural water quality of surface waters of the state.

2 WWQRR § 3(a)(ci)

42. The effluent limits at issue here are putatively derived from WDEQ's anti-degradation policy to protect existing uses. *See* Permits, Statements of Basis, p. 2. Importantly, one of the uses for which the permits are "protective" is aquatic life.

(The permits state that the effluent limits at issue are established for "chronic aquatic life protection values.") *Id.*

43. Because the effluent limits for dissolved cadmium, dissolved lead, dissolved copper, dissolved zinc and chlorides are based on the protection of aquatic life and also derived from the anti-degradation provision and the anti-degradation provision is explicitly set forth as a water quality standard, the WDEQ must allow for a mixing zone prior to determining whether compliance with the water quality standard is achieved.

44. To the extent WDEQ takes the position that there is not enough flow to allow for a mixing zone, the only time produced water is authorized under the permits to flow is in the event that there is enough precipitation runoff to cause the on-channel reservoirs to overtop. In essence, the only time produced water could potentially affect background water quality is when there is actual flow in the ephemeral waterbody.

3. The Permittee has Demonstrated that the Discharge Has Little to No Potential to Impact Pumpkin Creek or the Powder River

45. According to WDEQ's Antidegradation Implementation Policy,

> The water quality standards designate the uses which are protected on waters of the state and establish criteria that describe maximum pollutant concentrations and other water quality conditions that are necessary to maintain those uses. Many waters in the state have an existing level of water quality that is better than the criteria established to support designated uses. The antidegradation requirements are designed to maintain water quality at the higher levels unless there are good reasons for lowering the water quality.

Antidegradation Implementation Policy, p. 2. (Relevant portions attached as Exhibit "E".)

46. The intent of the Antidegradation Implementation Policy is to prevent discharges from degrading the natural water quality of the receiving stream. *See, e.g.,* Antidegradation Implementation Policy, p. 10.

47. In its permit application, Yates has provided water quality data from similar discharges to tributaries to Pumpkin Creek demonstrating that the produced water quality is of better quality than that dictated by the effluent limits set forth in the permits. Most of the constituents at issue here (i.e., dissolved cadmium, dissolved lead, and dissolved zinc) are at concentrations below the detection limit (and below the effluent limits set forth in the permits).

48. In fact, all of the constituents levels provided in the produced water quality sample are below the most stringent surface water quality standards set forth under the chronic aquatic life values. *See* 1 WWQRR, Appendix B.

49. In addition, the concentrations of dissolved cadmium, dissolved lead, dissolved copper and dissolved zinc are all below the "Calculated Limit, including Anti-Degradation (calculated at 20% of chronic values)" for the Powder River. *See* Pumpkin Creek General Permit for Surface Discharges Related to Coal Bed Methane Production, WYG 280000, Fact Sheet, p. 15 of 26. (Relevant portions attached as Exhibit "F".)

50. Because dissolved cadmium, dissolved lead, dissolved copper and dissolved zinc are all below the most conservative effluent limits estimated for the Powder River, even when anti-degradation is included in the calculation, it is unlikely that the discharge will have any impact on the water quality in the Powder River.

51. Because produced water is consistently below the effluent limits and is *of better water quality than the Powder River*, there is no justification for the imposition of effluent limits (or monitoring requirements) for dissolved cadmium, dissolved lead, dissolved copper and dissolved zinc. Hence, these limits (and the monitoring requirements for these constituents) should be removed from the permits.

D. Inconsistent Reporting Deadlines (Gauge POD and Wormwood)

52. Both permits require that discharge monitoring reports be submitted quarterly on the 28th day of the month following the previous monitoring period. Permits, Part I.A.6 (Gauge and Wormwood).

53. Both permits require that channel stability monitoring station reports be submitted quarterly on the 15th day of the month following the previous monitoring period. Permits, Part I.A.7 (Gauge and Wormwood).

54. Both permits require that routine monitoring at the tributary and mainstem water quality monitoring stations (TRIB1, UPR and DPR) be reported quarterly on the 15th day of the month following the previous monitoring period. Permits, Part I.A.8 (Gauge and Wormwood).

55. Yates has recently, at the request of WDEQ, changed its submission practices for filing Discharge Monitoring Reports (DMRs) from a paper system to the WDEQ's electronic-DMR (e-DMR) system. Under the e-DMR system, a facility may only submit one e-DMR per outfall for a given reporting period.

56. Because the permits have two reporting timeframes, Yates will be required to submit two separate e-DMRs for each outfall in the permits. This reporting requirement is unnecessarily burdensome for both Yates and WDEQ's permitting branch.

57. In this case, the solution is simple; Yates requests that the reporting timeframe (i.e., the date on which the data is due on the month following the reporting period) for the three categories of data set forth in paragraphs 51 through 53, above, be made consistent on the 28th of the month.

WHEREFORE, Yates respectfully requests the EQC grant the following relief:

1. Grant Yates a Contested Case Hearing on its appeal pursuant to the Environmental Quality Act, the Wyoming Administrative Procedures Act, and the EQC's Rules of Practice and Procedure;

2. Disapprove the conditions at issue in this appeal for permit numbers WY0056146 (Gauge POD) and WY0056201 (Wormwood);

3. Instruct the WDEQ, Water Quality Division, to remove effluent limitations in the Gauge permit for discharges above the Iberlin Ranch;

4. Instruct the WDEQ, Water Quality Division, to rescind requirements for headcut and channel stability monitoring from both the Gauge and Wormwood permits;

5. Instruct the WDEQ, Water Quality Division, to remove effluent limits and monitoring requirements for dissolved cadmium, dissolved lead, dissolved copper and dissolved zinc from both the Gauge and Wormwood permits;

6. Instruct the WDEQ, Water Quality Division, to revise the reporting deadlines to a single consistent date on the 28th of the month in both the Gauge and Wormwood permits; and

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

Respectfully submitted this 3rd day of April, 2008.

Eric L. Hiser (Wyo. Bar No. 6-4003)
Matthew Joy
Jorden Bischoff & Hiser, P.L.C.
7272 E. Indian School Road
Suite 360
Scottsdale, AZ 85251
Attorney for Yates Petroleum Corporation

Certificate of Service

I certify that on this 3rd day of April, 2008, service of a true and complete copy of Notice of Appeal and Request for Hearing Concerning Issuance of WYPDES Permit Numbers WY0056146 and WY0056201 was made upon each party or attorney of record herein as indicated below.

The ORIGINAL and eleven (11) copies were filed by Federal Express and also emailing a .pdf version of the same on April 3, 2008 with:

Terri Lorenzon, Director / Attorney
Wyoming Environmental Quality Council
122 W. 25th Street
Herschler Bldg., R. 1714
Cheyenne, Wyoming 82002

COPIES were served by Federal Express of the same on April 3, 2008 with:

Office of the Attorney General
123 Capitol
200 W. 24th Street
Cheyenne, WY 82002

John Corra, Director (2 COPIES)
Department of Environmental Quality
122 W. 25th Street
Herschler Building, 4th Floor West
Cheyenne, WY 82002

John Wagner
Wyoming DEQ, Water Quality Division
122 W. 25th Street
Herschler Building, 4th Floor
Cheyenne, WY 82002