

FILED

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL JUN 28 2005
STATE OF WYOMING**

*Terri A. Lorenzon, Director
Environmental Quality Council*

IN THE MATTER OF THE NOTICE OF)
VIOLATION AND ORDER ISSUED TO)
BLACK DIAMOND ENERGY, INC.)
410 MOUNT NEBO ROAD)
PITTSBURGH, PA 15237)

DOCKET NO. 3761-05

NOTICE OF APPEAL AND PETITION FOR HEARING

Black Diamond Energy, Inc. (“Black Diamond” or “Petitioner”), hereby appeals the Notice of Violation and Order issued by the Department of Environmental Quality under Docket No. 3761-05 and requests a hearing pursuant to the Environmental Quality Act, the Administrative Procedures Act and the Environmental Quality Council’s (“EQC”) Rules of Practice and Procedure. In support of this appeal, Petitioner advises the EQC as follows:

I. INFORMATION ABOUT THE PETITIONER:

1. The Petitioner filing this appeal is:

Black Diamond Energy, Inc.
410 Mount Nebo Road
Pittsburgh, PA 15237

Petitioner’s Wyoming contact for this matter is:

Boyd McMaster, Esq.
Black Diamond Energy, Inc.
801 East 4th Street, Suite 12
Gillette, WY 82716

Petitioner is represented in this matter by Keith Burron of Associated Legal Group, LLC. Correspondence and information related to this appeal should be served on Mr. McMaster in Gillette and on Mr. Burron at the address listed below.

II. ACTION BEING APPEALED:

2. Petitioner appeals the Notice of Violation (“NOV”) and Order under DEQ Docket No. 3761-05, which alleges improper siting of Petitioner’s approved Michelena Project 002 Off-Channel CBM produced water pit, constructed pursuant to DEQ authorization under the General Permit authorizing off-channel containment units for coal bed methane produced water (authorization No. WYG390013). Said order seeks to require Petitioner to immediately discontinue discharges of CBM

produced water to the pit based on the DEQ's allegation that the pit is sited in a manner contrary to the DEQ guidance on siting such facilities.

BASIS FOR APPEAL:

3. Petitioner challenges the NOV and Order on the following grounds:
 - a. Contrary to the allegations in the NOV, the reservoir is sited correctly and in conformance with the requirements of the DEQ's April 19, 2002 General Permit for siting off-channel, unlined CBM produced water pits. (*Authorization to Discharge Produced Water From Coal Bed Methane Wells Into Off-Channel Containment Units*, April 19, 2002.)
 - b. The allegations in Paragraphs 3 and 4 of the NOV pertaining to distances from the reservoir to ephemeral tributaries are erroneous and the reservoir is sited an appropriate distance from ephemeral tributaries as defined by the DEQ and as required by the General Permit.
 - c. Paragraph 4 of the NOV alleges that Petitioner has violated Chapter 2, Section 4(i)(i)(F)(I), WQRR. This provision of the regulations pertains to instances where the DEQ may require an individual permit, rather than addressing what constitutes a violation under a general permit. Petitioner has not "violated" this provision of the regulations and the provision is not relevant to Petitioner's operation of the pit under the General Permit, as the pit does not discharge pollutants to waters of the State.
 - d. Paragraph 4 of the NOV further alleges that Petitioner has violated the "Off-Channel, Unlined CBM Produced Water Pit Siting Guidelines" ("Siting Guidelines"). W.S. § 35-11-701 (a), which provides for issuance of NOV's and orders prescribes that such may be issued where "the director or the administrators have cause to believe that any persons are violating any provision of this act or any rule, regulation, standard, permit, license, or variance." The Siting Guidelines are not enforceable standards and do not fall within the category of "violations" for which an NOV and Order may issue.
 - e. Petitioner began its efforts to obtain a General Permit for its reservoir in February of 2002, and submitted its Notice of Intent to obtain coverage under the General Permit on September 6, 2002. The Siting Guidelines which the NOV alleges have been violated were not approved by the Water and Waste Advisory Board until October 1, 2002, nearly a month after Petitioner submitted its application. It is untenable for the DEQ to allege a retroactive violation of a guideline that was not approved by the Advisory Board until nearly a month after Petitioner submitted its application. This is especially so considering that the DEQ subsequently reviewed the Notice of Intent and issued an authorization for the reservoir.

- f. The provisions of the Order require, among other things, that the Petitioner “immediately stop all CBM produced water discharges through outfall 002 of WYPDES General Permit authorization WYG390013.” In essence, the Order would enjoin discharges to the pit which have previously been authorized by the DEQ. Such an order is both unnecessary and contrary to law. The pit is functioning correctly and is not resulting in pollution to waters of the state. Moreover, authorization for the pit has been properly obtained and it is legally sited, such that enjoining its use is contrary to law. In addition, to cease discharges to the pit would cause extreme economic hardship to Petitioner, and would interfere with a number of other related facilities which are associated with the pit.

WHEREFORE, Petitioner requests that the EQC grant the following relief:

1. Grant Petitioner a contested case hearing on its appeal pursuant to the Environmental Quality Act, W.S. § 35-11-112, the Administrative Procedures Act and the EQC’s Rules of Practice and Procedure.
2. Disapprove, revoke and repeal the DEQ’s Notice of Violation and Order in this matter.
3. Provide such other and further relief as the EQC determines just and equitable in the premises.
4. Pursuant to W.S. § 35-11-701(c)(ii), Petitioner is entitled to a stay of the DEQ’s Order as a matter of right upon the filing of this request, and Petitioner hereby requests and invokes the statutory stay of the Order pending the EQC’s determination of this appeal.

RESPECTFULLY SUBMITTED this 28th day of June, 2005.

FOR BLACK DIAMOND ENERGY, INC.


Keith S. Burron
Associated Legal Group, LLC
1807 Capitol Ave., Ste. 203
Cheyenne, WY 82001
307-632-2888
307-632-2828 (Fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true, full and correct copies of this Notice of Appeal and Request for Hearing were served upon the following on June 28, 2005, in the manner indicated below:

Mr. Mark Gordon, Chair
Environmental Quality Council
Room 1714
Herschler Building,
122 West 25th Street
Cheyenne, WY 82002

HAND DELIVERED ORIGINAL PLUS
8 COPIES; TWO COPIES VIA
CERTIFIED MAIL; COPY SENT
VIA E-MAIL

Mr. John Corra
Director
Department of Environmental Quality
Herschler Building, 4W
122 West 25th Street
Cheyenne, WY 82002

HAND DELIVERED PLUS
TWO COPIES VIA CERTIFIED MAIL



Keith S. Burron