BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL AND REVIEW OF)
THE DECISION REGARDING THE PROPOSED)
WYOMING POLLUTANT DISCHARGE ELIMINATION)
SYSTEM (WYPDES) PERMIT WY0052850)
(YATES PETROLEUM), DATED NOVEMBER 29, 2005)

File No. 06-3801

YATES PETROLEUM CORPORATION'S MOTION FOR LEAVE TO INTERVENE AND RESPONSE IN OPPOSITION TO PETITION FOR REVIEW, NOTICE OF APPEAL AND REQUEST FOR CONTESTED CASE HEARING

The undersigned Intervenor-Respondent, Yates Petroleum Corporation ("Yates"), hereby files its motion for leave to intervene and for permission to file a Response in opposition to the above-captioned petition filed by Adami Ranch ("Petitioner"). Petitioner's request for a contested case should be denied.

I. BACKGROUND

Yates is a coal bed natural gas producer with operations in the Powder River Basin of Wyoming. Petitioner is a landowner protesting the issuance of one of Yates' discharge permits. Petitioner, through its attorney, filed a Petition for Review, Notice of Appeal and Request for Contested Case Hearing with the Environmental Quality Council on January 26, 2006. The Petition appeals permit number WY0052850, which is a Wyoming Pollution Discharge Elimination System (WYPDES) permit authorizing Yates to discharge produced water from coal bed natural gas operations. The permit was issued to Yates on November 29, 2005.

II. YATES HAS A RIGHT TO INTERVENE AS ITS PERMIT IS AT ISSUE

Under the Environmental Quality Council's rules of practice and procedure, "any person interested in obtaining relief the sought by a party *or otherwise interested in the*

determination of a proceeding... pending before the Council may petition for leave to intervene in such proceeding prior to or at the date of hearing." 2 Rules of Practice & Procedure (RP&P) § 7(a) (italics added). Yates is a person "otherwise interested in the determination" of this proceeding. As mentioned above, it is Yates' permit and, hence, Yates' right to discharge which is directly at issue in this proceeding. Essentially, Petitioner is asking the Council to invalidate the Department's decision to issue the permit to Yates. *See*, Petition, p. 5. Yates has a legal right granted by the Department to discharge water in accordance with the permit and, if the Department's decision to issue the permit is denied, Yates' rights will be adversely affected by the outcome of the proceeding if the relief sought by the Petitioner is granted.[1] Yates therefore respectfully requests that the Council grant its motion for leave to intervene.

III. PETITIONER'S REQUEST FOR A CONTESTED CASE SHOULD BE DENIED AS IT HAS FAILED TO ALLEGE ANY MERITORIOUS CLAIMS

A. Yates Has Met its Obligation to Demonstrate Beneficial Use

Adami alleges that, under 40 C.F.R. § 435, Subpart E, Yates must submit "...a formal statement, with supporting documentation from a natural resources or environmental professional accompanied by the credentials of the natural resources or environmental personnel" with its permit application. There is no such requirement under either the federal or State regulations. In fact, the regulations only require that the "produced water has a use in agriculture or wildlife propagation when discharged into navigable waters." 40 C.F.R. § 435.50 (attached as Exhibit "A"). The term "use in

[1] A "contested case" is defined as "a proceeding including but not restricted to ratemaking, price fixing and *licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency* after an opportunity for hearing..." W.S. 16-3-101(b)(ii) (italics added). Hence, by definition, this proceeding involves a "legal right, duty or privilege." Because Yates' permit is the focus of the proceeding, its rights may be adversely affected by the outcome.

agriculture or wildlife propagation" is defined as "the produced water is of good enough quality to be used for wildlife or livestock watering or other agricultural uses..." 40 C.F.R. § 435.51(c). WQD, in fact, only requires that a permittee "document that the water will be used for a specific agricultural or wildlife purpose." DEQ Memorandum re: Wildlife and Agricultural Use Demonstration, p. 2 (January 27, 2004) (attached as Exhibit "B"). WQD expressly stated that an example of agricultural and wildlife use of produced water include "discharges to streams to enhance wildlife habitat; discharges to stock tanks, reservoirs, or ponds for stock watering irrigation *and/or wildlife use*; and, discharges to streams for various agricultural or wildlife use." *Id.* (italics added). Clearly, both the federal and state requirements contemplate beneficial use of produced water for both agricultural and wildlife purposes; beneficial use is not restricted to agricultural use, as Petitioner seems to advocate. In this case, Yates has met its burden of documenting that the water will be beneficially used for wildlife purposes. *See* Permit Application, Appendix A (excerpt attached as Exhibit "C"); Statement of Qualifications of Tony Wyllie (attached as Exhibit "D").

B. Produced Water Will Not Cause a Measurable Decrease in Livestock Production

Adami asserts that Yates has the burden of demonstrating that produced water will not measurably decrease livestock production. Essentially, Adami is claiming that the use of reservoirs will decrease the amount of bottomland forage in contravention of Chapter 1, Section 20 of the Wyoming Water Quality Rules & Regulations (WWQRR). This claim is disingenuous.

First, if produced/storm water is discharged to the Indian Creek tributaries, and assuming a total loss of palatable bottomland forage, the effect on agricultural production

would not be measurable. Calculations provided to WQD in the past demonstrate that, even if water is continually discharged and bottomland forage is completely lost to wetland species, only one to one-and-a-half animal units might be lost along the entire Indian Creek ephemeral stream system (conservatively estimated at 10.6 miles), assuming a 20-foot wide wetland corridor. Any such potential (and extremely unlikely) loss must be balanced against the likely increase in livestock production resulting from the increase in available water for potential livestock consumption. Kevin Harvey, Yates' soils consultant, has indicated that the net result would likely be an increase in livestock production rather than a decrease. *See* Letter from Kevin Harvey to Matt Joy, dated March 16, 2006 (attached as Exhibit "E"). This information has been provided to WDEQ in the past. The only evidence in the record to date is the analysis by Mr. Harvey.

Second, apparently the objector is more concerned with the loss of bottomland grazing at the location of the proposed reservoirs. It should be noted that the proposed reservoirs are located off Adami's property *and leased lands*. Because the reservoirs are not located on lands owned or leased by the objector, the objector has no standing to object, under the guise of loss of agricultural production, to any alleged loss of grazing to which it does not have a right.

Finally, the objector has misconstrued Section 20. Section 20 provides that "surface waters which have a 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." 1 WWQRR § 20 (italics added). First, Section 20 protects water *quality* and does not implicate water *quantity*. The fact that water exists in areas

where it had not before is not conclusive that there is a loss of *quality* sufficient to decrease agricultural use. Second, Section 20 contemplates that water quality is to be protected for *continued use,* which implies that the use must be present prior to a new use. Here, there is no agricultural use of the tributaries in the location of the proposed reservoirs, especially no legal use by Adami. Third, bottomland forage is not a "crop" within the meaning of Section 20. Section 20 talks about agricultural water supply, which strongly suggests that it is limited to waters that are diverted for beneficial use in agriculture or used for stock watering. In this case, Adami Ranch has presented no evidence that it diverts any water for agricultural purposes. Thus, the bottomland forage is not a "crop" within the meaning of Section 20. Any other interpretation renders Section 20 meaningless as it would convert Section 20 to protecting any vegetation that appears in any stream course anyplace in the state, which in no way can be reconciled with "agricultural use." No such general application was intended. Therefore, no Section 20 protections are warranted for this water based on putative bottom land forage use. As stated elsewhere in this letter, the quality of the water will not result in a measurable decrease in livestock production and will likely result in an increase in livestock production. Therefore, there is no Section 20 violation at all and no further action is warranted.

C. Yates' Water Budget Calculations Are Justified Based on Available Data and Scientific Methods

With respect to the objector's allegation that Yates has underestimated the expected water production from the proposed wells, information provided in the Permit Application in "Table 2 – *Coal Formation Water Production*" summarizes the nearby

CBM well water production records that were researched from the public Wyoming Oil & Gas Conservation Commission database to develop estimates of area water production from individual coal seams *at the time the application was submitted.* (Table 2 attached as Exhibit "F.") It is common practice to research the most recently available production data from the nearest producing wells as the most representative, current rates for an area. The wells listed were the nearest producing wells located at the time of the application (Devon Energy's Stranahan wells located approximately two miles northeast within Dry Creek drainage) and are still the nearest producing wells (i.e. these wells are not shut-in or otherwise not producing) found through research of the WOGCC database on July 21, 2005. The production records for the period from September 2003 through August 2004 were used, as this was the most current information available at the time it was downloaded on October 15, 2004 as indicated in the Table 2 footnote. Research of the currently available WOGCC water production data on July 21, 2005 for this same set of wells indicates a maximum (not average) water production rate of 33.7 gallons per minute for the period of May 2004 through May 2005, as compared to the estimate of 41.7 gallons per minute used for the application. Review of recorded pumping rates over time will show an initially relatively high water production rate over the period of weeks to months, followed by a long-term decline in water production rates on the order of months to years, followed by a stabilized rate that changes very little thereafter unless increased pumping commences elsewhere. These decline rates can be predicted fairly accurately with accepted mathematical equations, assuming continuous pumping at a constant rate.

No information is provided on how Kennedy Oil estimated the water production from their proposed wells. Comparison of their estimate to Yates' application production estimate and the updated July 21, 2005 well production data (which support an even lower production estimate) suggests that Kennedy's estimate may have been based on initially very high production rates from a newly producing well.

Initial pumping rates are not representative of long-term water production rates because of this known decline and, consequently, are not used for predictive purposes. As continued pumping dewaters a regional coal, initial pumping rates measured by the initial producer in the area will be lower for adjacent subsequent producers. This fact is exploited by subsequent producers in attempting to minimize the water they must produce and the associated expense of handling it. WDEQ requires that the permit applicant conservatively assume the maximum pumping rate per well determined through their research of a number of area wells in calculating the water balance for the project.

Lastly, the objective is to accurately predict water containment needs for the operator. Underestimating the water production only leads to operational difficulties, as the operator would not have planned for sufficient water management capacity and legally must cease water (and gas) production until sufficient capacity is available. Conversely, overestimating water production would cause a producer to construct costly unneeded reservoirs.

D. Yates has Complied with All Groundwater Sampling and Monitoring Requirements and WQD Requires Groundwater Sampling Prior to Discharge

The objector alleges that Yates must conduct groundwater sampling and monitoring to determine whether any produced water infiltration will impact groundwater

in the area. Apparently, of specific concern are the objector's two stock water wells. The objector has not indicated whether these wells are downgradient of the proposed reservoirs. Because Adami has failed to indicate the location of the stock water wells or show that there is any meaningful likelihood that Yates' operations might affect the wells, this objection is without merit. Objectors cannot simply make generalized objections; they must provide some level of meaningful technical comment.

As Adami failed to provide any substantive information to support this comment, neither Yates nor the Department can provide any meaningful response. In a general sense, Yates can provide technical information concerning groundwater quality versus produced water quality. Produced water is typically of better quality than groundwater underneath the reservoirs. Currently, the regulations governing WYPDES permit applications and approval do not require groundwater monitoring as part of the permitting application. However, DEQ has imposed groundwater sampling and monitoring requirements on permittees as part of a separate step in addition to the WYPDES permit application process. Essentially, the WYPDES permittee must provide a groundwater monitoring plan for review under the Groundwater Pollution Control Program, which is administered under a different section than the WYPDES Permitting Program. Hence, submission of groundwater sampling and monitoring information is not required as part of the WYPDES permit application step.

E. Yates Has Considered Cumulative Effects in the Drainage

Adami's assertion that Yates has not considered cumulative impacts of other producers in the drainage is baseless. As part of the discharge permit application, Yates researched area discharge permits to identify other CBM discharges immediately

upstream of Yates' proposed project and within the larger Indian Creek watershed to evaluate cumulative effects of CBM discharge. Well permits do not indicate the proposed method of water management (e.g. containment reservoirs, direct discharge, reinjection, etc.).

Draft discharge permits (i.e. permits not yet approved at the time this discharge application was submitted) were identified from researching the WDEQ WYPDES permit database and summarized with available projected discharge volumes in the application in "Table 10 – *Other CBM Outfalls Identified within Indian Creek Watershed Upstream of Powder River.*" (Table 10 attached as Exhibit "G.") These draft permits indicated *potential* outfalls (outfalls not yet permitted or discharging) to be located both upstream and downstream of where the Corsair reservoir tributaries join Indian Creek, as detailed in Table 10. In the WYPDES permit application *Hydrology Supplement* Section 1.6.1, "*Potential Area CBM and Other Water Contribution*" (p. 12), Yates stated that no other CBM discharges were identified upstream within un-named tributaries on which the tributaries containing the Corsair reservoirs would be located. (Excerpt attached as Exhibit "H.")

Typically only limited discharge volume information is publicly available for discharge permits. Arguably the most comprehensive and up-to-date source of permitted area discharges is WDEQ's permit application reviewers and writers. However, the WYPDES database was developed in part to alleviate the burden on WDEQ staff from being inundated by hundreds of telephone calls and e-mails requesting this information. Yates has made a good faith attempt at researching potential additional discharges in the drainage in preparing its permit application.

Also, under typical conditions there will be no discharge at all from the reservoirs and hence no impact upon Petitioner. In the event of a large storm that might cause discharge from the reservoirs, the amount of produced water will be insignificant when compared to the amount of runoff from a storm of that magnitude.

Finally, this objection has already been addressed by the WQD under its proposed Watershed-Based Permitting approach. As WQD has stated "this approach will allow for a more manageable permitting system and provide a mechanism to more efficiently assess cumulative impacts on drainages." DEQ Memorandum re: Wyoming NPDES Program Implementation Changes, p. 3 (September 2, 2003) (attached as Exhibit "I").

F. Yates' Management of Produced Water is Protective of the Downstream Wetland

The objector raises a concern regarding a "wetland" along Indian Creek "below one of the proposed containment ponds." The objector fails to point out several factors which make it unlikely that produced water will have any effect on the "wetland." First, quantities of any produced water allowed to discharge from the reservoir will be minimal and, in the event that the reservoir discharges as a result of a precipitation or runoff event, the amount of produced water versus runoff water will also be minimal. Hence, the likelihood that any adverse effects on the wetlands from produced water are minimized. Second, the EQA provides that "industrial concerns must be accommodated in the protection of wetlands." W.S. 35-11-109(a). The act specifically lists "energy development" as an "important" industry in this context. W.S. 35-11-109(a).

Because there is little probability that unaltered produced water from the proposed reservoirs would reach the downstream "wetlands" and because the EQA specifically

provides for accommodation of energy development when protecting wetlands, this objection should be denied.

G. Petitioner's Assertion Regarding Lack of Access Is Not Properly Before the EQC

Finally, Adami alleges that any water passing across its property would be considered a trespass. First, issues of trespass are not within the realm of the EQC to determine and must be left to the Wyoming Courts. Second, it is unlikely that such a claim presents a viable cause of action under Wyoming law. Essentially, Adami's argument is analogous to a situation where any downstream rancher could object to the carriage of water, which may include return flow containing wastes, as a trespass on their lands. For example, if a rancher utilizes a spreader dike system to distribute flow across fields where it is exposed to sediment and manure ("pollutants" under the Clean Water Act), that rancher would be liable for trespass on the next downstream rancher. Because this claim, if validated, would upset the entire foundation of Wyoming water law, WQD should leave this issue to the courts.

IV. CONCLUSION

The permit application submitted by Yates met all statutory and regulatory requirements governing information which must be included in the application. In addition, the permit issued by WDEQ provides many protections against the allegations complained of by Petitioner.

For the foregoing reasons, Respondents respectfully request the EQC to dismiss the Petition and decline to proceed to a contested case hearing on the matters raised by Petitioner.

RESPECTFULLY SUBMITTED this 28TH day of March, 2006.

FOR

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CERTIFICATE OF SERVICE

I, Sharon E. Baker, certify that on the 28th day of March, 2006, I served the original and eight (8) copies of the foregoing Motion for Leave to Intervene and Response in Opposition to Petition for Review, Notice of Appeal and Request for Contested Case Hearing by depositing copies of the same via Federal Express and addressed to:

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