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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF) POWDER RIVER BASIN RESOURCE) COUNCIL, BERNADETTE BARLOW) BERNADETTE BARLOW TRUST,) WILLIAM L. BARLOW TRUST AND) ERIC BARLOW FROM WYPDES) PERMIT NO. WY0052299)		Docket No. 09-3802

PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Petitioners, by and through their undersigned counsel, respectfully submit this Motion for Summary Judgment, pursuant to WRCP 56 and the Rules of the Environmental Quality Council. Petitioners request that the EQC grant summary judgment in favor of Powder River Basin Resource Council, Bernadette Barlow, Bernadette Barlow Trust, William L. Barlow Trust and Eric Barlow for the reasons stated below. This Petition requires the Council to answer two questions of law as to which there are no disputed issues of material fact:

1. Can the EQC approve a permit that has been issued by DEQ without a valid scientific basis?
2. Can discharges made under permits issued by DEQ without valid scientific basis continue unless and until an injured landowner is able to prove the discharges will or have caused a measurable decrease in crop or livestock production?

BACKGROUND

On November 25, 2008, with the approval of the Administrator of WDEQ/WQD and the Director of WDEQ, WYPDES Permit No. WY0052299 (the Permit), was issued to Bill Barrett Corporation (Barrett) authorizing discharge of water from coalbed methane wells into Dead Horse Creek in Campbell County, Wyoming. Petitioners appealed the Permit on January 21, 2009 on the bases that the effluent limits for on EC and SAR in the Permit were not derived from appropriate scientific methods in violation of Water Quality Rules and Regulations, Ch. 2, Sec. 5(c)(iii)(C)(IV) and that the Permit authorized discharges that will not maintain the water supply at a quality which allows continued use of the water for agricultural purposes without a measurable decrease in production in violation of Water Quality Rules and Regulations, Ch. 1, Sec. 20.

Responses were filed by the Wyoming Department of Environmental Quality (DEQ) and Barrett on February 20 and March 30, 2009. Written discovery and designation of experts have been completed in accordance with the Council's order of October 6, 2009. The matter is set for hearing on July 7-9, 2010.

STATEMENT OF UNDISPUTED FACTS

WYPDES Permit No. WY0052299 (the "Permit") authorizes discharge of up to 1.1 million gallons per day (3.38 acre feet per day) from five outfalls into a series of on-channel reservoirs located in ephemeral drainages tributary to Dead Horse Creek. (Ex. 1, SOB, p. 1; Ex. 3, SOB, p. 1). The Permit is a Major Modification to WPDES Permit WY0052299 issued August 30, 2007 (Exs. 2 and 3). Barrett's water management plan and the reservoirs were described in

its application of May 8, 2007. (Ex. 4, Application, pp. 3, 4, 15, and 29 (Map)). That application indicated that CBM discharges would be managed through "evaporation and seepage losses associated with the on-channel reservoirs." (Ex. 4, cover letter, p. 2). In that application Barrett also requested that it be authorized to discharge from the upstream reservoirs to the two most downstream reservoirs. *Id.* The Permit authorizes Barrett to discharge 1.1 MGD of CBM water into and from the upstream on-channel reservoirs ("P1-1", "P1-2", "1-1", "2-1" and "6-1") into the two lowermost on-channel reservoirs ("January" AKA "35-1" and "Dead Horse").[1] (Ex. 1, SOB, p. 1; Ex. 4, p. 2). Discharge from the lowermost reservoirs - "January/35-1" and "Dead Horse" - is limited to natural overtopping not to exceed 48 hours during any one period.[2] (Ex. 1, SOB, pp. 1- 2). The "January/35-1" and "Dead Horse" reservoirs are, respectively, located approximately 2.8 and 3.2 stream miles above the Barlow's lands. (Ex. 2, p. 5 (Map)).

The Permittee provided DEQ with reservoir information on May 08, 2007 that indicated the January/35-1 had a capacity of 10 acre-feet, and that Reservoirs P1-1 and P1-2 would have capacities of 19.4 and 12.1 acre feet respectively. However, the permits issued by the Wyoming State Engineer for the upstream reservoirs, ("P1-1" and "P1-2") have been cancelled. (Ex. 5a, pp. 1, 4; Ex. 5b, pp. 1, 4). The "January/35-1" reservoir is permitted with the State Engineer in the name of the Nisselius Ranch for a capacity of 1.1 acre feet, one-tenth the capacity that DEQ based the Permit on.[3] (Ex. 5f, p. 1; Ex. 4, Application, p. 15).

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[1] Reservoir "1-1" is also known as Paint Rock Reservoir (Ex. 2, p. 3) Reservoir 6-1 is also known as Little Red Reservoir. *Id.* Copies of the relevant reservoir permits are provided as Exhibits 5a through 5h.

[3] The January/35-1 reservoir was originally permitted with the Wyoming State Engineer by Yates Petroleum Corporation which submitted its permit application on December 23, 2004 and indicated that the reservoir would have a dam height of twenty (20) feet, a capacity of 10.0 acre feet and would be filled by groundwater wells. (Ex. 5g, p. 1). Yates requested cancellation of the permit (Permit No. 16296) on November 15, 2009 and the permit was cancelled on December 11, 2009. (Ex. 5g, p. 6). Subsequently, a permit application for the January/35-1 reservoir was submitted by the Nisselius Ranch Co. Inc. on February 12, 2010 indicating that the reservoir has an existing dam 7.9 feet in height, a capacity of 1.1 acre feet and is to be filled by natural runoff. (Ex. 5f, p. 1).

DEQ identified irrigation as an agricultural use occurring below the permitted outfalls and that such use occurs on Barlows' land. (Ex. 1, SOB p. 2; Ex. 4, Application, p. 7). In the predecessor permit issued in August 2007, DEQ identified Smooth Bromegrass as the most salt-sensitive irrigated vegetation downstream of this facility, and established a default effluent limit for EC of 1,500 µS/cm, based on a Tier 1 analysis.[4] (Ex. 3, SOB p. 3). However, DEQ recognized that "the existing facility's water quality is unable to meet effluent limits protective of irrigation at end of pipe" and gave the Permittee "a 'window of opportunity' to investigate methodologies that could be utilized to achieve end of pipe effluent limits protective of irrigation uses . . . ." (Ex. 3, SOB, p. 4). DEQ issued the November 2008 Permit with a Tier 2 effluent limit for EC of 2,315 µS/cm. (Ex. 1, SOB, p. 2).

DEQ's Agricultural Use Protection Policy describes a 3-tiered decision making process for establishing effluent limits for EC and Sodium Absorption Ratio (SAR) whenever a proposed discharge will likely reach irrigated lands. (Ex. 6, p. 57). DEQ used the now discredited "Tier 2" methodology to derive the effluent limit for EC in this permit. "Tier 2" attempts to protect agricultural use by limiting effluents so as not to exceed an average "background" water quality, which is derived by sampling and averaging soil electrical conductivity in irrigated fields. (Ex. 6, p. 59). Relying on Tier 2, DEQ determined that the average soil EC in irrigated fields affected by the Permit likely fell within the range of 3,475 to 4,746 µS/cm. (Ex. 1, SOB, p. 2). DEQ then divided the lower value by 1.5 to establish the effluent limit for EC of 2,315 µS/cm. *Id.*

[4] The Permit is a Major Modification to WPDES Permit WY0052299 issued August 30, 2007 attached hereto as Ex. 3. Tier 1 effluent limits are derived by dividing published soil EC threshold value for 100% yield of the most salt-sensitive crop by 1.5. (Ex. 6, pp.57-59). The August 30, 2007 permit actually established an interim effluent limit for EC of 2,000 µS/cm during the Permittee's "window of opportunity." (Ex. 3, SOB, p. 4).

Petitioners' expert, Dr. Ginger Paige, states that the Tier 2 methodology is scientifically invalid and cannot be used to establish numeric effluent limits for EC and SAR that ensure no measurable decrease in crop production. (Ex. 7, p. 2). As Dr. Paige explains, no evidence has been found in the peer-reviewed scientific literature that will support the methodology of Tier 2 to accurately determine background water quality. (*Id.* at 3). Soil salinity is not a direct reflection or result of the quality of water applied. Dr. Paige explains that soil salinity changes with time in semi-arid environments and is primarily the result of soil characteristics, depth to groundwater, climate and irrigation management. (*Id.* at 2). The Tier 2 methodology does not provide a reasonable or scientifically defensible method to determine the quality of water that historically flowed within a drainage system and will not support the establishment of scientifically defensible effluent limits for discharges that will not cause a measurable decrease in crop production. (Id.). Among the sources cited and relied upon by Dr. Paige in developing her expert onion is a May 2009 report commissioned by the EQC which also concluded that "[t]he Tier 2 methodology . . . is not reasonable nor scientifically valid for determining the EC and SAR of water that can be discharged into an ephemeral drainage in Wyoming so that degradation of the receiving water will not be of such an extent to cause a measurable decrease in crop production." (Hendrickx & Buchanan, Expert Scientific Opinion on the Tier-2 Methodology – Report to the Wyoming Environmental Quality Council, May 2009, p. iii).[5]

The Permit did not set an effluent limit for Sodium Adsorption Ratio ("SAR"). Instead, the Permit requires that all effluent be contained in the lowermost on-channel reservoirs. (Ex. 1, SOB p. 2). The Permit otherwise requires all effluent discharged to the reservoirs to be contained during "dry operating conditions" – which means discharges are authorized in conjunction with

[5] In the interest of space, Petitioners have not attached a copy of the Hendrickx & Buchanan report, which the Council already has in its possession.

natural precipitation events. (Ex. 1, SOB p. 2). In spite of what Respondents may contend, this is not a total containment permit; which is why DEQ employed the Tier 2 methodology in the first place.

The reservoirs are unlined and the water placed in the reservoirs infiltrates into the soils underlying the reservoirs. Respondents can present no evidence that water does not escape the reservoirs through infiltration. In fact, Barrett relied upon infiltration to manage the volume of water discharged, estimating that infiltration rates for ponds in the Spotted Horse Project Area were between 0.93 and 0.52 acre-ft/day. (Ex. 4, cover letter, p. 2; Ex. 4, Application, p. 21). Infiltrated water can move vertically and horizontally through the soil to reach surface streams. (Ex. 8, p. 23-24).[6] Despite this, the Permit places no limitation on infiltration nor does it require groundwater monitoring between the reservoirs and the Barlow lands. (Ex. 1).

Finally, it is undisputed that petitioners cannot prove by a preponderance of the evidence that the water discharged under the Permit has or will cause a measurable decrease in crop or livestock production on the Barlows' lands.

ARGUMENT

A. Posture of the Case

Administrative agencies are typically vested with both legislative and judicial powers. BERNARD SCHWARTZ, ADMINISTRATIVE LAW §1.5, at 10 (2d Ed. 1984). This is true for the EQC. *See In Re: Matter of Bessemer Mountain*, 856 P.2d 450 (Wyo. 1993). "An agency can make a decision through adjudication that is binding on the parties to the adjudication and may be

[6] Hendrickx & Buchanan recognized this problem when they said:

> In Ivy Creek CBM water discharged in the creek and never makes it to the downstream landowner. This is considered a success but is it? Where did the water and the salts go? Nobody knows since monitoring is not part of a Tier 2 or Tier 1 permit. The water is probably decreasing the depth of an existing water table and will sooner or later reach the root zone and result in soil salinization. Or the saline waters may start seeping towards the downstream landowner.

Hendrickx & Buchanan, *EXPERT SCIENTIFIC OPINION ON THE TIER-2 METHODOLGY,* Report to the Wyoming Department of Environmental Quality, Sept. 2009, p.19.

precedent with respect to non-parties in future adjudications. Or, it can promulgate a rule that is binding on all those subject to the rule." WILLIAM F. FUNK, ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE at 317, (2d Ed. 2001).

This is a contested case arising from the appeal of a permit issued by the DEQ. In a contested case, the Council acts in its adjudicatory capacity, which applies "to identifiable persons and specific situations;" in contrast to its rulemaking function, in which the Council "produces a general rule or policy which applies to a general class of individuals, interests or situations." *Walker v. Karpan*, 726 P.2d 82, 87 (Wyo. 1986).

B. Issues Presented on Summary Judgment.

Pursuant to WY. R. CIV. P. 56(c) summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "The purpose of summary judgment is to dispose of suits before trial that present no genuine issue of material fact." *Mathisen v. Thunder Basin Coal Co., LLC*, 2007 WY 161, ¶9, 169 P.3d 61, 64 (Wyo. 2007). "The purpose of summary judgment is to eliminate the necessity of formal trials where only questions of law are involved." *Stane v. McVaney*, 44 P.3d 41, 46 (Wyo. 2002).

"A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a course of action or defense asserted by the parties." *Schuler v. First Nat'l Bank*, 999 P.2d 1303 (Wyo. 2000). "Where there are no material facts in dispute, and, normally, where the only conflict is as to what legal conclusions should be drawn from the undisputed facts, a summary judgment should be entered." *Guggenmos v. Tom Searl-Frank McCue, Inc.*, 481 P.2d 48 (Wyo. 1971).

There are two issues in this appeal. First, whether the effluent limits in the Permit meet statutory and regulatory requirements – that is whether the effluent limit for EC was derived by

appropriate scientific methods and whether an effluent limit for SAR is required. Second, whether it is the Petitioners' burden to prove that discharges authorized under the permit will result in a measurable decrease in crop production.

There are no disputed facts as to the first issue. Petitioners' expert, as well as the experts commissioned by the Council, has opined that Tier 2 is not scientifically valid and that there is no basis in science for the premise on which it is based – namely that historic water quality can be determined from sampling and analysis of soil salinity data. Respondents have offered no evidence to the contrary.

As to the second issue Petitioners are unable to show by a preponderance of the evidence that the water discharged under the Permit has or will cause a measurable decrease in crop or livestock production on the Barlows' lands. It is the Respondents' burden to demonstrate that, using appropriate scientific methods, it has concluded no measureable decrease would result from these discharges. Respondents cannot meet that burden.

C. The Permit's Effluent Limitations for Protection of Irrigation Do Not Satisfy Regulatory and Statutory Requirements.

DEQ has identified EC and SAR as the parameters or constituents of concern for protecting irrigation uses below CBM outfalls, and it therefore must establish effluent limitations for both EC and SAR that will ensure there is no measurable decrease in crop production. These must be established by appropriate scientific methods.

1. DEQ Is Required to Use Appropriate Scientific Methods to Establish Numeric Effluent Limits

The policy and purpose of the Wyoming Environmental Quality Act (EQA), WYO. STAT. §§ 35-1-101 et seq. is expressly described in WYO. STAT. § 35-1-102.

> Whereas pollution of the air, water and land of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and

> aquatic life, and impair domestic agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve and enhance the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives.

The purpose of the EQA is not only to prevent and minimize pollution but to allow pollution only if it does not impair beneficial use of the waters of the state. Thus the EQA prohibits anyone to "cause, threaten or allow the discharge of any pollution or wastes into the waters of the state" or to "alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state" except when authorized by a permit issued pursuant to the EQA. WYO. STAT. § 35-11-301(a)(I) – (ii). The extent to which the EQA allows alteration of the Wyoming's waters is prescribed by the water quality standards. Wyoming's water quality standards are contained in Chapter 1 of the Water Quality Rules and Regulations (WQRR). Water quality standards may be either numeric or narrative. (*see* WQRR, Chapter 2, Sec. 3(b)(ci)). At issue in this case is Chapter 1, Section 20 of the WQRR which provides a narrative water quality standard for the protection of agricultural uses:

> All Wyoming surface waters which have the natural water quality potential for use as an agricultural water supply shall be maintained at a quality which allows continued use of such waters for agricultural purposes.
>
> Degradation of such waters shall not be of such an extent to cause a measurable decrease in crop or livestock production.
>
> Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.
>
> The procedures used to implement this section are described in the "Agricultural Use Protection Policy."

It is the DEQ water quality administrator's duty to establish a permit system that prescribes "Effluent standards and limitations **specifying the maximum amounts or concentrations** of pollution and wastes which may be discharged into waters of the state." WYO. STAT. § 35-11-302(a)(ii). (emphasis added). The permit regulations, described in Chapter 2 of the WQRR, state that where an effluent constituent "has the reasonable potential to adversely impact a designated use of receiving surface waters of the state and no numeric standard has been promulgated . . . for the constituent, the administrator may establish a numeric effluent limitation based on values derived from appropriate scientific methods." WQRR, Ch. 2, Sec. 5(c)(iii)(C)(IV). Effluent limitations are defined as "any restriction established by the state or by the administrator of the Environmental Protection Agency on **quantities, rates and concentrations** of chemical, physical, biological and other constituents which are discharged from point sources into waters of the state, including schedules of compliance." WQRR, Ch. 1, Sec. 2(b)(xv). (emphasis added).

Therefore, it is DEQ's duty to write permits that contain effluent limitations on the amount or concentration of the constituents of concern so that the applicable water quality standards in the receiving water are not violated. DEQ determined that EC and SAR are constituents that have reasonable potential to adversely impact irrigation occurring downstream of the outfalls authorized by the Permit. (Ex. 1, SOB, p. 2; Ex. 6, p. 55). In this Permit, DEQ elected to establish a numeric limitation on the EC of the discharged water. Having elected to set a numeric limit for EC, the regulations require that it have been derived by an appropriate scientific method.

There is no dispute that Tier 2, DEQ's methodology for deriving a numeric effluent limitation for EC, is not an appropriate scientific method. The only evidence before the Council on

this issue is that offered by Drs. Paige, Hendrickx and Buchanan who categorically deny any basis in science for the assumption that background water quality can be determined from sampling soil salinity. (Ex. 7, p. 2, Hendrickx & Buchanan (May 2009), p. iii, 11-14). A method whose whole premise is based on a scientifically invalid assumption cannot be an appropriate scientific method. Pursuant to the EQA and DEQ's WQRR, the Permit cannot be issued.

2. The Permit Fails to Establish the Required Effluent Limitation for SAR.

DEQ has identified SAR as a parameter of concern in regard to irrigation. (Ex. 6, p. 55). SAR is a ratio of sodium to calcium and magnesium dissolved in the water. Thus, the sodium, calcium and magnesium are effluent constituents that have the potential to adversely impact a designated use. By the plain language of the WYO. STAT. § 35-11-302 and WQRR, Ch. 2, Sec. 5(c)(iii)(C)(IV), DEQ was required to establish an effluent limitation for these constituents. The Permit contains no limit on the SAR, or on the concentrations of sodium, calcium or magnesium that may be discharged from the outfalls described in the permit. Neither does it contain a restriction on the quantity or rate that these constituents may be discharged from the outfalls. The Permit allows discharges to lower Dead Horse Creek from the lowermost reservoirs when these reservoirs overtop due to natural precipitation events.[7] The Permit contains no limit on the quantity, rate or concentration of the sodium, calcium, magnesium that may be discharged.

In addition to overtopping events, because the reservoirs are unlined, the probability is that water stored in the reservoirs will infiltrate into the underlying soils as the Permittee relied upon in

[7] The fact that the reservoir permits for two of the upstream reservoirs (P1-1 and P1-2) have been cancelled (Exs. 5a and 5b) and that one of the downstream reservoirs (January/35-1) has only one tenth of the capacity represented in the Permittee's submittals to DEQ (*compare* Ex. 4, Application, p. 15 with Exs. 5f and 5g) indicates that overtopping may be much more frequent than anticipated by DEQ when it issued the permit. This also indicates that the information provided to DEQ in this regard may have been inaccurate or that the Permittee may have failed to make application for modification to the Permit as required by WQRR, Ch. 2, Sec. 12.

its water management plan. (Ex. 4, cover letter, p. 2; Ex. 4, Application, pp. 21-24). As a result of infiltration, water infiltrating from the reservoirs may contribute to base flows in Dead Horse Creek. Respondents provided no evidence that water stored in these reservoirs does not infiltrate the underlying soils. The Permit does not prohibit infiltration nor does it require monitoring of infiltration. Without such a requirement, there is no effluent limitation on the amount of water that may contribute to the flow in Dead Horse Creek and there are no effluent limitations on the SAR of that water.

DEQ failed to use an appropriate scientific method to derive the numeric effluent limitation for EC in the Permit. The Permit also fails to establish an effluent limitation for SAR. As a matter of law, these failures violate WQRR Ch. 2, Sec. 5(c)(iii)(C)(IV). Pursuant to WQRR Ch. 2, Sec. 9(a)(vi), the Permit may not be issued. Petitioners therefore request that the EQC grant Petitioners' motion for summary judgment.

Respondents are expected to argue that the Permit does provide an effluent limit on SAR through monitoring of EC and SAR of discharges at an Irrigation Monitoring Point (IMP) which is located on Dead Horse Creek downstream of the Permit reservoirs and immediately upstream of Barlows' lands. (Ex. 2, p. 5 (Map)). Discharges are to be monitored and if DEQ determines that effluent discharged under this permit does not conform to the Hanson relationship between EC and SAR the IMP can reopen the permit to impose an SAR effluent limit or may impose the SAR effluent limit automatically under specified conditions.[8] (Ex. 1, SOB p. 3). Regardless of whether one considers the monitoring and potential imposition of an end-of-pipe limit on the SAR of discharges to be an effluent limit, the resultant SAR limit, being dependent upon an EC limit

[8] The Hanson EC-SAR relationship described in the permit (i.e. SAR < 7.1 x EC – 24.48) has been superseded and DEQ currently defining the relationship as SAR < 6.67 x EC – 3.33. The SAR monitoring and re-opener provisions, however, are based on a threshold in-stream EC of 2,740 µS/cm which is higher than the effluent limit for EC of 2,315 µS/cm.

derived from inappropriate and invalid scientific methods, likewise fails to have been derived from appropriate scientific methods.

D. The EQC May Not Approve the Permit.

As described above, the undisputed facts in this case demonstrate that DEQ has failed to establish effluent limitations for EC and SAR that comply with the EQA, and Wyoming water quality standards and permit regulations. Respondents are expected to argue the EQC can still approve the permit because the Petitioners are unable to show by a preponderance of the evidence that discharges authorized by the Permit will result in a measurable decrease in crop production. EQC cannot approve the permit on this basis, for two reasons. First, the EQA does not vest the EQC with that authority. Second, the burden of proof, including the burden of production and the burden of persuasion, is properly placed on the DEQ and permittee to show by a preponderance of the evidence that discharges under the permit will not result in a measurable decrease in crop production.

1. **The EQC Lacks Authority to Approve a Permit that Does Not Meet the Requirements of the EQA and Water Quality Rules and Regulations**

If the EQC approves a permit that does not meet the requirements of the EQA and of the Water Quality Rules on Regulations on the basis that a Petitioner appealing the permit has failed to show that he will be suffer damage, it would be excusing DEQ from doing its job of writing permits. WQRR Chapter 2, Section 5(c)(iii)(C)(IV) requires that EQC have evidence that there is adequate scientific basis for concluding that the permit terms are protective. To approve a permit on the basis that the evidence does not show damage is to rewrite the permit for DEQ. The EQC does not have the statutory authority to do that. Furthermore, it would only encourage a practice of shoddy work to allow DEQ to issue permits based on inadequate data and poor scientific method, and to allow discharges to continue under such invalid permits until such time

as an affected landowner has gone to considerable effort and expense to challenge the permit. Shouldn't every permit, challenged or not, be issued by DEQ with the same scientific rigor?[9]

- The DEQ Director has the "power and duty to issue, deny, amend, suspend or revoke permits. . ." W.S. § 35-11-109(a)(xiii).
- The DEQ Director is to issue permits "upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with." W.S. § 35-11-801(a).

As explained above, the rules relevant to this proceeding are WQRR, Ch. 1, § 20 and WQRR, Ch. 2, Section 5(c)(iii)(C)(IV).

The Council's duties and role does not encompass rewriting WYPDES permits.

- The Council's duty is to "act as the hearing examiner for the department and [] hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or determined by the" DEQ. WYO. STAT. § 35-11-112(a).
- "The Council shall ... [c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit ... authorized or required by this act...." WYO. STAT. § 35-11-112(a)(iv).
- The Council may "[o]rder that any permit . . . be granted, denied, suspended, revoked or modified." WYO. STAT. § 35-11-112(c)(ii).

[9] For example, there are approximately 170 WYPDES permits that are based on Tier 2 of the Ag Use Policy and therefore are presumed to have been issued without an adequate scientific basis. If an affected landowner had the time and the money to challenge one of those permits, and at the hearing on that permit appeal, DEQ, or more likely, the permit applicant, presented all new data and scientific analysis to support the permit terms, the EQC might, on that entirely new basis, find the permit terms to be protective. DEQ would then have very little incentive, when the other 169 permits come up for renewal, to issue them on a sound scientific basis that is transparent to the affected public. It would instead continue to rely on the permit applicant and the Council to do its job for it, only as to those permits that a landowner brought to the Council's attention.

- The Environmental Quality Council "shall not be with the department of environmental quality but shall be a separate operating agency, and . . . all programs and functions specified in chapters 11 and 12 of title 35 shall be with the department of environmental quality." WYO. STAT. § 9-2-2013.

Clearly, it is DEQ's job to issue, deny, amend, suspend or revoke permits. EQC's job is to review the DEQ's permit decision on appeal. When the Council acts in its adjudicative capacity and hears a contested case, it resembles a "lower tribunal," not an administrative agency. *Antelope Valley Imp. v. State Bd. of Equalization*, 4 P.3d 876, 2000 WY 85 ¶6; *see also Wyoming Outdoor Council v. Marathon*, 2010 WY 20. As such, the Council may not depart from its adjudicative role and may not proceed to rewrite DEQ permits.

The Wyoming Supreme Court has answered this question before in the context of the Board of Equalization, which acts as the reviewing body for the Department of Revenue; in the same way that the EQC acts as the reviewing body for the DEQ. In *Amoco Prod. Co. v. Wyoming State Bd. of Equalization*, 12 P.3d 668, 2000 WY 84, the Wyoming Supreme Court invalidated the Board's decision because the Board had exceeded its statutory authority when it departed from its role of reviewing a final decision of the Department, and instead proceeded to prescribe the system to establish fair market value for mineral production. *Id.* at ¶1. The Court held that the Board improperly departed from its adjudicatory role to assume functions statutorily assigned to the Department of Revenue. *Id.* The Court held:

> The only way to harmonize the various descriptions of the review or appeal function of the Board is to hold that the Board is limited to an adjudicatory decision making its review on the record. **It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.**

Id. at ¶23 (emphasis added).[10]

Because the EQC has no authority to rewrite DEQ's permits, it should exclude any evidence of a new and different scientific basis to justify the permit terms.

Because the Council can only approve or disapprove the permit as written by the DEQ, the Council is without authority to approve a permit that does not meet the requirements of the EQA and water quality rules and regulations.

2. The Burden of Proof is Properly on the Agency

"Allocation of the burden of proof is a matter of law." *J.M. v. Dep't of Family Servs.*, 922 P.2d 219, 221 (Wyo. 1996). The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. *Id.* "In general, an agency is the proponent of its orders, while an applicant for benefits or for a license is the proponent in eligibility determinations." *Id.* The burden of proof has two components - the burden of production and the burden of persuasion. *Id.*

The Wyoming Supreme Court has stated that placement of the burden of proof is determined by considering the underlying substantive statutes. *Id.* at 222; *Casper Iron & Metal, Inc. v. Unemployment Insurance Comm. Of Dept. of Employment of the State of Wyoming*, 845 P.2d 387, 393 (Wyo. 1993). In *J.M.* a father challenged a decision by the Department of Family Services to place his name on a central registry of persons who were the subjects of child abuse complaints. 922 P.2d at 220. The Wyoming Supreme Court, looking to the purposes of the

[10] This conclusion is consistent with the "functional division" created by government reorganization, that generally disconnects traditional executive branch activities (such as tax collection and permitting) from the rule making and review functions retained by quasi judicial separate operating agencies (such as the Council and the State Board of Equalization). *Amax Coal Co. v. State Bd. of Equalization*, 819 P.2d 825, 833 (1991). "Any other exercise of authority violates the clear intent of the legislature." *Antelope Valley Imp. v. State Bd. of Equalization*, 992 P.2d 563, 1999 WY 165 ¶16, citing *Basin Electric*, 970 P.2d at 849.

pertinent statutory provisions, noted that the protecting children's well-being was the paramount purpose of the underlying statutes but that the statutes also recognized the importance of preserving family life whenever possible. The Court stated that

> in acknowledging the seriousness of child abuse accusations, the legislature intended for the general rule which places the burden of proof upon the agency to apply. The agency was the proponent of an order holding that the child abuse allegations against the father had been substantiated and, therefore, had both the initial burden of production and the ultimate burden of persuasion.

Id. at 222. The Court also determined that public policy supported placing the burden on the agency, noting that "if the agency has truly substantiated the child abuse reports, it should not be reluctant to assume the burden of proof at the hearing." *Id.*

As described above, the purpose of the Environmental Quality Act is to prevent, reduce and eliminate pollution and to preserve the water of the Wyoming. WYO. STAT. § 35-1-102. To achieve those purposes, DEQ has promulgated water quality standards and allows that discharges of pollution may occur only under a permit issued in compliance with DEQ regulations that ensures those water quality standards are not violated. Here, DEQ and Barrett are the proponents of an order that the permit issued, which establishes an effluent limitation for EC of 2,315 μS/cm and establishes no effluent limitation on SAR, will not violate the Agricultural Use Protection water quality standard and that the permit was issued in compliance with DEQ's regulations. DEQ and Barrett must therefore produce evidence that the EC limitation was derived from appropriate scientific methods and that an effluent limitation for SAR is not required. The DEQ and Barrett also bear the burden of proof (both of production and persuasion) that discharges made under the Permit will not result in a measurable decrease in crop production.

a. Petitioners Have Met Their Burden While DEQ and Barrett Have Not

Pursuant to the general rule of administrative law, Petitioners have the burden of production to show that that DEQ failed to use appropriate scientific methods to derive the effluent limit for EC and that there is no effluent limit for SAR. As explained in part C above, Petitioners have produced evidence showing that DEQ failed to use appropriate scientific methods to derive the effluent limit for EC. Petitioners have therefore met this burden. The burden of persuasion rests with DEQ and Respondents to persuade the Council that DEQ used appropriate scientific methods to derive the effluent limit for EC and that an effluent limit for SAR is not required. DEQ and Barrett have failed to produce any evidence to the contrary.

b. Petitioners Need Not Prove That Damage W*ill* Occur

The purpose of the EQA and the statutes and rules cited above is to prevent damage. If the landowner is required to present the Council with a dead body before it will take action, then the permit objective will already have failed and there will be no way to bring the corpse back to life.

The EQA places the burden of proof on the agency in a contested case challenging the grant of a WYPDES discharge permit. The applicable substantive statute here is

> The EQA addresses permit issuance in WYO. STAT. § 35-11-801(a):
>
> When the department has, by rule or regulation, required a permit to be obtained it is the duty of the director to issue such permits **upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with.**

(emphasis added).[11] Clearly, the applicable statutes here indicate a legislative intent that DEQ and the permittee, as proponents of the Permit, have the burden of proving compliance with the water

[11] See also WYO. STAT. § 35-11-302(a)(vi) which requires the administrator, in recommending a permit, consider all of the following:

(A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic live and plant life affected;

quality rules and regulations. Again, the applicable rule at issue here is found at Chapter 1, Wyoming Surface Water Quality Standards.

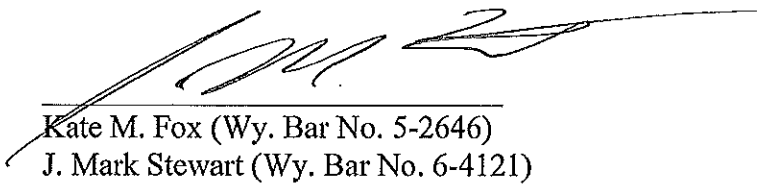
Since, as DEQ recognizes in its Agricultural Use Protection Policy where it states, at ¶ III, "The goal is to ensure that pre-existing irrigated crop production will not be diminished as a result of the lowering of water quality," the applicable statutes, rules and regulations taken together impose the upon the agency and the applicant the burden of proving that the effluent limits will not result in a measurable decrease in crop or livestock production. To hold otherwise would relieve DEQ of the duties imposed upon it by the EQA, as DEQ could establish effluent limits based on little to no information, using whatever methods it desires, or no method at all, and force the persons it is charged with protecting to prove that those limits are not protective. Such a holding would completely undermine and defeat the purpose of the EQA.

CONCLUSION

There are no genuine disputes of material fact that the effluent limitation established for EC in Permit WY0052299 was not derived using appropriate scientific methods as required by WWQR, Ch. 2, Sec. 5(c)(iii)(C)(IV). Additionally, there is no dispute that the Permit does not contain an effluent limitation for SAR as required by the EQA and WQRR. Petitioners therefore request that the Council grant Petitioners' Motion for Summary Judgment and revoke Permit WY0052299.

DATED this 15th day of April, 2010.

(B) The social and economic value of the source of pollution;
(C) The priority of location in the area involved;
(D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
(E) The effect upon the environment.



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CERTIFICATE OF SERVICE

I certify that on the 1st day of April, 2010, I served a true and correct copy of the foregoing by U.S. mail and email to:

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