

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

FILED

APR 09 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF)
POWDER RIVER BASIN RESOURCE) DOCKET NO. 09-3807
COUNCIL, AND WILLIAM F. WEST)
RANCH, LLC FROM WYPDES)
PERMIT NO. WY0094056)

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S OBJECTIONS
TO PETITIONERS' PROPOSED FINDINGS OF FACTS AND CONCLUSIONS
OF LAW

The Wyoming Department of Environmental Quality (DEQ) hereby submit the following objections to Petitioners' Proposed *Order Denying Motion to Strike Expert Witness, Denying Respondent Stephens Energy Company LLC's Motion to Dismiss and Motion for Summary Judgment, Granting Petitioners' Motion for Summary Judgment, and Revoking WYPDES Permit No. WY0094056*. DEQ also submits the attached Proposed Findings of Fact and Conclusions of Law (Proposed Findings) for the Environmental Quality Council's (Council) consideration.

1. This matter came before the Environmental Quality Council ("Council") upon the Motion to Strike of Stephens Energy Company, LLC ("Stephens"); the Motion to Dismiss of Stephens; and the cross-motions for summary judgment filed by Petitioners and Stephens. Council members present included Dennis M. Boal, Chairman; Dr. Fred Ogden, presiding officer; John N. Morris; Thomas Coverdale (via videoconference); Tim Flitner; and Catherine Guschewsky.

Objection: No objection.

2. The Council held a hearing March 11, 2010, at which the Petitioners were represented by Kate M. Fox and Mark Stewart of Davis & Cannon, LLP; Respondent Stephens was represented by Drake Hill and William Sparks of Beatty & Wozniak, P.C.; and Respondent

the Department of Environmental Quality (DEQ) was represented by Mike Barrash and Luke Esch.

Objection: No objection.

I. MOTION TO STRIKE

3. Stephens moved to strike the testimony of Petitioners' expert, Ginger Paige, PhD, arguing that her testimony did not meet the standards set forth in *Daubert v. Merrell Dowd Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999). However, the Wyoming Supreme Court has held, in *Griffin v. State*, 2002 WY 82, ¶11, 47 P.3d 194, that the *Daubert/Bunting* standard does not apply to administrative proceedings. Instead, "[t]he evidence must be of a type that is 'commonly relied upon by reasonably prudent men in the conduct of their serious affairs.'" *Id.*

Objection: No objection.

4. Dr. Paige is well-qualified to opine on matters of watershed and rangeland hydrology, and specifically on the impacts of coalbed methane produced water on agriculture. *Paige CV, Petitioners' Ex. 13*. Her testimony regarding the scientific validity of "Tier 2" is important to the Council's determination of the issues presented in this appeal, and is of a type commonly relied upon by prudent persons in the conduct of their serious affairs.

Stephens' Motion to Strike is therefore DENIED.

Objection: DEQ objects to this finding that the expert is "well-qualified." An expert is either "qualified" or not. The use of the term "well" offers nothing to the finding and should be removed.

II. MOTION TO DISMISS

5. Stephens argues that the Petition should be dismissed for failure to state a claim under rule 12(b)(6); however, Stephens' argument for dismissal was that Petitioners "have no evidence that can substantiate any of their claims." *Tr. 17:16-18*. The Council finds that the Petition states a claim upon which relief can be granted, and will not consider evidentiary matters in the context of a motion to dismiss.

Stephens' Motion to Dismiss is therefore DENIED.

Objection: No objection.

III. MOTION FOR SUMMARY JUDGMENT

A. Standard

6. 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. WRCP 56, Chapter 2, § 14, DEQ Rules of Practice & Procedure.

Objection: DEQ objects to this finding. DEQ does not believe that the finding is incorrect, just that it is incomplete. DEQ refers the Council to its Proposed Findings ¶ 7 for an alternate finding on the standard for granting summary judgment.

7. This is a contested case arising from the appeal of a new 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).

Objection: DEQ objects to this finding. Based on DEQ's review of the hearing transcript, DEQ believes that the Council did not make a finding of its adjudicatory or rulemaking capacity. DEQ is mindful of the Council's desire to keep findings and conclusions strictly focused on necessary bases. DEQ believes this finding to be unnecessary.

B. Findings of Fact

8. On May 6, 2009, DEQ issued WYPDES Permit No. WY0094056 ("the Permit") to Cedar Ridge, LLC (Cedar Ridge), authorizing discharge of water from coalbed methane wells into Spotted Horse Creek. Petitioners timely appealed the Permit.

Objection: DEQ objects to this finding. The Permit authorized discharges to three reservoirs located in ephemeral tributaries to Spotted Horse Creek. DEQ refers the Council to its Proposed Findings ¶ 8 for an alternate finding.

9. Petitioner Powder River Resource Council (PRBRC) is an association of ranchers and citizens dedicated to ensuring the viability of Wyoming's agricultural heritage and rural lifestyle and is also dedicated to working for the careful and responsible development of Wyoming's valuable and important mineral resources. *Petition*, ¶3.

Objection: DEQ objects to this finding. There is no mention in the record that PRBRC is "dedicated to ensuring the viability of Wyoming's agricultural heritage and rural lifestyle." Petitioners did allege this in their Petition; however, Respondent's response stated that it was without information to agree with this assertion. Petitioners did not provide an affidavit to support this assertion. DEQ refers the Council to its Proposed Findings ¶ 10 for an alternate finding about PRBRC.

10. Petitioner William F. West Ranch, LLC, (West) whose members and managers are Bill and Marge West, Trustees of the William F. West Revocable Trust, dated January 20, 2005 as amended, and the Marjorie E. West Revocable Trust, dated January 20, 2005, as amended, own and operate ranchlands in Campbell County, Wyoming, portions of which lie on Spotted Horse Creek, downstream of the permitted discharges. Bill and Marge West are members of the PRBRC. *Petition*, ¶3.

Objection: DEQ objects to this finding. While Petitioners did allege this in their Petition for review, they failed to provide any evidence in the form of an affidavit or otherwise which supports this assertion. There is also no evidence in the record that Marge West is a member or manager of the William F. West Ranch LLC. DEQ also objects to the use of the term “West” to describe the William F. West Ranch, LLC. If the ranch is owned by a corporate entity, it should be described as such. DEQ refers the Council to its Proposed Findings ¶ 11 - 12 for an alternate finding on the ownership of the William F. West Ranch, LLC.

11. By order entered October 28, 2009, the Council approved the substitution of Stephens Energy, LLC (Stephens) for Cedar Ridge as a party/permittee. The Permit authorizes discharge from three outfalls into three unlined, on-channel reservoirs located in ephemeral drainages tributary to Spotted Horse Creek, located from approximately seven to eleven miles upstream of the ranch owned by Petitioners West. *Petitioners' Ex. 1, Statement of Basis (“SOB”), p. 1.*

Objection: “West” should be replaced with “West LLC.” DEQ also believes that this finding contains two very different facts and should be separated into two

separate findings. DEQ refers the Council to its Proposed Findings ¶ 13 - 14 for alternate findings.

12. DEQ identified irrigation as an agricultural use occurring below the permitted outfalls on Petitioners' Wests land. The Permit establishes an effluent limit for Electrical Conductivity ("EC") of 2,680 $\mu\text{S}/\text{cm}$ for protection of that agricultural use. *SOB, p.2.*

Objection: "Wests" should be replaced with "West LLC." DEQ believes that this finding is duplicative of other findings and can be removed. The establishment of the EC limit is described adequately in ¶ 13 of Petitioners' proposed findings and should not be stated twice. DEQ refers the Council to its Proposed Findings ¶ 16 for the development of the effluent limits for EC.

13. Relying on the "Tier 2" methodology in its Agricultural Use Policy, *Petitioners' Ex. 5.* DEQ determined that the average soil EC in irrigated fields affected by the Permit likely fell within the range of 4,024 to 5,356 $\mu\text{S}/\text{cm}$. DEQ then divided the lower value by 1.5 to establish the effluent limit for water EC of 2.680 $\mu\text{S}/\text{cm}$. *SOB, pp. 2-3.*

Objection: DEQ objects to this finding. DEQ established an effluent limit of 2,680 $\mu\text{S}/\text{cm}$ for EC. DEQ refers the Council to its Proposed Findings ¶ 16 for the development of the effluent limits for EC.

14. 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. Soil salinity is not a direct reflection or result of the quality of water applied. Dr. Paige states 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. *Petitioners' Ex. 6, p. 2.*

Objection: DEQ objects to this finding. DEQ believes that the second and third sentences are not necessary to establish the basis on which the Council based its decision. DEQ refers the Council to its Proposed Findings ¶ 17 for an alternate finding regarding Dr. Paige's deposition testimony.

15. Dr. Paige's conclusion comports with the opinion of consultants hired by the Council and DEQ. Hendrickx & Buchanan, Expert Scientific Opinion on the Tier-2 Methodology – Report to the Wyoming Environmental Quality Council, May, 2009, p. iii; Hendrickx & Buchanan, Expert Scientific Opinion on the Tier-2 Methodology – Report to the Wyoming Department of Environmental Quality, September, 2009. (The Council takes notice of these two reports, which are posted on its website.)

Objection: DEQ objects to this finding. Dr. Paige's conclusions comport with some of the opinions of Dr. Hendrickx and Buchanan. When asked whether Dr. Paige agreed with other aspects of Dr. Hendrickx and Buchanan's reports, Dr. Paige declined to agree with other statements made in the reports. *See Dr. Paige Depo. Tr. 16:12-17.* DEQ refers the Council to its Proposed Findings ¶ 18 for an alternate finding.

16. Respondents have presented no evidence or testimony to dispute the opinions of Dr. Paige regarding the scientific validity of Tier 2 methodology.

Objection: No objection.

17. The Permit sets no effluent limit for Sodium Adsorption Ratio (“SAR”), although under certain circumstances, an SAR limit may be imposed, using the formula: $SAR < 6.67 \times EC - 3.33$. *SOB*, p. 3.

Objection: DEQ objects to this finding. This finding understates the efforts undertaken by DEQ to set limits for SAR in this permit. DEQ refers the Council to its Proposed Findings ¶ 20 for a better explanation of the SAR limits.

18. The Permit generally requires that all effluent be contained in the on-channel reservoirs, except if DEQ grants prior written authorization for a release in association with assimilative capacity credits, or in conjunction with natural precipitation events. *SOB*, pp. 1-2.

Objection: DEQ objects to this finding. This finding understates the containment requirements imposed by DEQ in this permit. DEQ would withdraw its objections if the word “generally” was removed. DEQ refers the Council to its Proposed Findings ¶ 21 for its proposed finding on the containment issue.

19. Water may also leave the unlined reservoirs by infiltration into the underlying soils. The evidence showed that one of Stephens’ predecessors relied upon an infiltration rate for ponds in the Spotted Horse drainage of 5 acre-ft/acre/year, declining at 1.5% per month. *Petitioners’ Ex. 8*. The probability is that water stored in the reservoirs will infiltrate into the underlying soils as a result of hydrostatic pressure and the matrix potential of the soils. *Petitioners’ Ex. 7, Dr. Paige Deposition, 23:4-24:15*. Dr. Paige testified it is a valid assumption that an unlined reservoir in the Powder River Basin is likely to result in infiltration. *Id. at 26:11-27:15*.

Objection: DEQ objects to this finding. Based on DEQ’s review of the hearing transcript, the Council made no finding on the probability of infiltration of water

stored in the reservoirs. DEQ also believes that this finding is not relevant to the basis for the Council's decision and should be removed.

20. DEQ has neither conducted nor obtained any study, nor made any calculation, regarding the quantity of water that is leaving the reservoirs by infiltration. *Tr. 57:10-58, 66:10-13.*

Objection: No objection.

21. DEQ recognized the "past potential sub-irrigation of this [the West] field with CBM water." *SOB, p. 2.*

Objection: DEQ objects to this finding. DEQ believes that this finding is irrelevant and should be removed from the findings.

22. The Wests have experienced extensive damage to their ranch as a result of CBM water discharges in Spotted Horse Creek above them, including the loss of 100 acres of hay meadows and 200 cottonwoods. They have hauled 500 truckloads of soil to attempt to reclaim their lands. *Petitioners' Ex. 10, Marge West Deposition, 6:20-8:22.*

Objection: "Wests" should be replaced with "West LLC." DEQ refers the Council to its Proposed Finding ¶ 23 for a modified finding.

23. Petitioners are unable to establish that the damage they have experienced and anticipate experiencing in the future is the result of the specific discharges under this permit. *Petitioners' Motion for Summary Judgment, p. 5.*

Objection: No objection.

C. Conclusions of Law

24. To the extent any of the above findings of fact include conclusions of law, they are incorporated.

Objection: No objection.

25. Petitioner Wests, whose hay meadows are downstream of water discharged with effluent limits set with a scientifically invalid methodology, have standing to appeal the Permit. They have demonstrated a “definite interest exceeding the general interest in community good shared in common with all citizens.” *Northfolk Citizens v. Park Cty. Bd. of Cty. Commr’s*, 2008 WY 88, ¶ 16, 189 P.3d 260.

Objection: Based on DEQ’s review of the hearing transcript, the Council did not state such a conclusion. DEQ refers the Council to its Proposed Findings ¶ 26 for a revised finding. Also, “Wests” should be replaced with “West LLC.”

26. Petitioner PRBRC has standing as an organization. An organization has standing if “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 670 (10th Cir. 2006) (citing *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). PRBRC meets all three.

Objection: DEQ objects to this finding. Based on DEQ’s review of the hearing transcript, the Council did not make this finding and this issue was not briefed or addressed at the hearing by Petitioners. DEQ believes that this finding should be removed.

27. “A litigant is said to have standing when he has a ‘personal stake in the outcome of the controversy.’ This personal stake requirement has been described in Wyoming as a ‘tangible interest’ at stake.” *Riedel v. Anderson*, 70 P.3d 223, 229 (Wyo. 2003). The phrase “tangible interest” has been equated with the phrase “personal stake in the outcome.” *Halliburton*

Energy Services, Inc. v. Gunter, 167 P.3d 645, 649 (Wyo. 2007). The individuals Petitioners, Bill and Marge West, are PRBRC members and have personal stakes in the outcome of this Permit appeal.

Objection: DEQ objects to this finding. Based on DEQ's review of the hearing transcript, the Council did not make this finding and this issue was not addressed during the hearing. DEQ believes that this finding should be removed. DEQ refers the Council to its Proposed Findings ¶ 26 for a revised finding.

28. 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.

Objection: DEQ objects to this finding. DEQ believes that most of this finding is unnecessary. DEQ is mindful of the Council's desire to keep findings and conclusions focused on necessary bases. DEQ refers the Council to its Proposed Findings ¶ 27 for an abbreviated conclusion of this nature.

29. 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 Chapters 1 and 2 of the Water Quality Rules and Regulations (WQRR).

Objection: DEQ objects to this finding. Wyoming's water quality standards are contained in Chapter 1 of the WQRR. Chapter 2 contains rules for discharges and permit regulations. DEQ refers the Council to its Proposed Findings ¶ 28 for a revised conclusion.

30. Chapter 1, Section 20 of the WQRR 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."

Objection: No objection.

31. DEQ's statement in its Agricultural Use Protection Policy, 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," recognizes that 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.

Objection: DEQ objects to this finding's discussion on burden of proof. Burden of proof is a concept that is addressed at a full contested case evidentiary hearing, not a summary judgment hearing. The standard of review, as stated by Petitioners, is "whether there is no genuine issue of material fact" and the moving

party is entitled to judgment as a matter of law. Burden of proof only becomes an issue when there is an evidentiary hearing to decide a dispute of material fact. Because this was decided on summary judgment, there is no reason to discuss burden of proof.

Furthermore, DEQ believes, and the Council has held in previous WYPDES appeals, that the burden of proof rests upon the party appealing the agency's determination. (*See Finding of Fact and Conclusions of Law, In the Matter of the Appeal of John D. Koltiska of WYPDES Permit No. WY0054364, EQC Docket No. 09-3805*, ¶ 16, "To succeed on this permit appeal, Petitioners were required to show that DEQ's selection of the challenged permit conditions was unfounded or otherwise not in accordance with law.")

Finally, based on DEQ's review of the hearing transcript, the Council made no such finding that the agency and applicant have the burden to show that the effluent limits will not result in a measurable decrease in crop production. As such, DEQ believes this finding should be removed.

32. 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).

Objection: DEQ objects to this finding. WYO. STAT. ANN. § 35-11-302 states that the administrator "shall recommend to the director" rules and regulations that prescribes effluent standards and limits. DEQ refers the Council to its Proposed Findings ¶ 30 for a revised finding.

33. When 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, Chapter 2, Section 5(c)(iii)(IV)(emphasis added).

Objection: No objection.

34. 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, Chapter 1, Section 2(b)(xv).

Objection: No objection.

35. DEQ determined that EC is a constituent that has reasonable potential to adversely impact irrigation occurring downstream of the outfalls authorized by the Permit. *Petitioners’ Ex. 1, SOB, p. 2; Agricultural Use Policy, Ex. 5, p. 55.*

Objection: No objection.

36. 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 the testimony and reports of Drs. Paige, Hendrickx and Buchanan, who deny any basis in science for the assumption that background water quality can be determined from sampling soil salinity. (*Ex. 3, p. 2, Hendrickx & Buchanan, p. iii, 11-14*). A method whose whole premise is based on a scientifically invalid assumption cannot be an appropriate scientific method.

Objection: No objections.

37. DEQ established a numeric limitation on the EC of the discharged water for this Permit. Its purpose for doing so is to protect downstream irrigated agriculture. *Tr. 45:25-46:4*. The DEQ's own regulations and common sense require that the limits be set correctly, with appropriate scientific methods. The DEQ does not have the discretion to ignore this requirement.

Objection: DEQ objects to this finding. DEQ is mindful of the Council's desire to keep findings and conclusions strictly focused on necessary bases. DEQ believes that the first two sentences are duplicative of what is stated in ¶ 12 of Petitioners' findings of fact and can be removed.

38. DEQ has also identified SAR as a parameter of concern in regard to irrigation. *Petitioners' Ex. 5, 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, Chapter 2, Section 5(c)(iii)(C)(IV), DEQ was required to establish an effluent limitation for SAR. 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.

Objection: DEQ objects to this finding. DEQ does not agree that SAR was a parameter of concern for this Permit. Petitioners cite to the Ag Use Policy for its support that DEQ believed that SAR was a parameter of concern, but that does not prove that SAR was a parameter of concern for this Permit. The only evidence in the record regarding a discussion of SAR is DEQ's Affidavit of Jason Thomas. Mr. Thomas describes DEQ's consideration of SAR and why DEQ

believed it to be adequately addressed and why it did not have an end-of-pipe effluent limit. *See J. Thomas Aff.* ¶ 5 – 11.

Furthermore, based on the comments received from the Council at the hearing, DEQ believes that the Council's decision was based on its determination that Tier 2 was not scientifically appropriate and therefore DEQ believes that the Council's decision is better stated in DEQ's Proposed Findings ¶ 34 – 37.

39. Although Respondents argue no SAR limit is necessary because the water is fully contained in the reservoir, this is unsupported by the Permit terms allowing overtopping with precipitation events or through the use of assimilative capacity credits. The Permit does not prohibit infiltration nor does it require monitoring of infiltration.

Objection: DEQ objects to this finding. As stated above, DEQ does not agree that SAR was a parameter of concern in this case. DEQ believes that the Council revoked this permit based on its determination that "Tier 2" was not scientifically appropriate. Based on comments received from the Council at the hearing, DEQ believes that the Council's determination is better stated in DEQ's Proposed Findings ¶ 34 – 37.

40. There was insufficient evidence to determine whether water infiltrating from the three reservoirs (whether in combination with water from other permitted discharges or not) reached the West Ranch. DEQ cannot contend these are full containment reservoirs without obtaining such information.

Objection: DEQ objects to this finding. This finding presupposes that it is DEQ's burden to show that water will not reach Petitioners' property. Burden of proof is a concept that is addressed at a full contested case evidentiary hearing.

not a summary judgment hearing. The standard of review, as stated by Petitioners, is “whether there is no genuine issue of material fact” and the moving party is entitled to judgment as a matter of law. Burden of proof only becomes an issue when there is a dispute of material fact.

Furthermore, DEQ believes, and the Council has previously held as stated above, that the burden of proof rests upon the party appealing the agency’s determination. Based on the Council’s comments during the hearing, DEQ does not believe that this finding was a reason for the Council’s final determination and should be removed.

41. DEQ cannot contend these are full containment reservoirs when it issued a Permit under Option 2, DEQ’s own option “for facilities which discharge into drainages that are class 2 or are tributary to class 2 systems, regardless of whether a reservoir(s) is being proposed for construction within the drainage.” This option requires “evaluation of downstream irrigation practices.” *Petitioners’ Ex. 12, pp. 2-3.*

Objection: DEQ objects to this finding. Based on the Council’s comments during the hearing, DEQ does not believe that this finding was a reason for the Council’s final determination and should be removed.

42. On those occasions when the Permit provides that SAR limits may be imposed, the effluent limit is to be derived from a formula that depends upon the EC limit -- $SAR < 6.67 \times EC - 3.33$.

Objection: DEQ objects to this finding. The SAR limit is not based on the EC limit, but rather the EC of the water at the IMP. (*See SOB, p. 3.*, “EC” represents specific conductance of the IMP sample”). Furthermore, based on the Council’s

comments during the hearing, DEQ does not believe that the SAR limit was a reason for the Council's final determination and should be removed.

43. The Council concludes the EC limit was not derived based on an appropriate scientific method; therefore, any SAR limit imposed would likewise lack an appropriate scientific method. The Permit also violates, as a matter of law, WQRR Chapter 2, Section 5(c)(iii)(C)(IV), because it fails to set an SAR limit.

Objection: DEQ objects to this finding. As stated above, the record shows that the SAR limit was not based on the EC limit, but rather the EC of the sample collected at the IMP. *SOB, p. 3*. However, based on the Council's comments during the hearing, DEQ does not believe that the SAR limit was a reason for the Council's final determination. DEQ believes that the Council's determination was based primarily on the appropriateness of the scientific method of the "Tier 2" methodology and this finding should be removed.

44. 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.

Objection: DEQ objects to this finding. Based on the Council's comments during the hearing, DEQ does not believe that the SAR limit was a reason for the Council's final determination and should be removed. DEQ believes that the Council's determination was based primarily on the appropriateness of the scientific method of the "Tier 2" methodology and this finding should be removed. DEQ refers the Council to its Proposed Finding ¶ 37 for a revised finding.

45. WQRR Chapter 2, Section 9(a)(vi) states that “No permit may be issued when conditions of the permit do not provide compliance with applicable requirements of W.S. 35-11-302 and of these regulations.” This regulation allows DEQ no discretion to avoid compliance with the regulations and statutes.

Objection: No objection.

46. Petitioners have met their burden of production to show that DEQ failed to use appropriate scientific methods to derive the effluent limit for EC and that there is no effluent limit for SAR. DEQ and Stephens have failed to produce any evidence to the contrary.

Objection: DEQ objects to this finding. Burden of proof is a concept that is addressed at a full contested case evidentiary hearing, not a summary judgment hearing. The standard of review, as stated by Petitioners, is “whether there is no genuine issue of material fact” and the moving party is entitled to judgment as a matter of law. Burden of proof only becomes an issue when there is a dispute of material fact. Therefore, the argument of who has the burden of proof does not need to be addressed and should be removed.

Furthermore, based on the Council’s comments during the hearing, DEQ does not believe that the SAR limit was a reason for the Council’s final determination and should be removed. DEQ believes that the Council’s determination was based primarily on the appropriateness of the scientific method of the “Tier 2” methodology.

47. 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). This statute indicates a legislative intent that DEQ and the permittee, as proponents of the Permit, have the burden of proving compliance with the water quality rules and regulations. The Permit application, based on the scientifically invalid Tier 2 methodology, fails to provide proof that the procedures of this act and the rules and regulations promulgated thereunder have been complied with. The Permit should not have been issued by the Director.

Objection: DEQ objects to this finding. Burden of proof is a concept that is addressed at a full contested case evidentiary hearing, not a summary judgment hearing. The standard of review, as stated by Petitioners, is “whether there is no genuine issue of material fact” and the moving party is entitled to judgment as a matter of law. Burden of proof only becomes an issue when there is a dispute of material fact. Therefore, the argument of who has the burden of proof does not need to be addressed and should be removed.

DEQ believes, and the Council has previously held as stated above, that the burden of proof rests upon the party appealing the agency’s determination. Based on the Council’s comments during the hearing, DEQ does not believe that the Council’s decision addressed the burden of proof. DEQ believes that the Council’s determination was based primarily on the appropriateness of the scientific method of the “Tier 2” methodology. Therefore, DEQ believes that this finding should be removed as contrary to the law.

IV. CONCLUSION

There are no genuine issues as to any material fact; the effluent limitation established for EC in Permit WY0094056 was not derived using appropriate scientific methods as required by

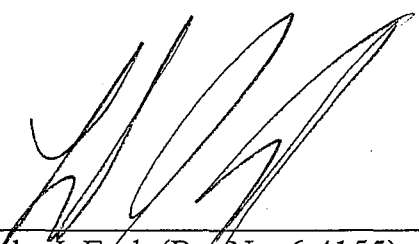
WWQR, Chapter 2, Section 5(c)(iii)(C)(IV). Additionally, there is no dispute that the Permit does not contain an effluent limitation for SAR as required by the EQA and WWQR.

Objection: DEQ objects to this finding. Based on the Council's comments during the hearing, DEQ does not believe that the SAR limit was a reason for the Council's final determination and should be removed. DEQ believed that the Council's determination was based primarily on the appropriateness of the scientific method of the "Tier 2" methodology.

The Council hereby FINDS and ORDERS that Stephens' Motion to Strike shall be DENIED, Stephens' Motion to Dismiss shall be DENIED, Stephens' Motion for Summary Judgment shall be DENIED, and Petitioners' Motion for Summary Judgment shall be GRANTED. The Council ORDERS that Permit WY0094065 is hereby revoked.

Objection: DEQ objects only to the extent that the permit is WY0094056.

DATED this 9th day of April, 2010.



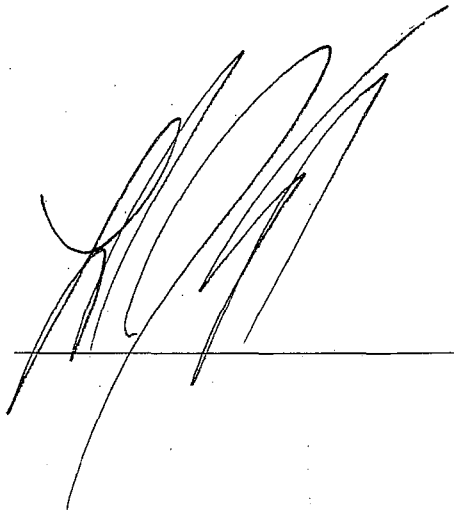
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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S OBJECTIONS TO PETITIONERS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW was served this 9th day of April, 2010 by United States mail, postage prepaid and also by e-mail or facsimile transmission, addressed as follows:

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A handwritten signature in black ink, appearing to be 'M. Wozniak', written over a horizontal line.

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF)
POWDER RIVER BASIN RESOURCE) DOCKET NO. 09-3807
COUNCIL, AND WILLIAM F. WEST)
RANCH, LLC FROM WYPDES)
PERMIT NO. WY0094056)

**RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S
PROPOSED ORDER DENYING MOTION TO STRIKE EXPERT WITNESS,
DENYING RESPONDENT STEPHENS ENERGY COMPANY, LLC'S MOTION
TO DISMISS AND MOTION FOR SUMMARY JUDGMENT,
GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT,**

1. This matter came before the Environmental Quality Council ("Council") upon the Motion to Strike of Stephens Energy Company, LLC ("Stephens"); the Motion to Dismiss of Stephens; and the cross-motions for summary judgment filed by Petitioners and Stephens. Council members present included Dennis M. Boal, Chairman; Dr. Fred Ogden, presiding officer; John N. Morris; Thomas Coverdale (via videoconference); Tim Flitner; and Catherine Guschewsky.

2. The Council held a hearing March 11, 2010, at which the Petitioners were represented by Kate M. Fox and Mark Stewart of Davis & Cannon, LLP; Respondent Stephens was represented by Drake Hill and William Sparks of Beatty & Wozniak, P.C.; and Respondent the Department of Environmental Quality ("DEQ") was represented by Luke Esch and Mike Barrash.

I. MOTION TO STRIKE

3. Stephens moved to strike the testimony of Petitioners' expert, Ginger Paige, PhD, arguing that her testimony did not meet the standards set forth in *Daubert v. Merrell Dowd Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999). However, the Wyoming Supreme Court has held, in *Griffin v. State*, 2002 WY 82, ¶11, 47 P.3d 194, that the *Daubert/Bunting* standard does not apply to administrative proceedings. Instead, "[t]he evidence must be of a type that is 'commonly relied upon by reasonably prudent men in the conduct of their serious affairs.'" *Id.*

4. Dr. Paige is qualified to opine on matters of watershed and rangeland hydrology, and specifically on the impacts of coalbed methane produced water on agriculture. *Paige CV, Petitioners' Ex. 13*. Her testimony regarding the scientific validity of Tier 2 is important to the Council's determination of the issues presented in this appeal, and is of a type commonly relied upon by prudent persons in the conduct of their serious affairs.

Stephens' Motion to Strike is therefore DENIED.

II. MOTION TO DISMISS

5. Stephens argues that the Petition should be dismissed for failure to state a claim under rule 12(b)(6); however, Stephens' argument for dismissal was that Petitioners "have no evidence that can substantiate any of their claims." *Tr. 17:16-18*. The Council finds that the Petition states a claim upon which relief can be granted, and will not consider evidentiary matters in the context of a motion to dismiss.

Stephens' Motion to Dismiss is therefore DENIED.

III. MOTION FOR SUMMARY JUDGMENT

A. Standard

6. 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. WRCP 56, Chapter 2, § 14, DEQ Rules of Practice & Procedure.

7. Summary judgment is proper if “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” WRCP 56(c).

B. Findings of Fact

8. On May 6, 2009, DEQ issued WYPDES Permit No. WY0094056 (“the Permit”) to Cedar Ridge, LLC (“Cedar Ridge”), authorizing discharge of water from coalbed methane wells into three reservoirs located in ephemeral tributaries to Spotted Horse Creek. Petitioners timely appealed the Permit. *Permit 1*.

9. On July 2, 2009, Petitioners appealed the issuance of the Permit alleging that the Permit would not meet the requirements of Chapter 1, Section 20 and that the Permit did not comply with Chapter 1, Section 20 and that the Permit was not derived with appropriate scientific methods. *Petition ¶3 p - q*.

10. Petitioner, Powder River Basin Resource Council (“PRBRC”), is an association of ranchers and citizens dedicated to working for the careful and responsible development of Wyoming’s valuable and important mineral resources. *Morrison Depo. Tr. 6:2-7*.

11. Petitioner, William F. West Ranch, LLC, ("West LLC"), owns and operates ranchlands in Campbell County, Wyoming, portions of which lie on Spotted Horse Creek, downstream of the permitted discharges. *B. West Depo. Tr.*

12. Bill West, the owner and operator of West LLC, is a member of PRBRC. *B. West Depo. Tr. 5:11-13; 39:4-6.*

13. By order entered October 28, 2009, the Council approved the substitution of Stephens Energy, LLC ("Stephens") for Cedar Ridge as a party/permittee.

14. The Permit authorizes discharge from three outfalls into three unlined, on-channel reservoirs located in ephemeral drainages tributary to Spotted Horse Creek, located from approximately seven to eleven miles upstream of the ranch owned by the West LLC. *Petitioners' Ex. 1, Statement of Basis ("SOB"), p. 1.*

15. DEQ determined that effluent limits for EC were appropriate to protect agricultural uses in the Spotted Horse Creek drainage. *SOB, p. 2.*

16. Relying on the "Tier 2" methodology in its Agricultural Use Policy, DEQ determined that the average soil EC in irrigated fields potentially affected by the Permit likely fell within the range of 4,024 to 5,356 $\mu\text{S}/\text{cm}$. DEQ then divided the lower value by 1.5 to establish the effluent limit for water EC of 2,680 $\mu\text{S}/\text{cm}$. *SOB, p. 2-3.*

17. Petitioners' expert, Dr. Ginger Paige, stated in her deposition that the Tier 2 methodology is scientifically invalid and cannot be used to establish numeric effluent limits for EC that ensure no measurable decrease in crop production. *Petitioners' Ex. 6, p. 2.*

18. Dr. Paige's conclusion comports with some of the opinions of consultants hired by the Council and DEQ. Hendrickx & Buchanan, Expert Scientific Opinion on the Tier-2 Methodology – Report to the Wyoming Environmental Quality Council, May, 2009, p. iii;

Hendrickx & Buchanan, Expert Scientific Opinion on the Tier-2 Methodology – Report to the Wyoming Department of Environmental Quality, September, 2009. (The Council takes notice of these two reports, which are posted on its website.)

19. Respondents presented no expert affidavits or testimony to dispute the opinions of Dr. Paige regarding the scientific validity of the Tier 2 methodology.

20. The Permit did not set an end-of-pipe effluent limit for Sodium Adsorption Ratio (“SAR”). Instead, the Permit required daily monitoring below the reservoirs to determine whether effluent from the outfalls would reach the irrigation monitoring point (“IMP”). If data collected at the IMP exceeded the formula of $SAR < 6.67 \times EC - 3.33$, a SAR end-of-pipe effluent limit would automatically apply at each outfall for the Permit. *SOB, p. 3.*

21. The Permit required that all effluent be contained in the on-channel reservoirs, except if DEQ grants prior written authorization for a release in association with assimilative capacity credits, or in conjunction with natural precipitation events. *SOB, p. 1-2.*

22. DEQ did not conduct any study, or make any calculation, regarding the quantity of water that is leaving the reservoirs by infiltration. *Tr. 57:10-58, 66:10-13.*

23. West LLC has experienced damage as a result of CBM water discharges in Spotted Horse Creek above them flooding its property, including the loss of 100 acres of hay meadows and 200 cottonwoods. It has hauled 500 truckloads of soil to attempt to reclaim its lands. *Petitioners' Ex. 10, Marge West Deposition, 6:20-8:22.*

24. Petitioners are unable to establish that the damage they have experienced and anticipate experiencing in the future is the result of the specific discharges under this permit. *Petitioners' Motion for Summary Judgment, p. 5.*

C. Conclusions of Law

25. To the extent any of the above findings of fact include conclusions of law, they are incorporated.

26. Petitioners have standing to appeal the Permit. They have demonstrated a “definite interest exceeding the general interest in community good shared in common with all citizens.” *Northfolk Citizens v. Park Cty. Bd. of Cty. Commr’s*, 2008 WY 88, ¶ 16, 189 P.3d 260.

27. 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 where it states that it is 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; [and] to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state[.]”

28. 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”).

29. Chapter 1, Section 20 of the WQRR 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.”

30. It is the DEQ water quality administrator's duty to recommend that the director of DEQ adopt rules and regulations that 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. ANN. § 35-11-302(a)(ii).

31. 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, Chapter 1, Section 2(b)(xv).

32. When 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, Chapter 2, Section 5(c)(iii)(IV).

33. WQRR Chapter 2, Section 9(a)(vi) states that "No permit may be issued when conditions of the permit do not provide compliance with applicable requirements of W.S. 35-11-302 and of these regulations." This regulation allows DEQ no discretion to avoid compliance with the regulations and statutes.

34. DEQ determined that EC is a constituent that has reasonable potential to adversely impact irrigation occurring downstream of the outfalls authorized by the Permit.

Petitioners' Ex. 1, SOB, p. 2.

35. There is no dispute that Tier 2, DEQ's methodology for deriving a numeric effluent limitation for EC in this Permit, is not an appropriate scientific method. The only evidence before the Council on the issue of whether the "Tier 2" method is an appropriate scientific method is the testimony and reports of Drs. Paige, Hendrickx, and Buchanan, who deny any basis in science for the assumption that background water quality can be determined from sampling soil salinity. (*Ex. 3, p. 2, Hendrickx & Buchanan, p. iii, 11-14*). A method whose whole premise is based on a scientifically invalid assumption cannot be an appropriate scientific method.

36. DEQ's regulations require that the limits be set with appropriate scientific methods. *Tr. 94:23-25; 95:1-5*.

37. DEQ has failed to establish effluent limitations in the Permit that comply with the EQA and Wyoming water quality standards and permit regulations by basing the EC limit on the flawed Tier 2 methodology. *Tr. 94:23-25; 95:1-5*.

IV. CONCLUSION

There are no genuine issues as to any material fact that the effluent limitations established in Permit WY0094056 were not derived using appropriate scientific methods as required by WWQR, Chapter 2, Section 5(c)(iii)(C)(IV). As such, the Permit is not scientifically defensible and is hereby revoked.

The Council hereby FINDS and ORDERS that Stephens' Motion to Strike shall be DENIED, Stephens' Motion to Dismiss shall be DENIED, Stephens' Motion for Summary Judgment shall be DENIED, and Petitioners' Motion for Summary Judgment shall be GRANTED. The Council ORDERS that Permit WY0094056 is hereby revoked.

DATED this ____ day of _____, 2010.

Fred Ogden, PhD, Presiding Officer
Environmental Quality Council