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Terri A. Lorenzon, Director
Environmental Quality Council

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

IN THE MATTER OF THE APPEAL)
OF 4W RANCH, OBJECTION)
NPDES PERMITS NOS.) Docket No. 04-3801
WY0051217, WY0051233 &)
WY0051373)

BILL BARRETT CORPORATION'S MOTION FOR REMAND

Pursuant to Chapter IV, Section 1 of the Environmental Quality Council's Rules of Practice and Procedure, Bill Barrett Corporation ("BBC") submits the following Motion for Remand.

On September 26-27, 2006, the Council heard the appeal of Major Robert and Mrs. Jean Harshbarger, owners of the 4W Ranch, of BBC discharge Permit Nos. WY0051217 (the Palm Tree Project Permit) and WY0051233 (the Big Porcupine Project Permit). At the close of the evidence, the Council deliberated and determined that the Big Porcupine Project Permit should be affirmed as written, and that the Palm Tree Project Permit should be affirmed with the following ratio condition: Sodium Adsorption Ratio ("SAR") be less than 7.1 times the Electrical Conductivity ("EC") minus 2.48. Tr., Vol. II, at 378-79.

As part of the revisions to Chapter 1 of Wyoming's Water Quality Rules and Regulations, Wyoming DEQ has completed a Fifth Draft of an Agricultural Use Protection Policy ("Policy") to assist DEQ in implementing Chapter 1, Section 20's standards for the protection of agricultural uses. The draft Policy contemplate a new

process for determining appropriate discharge limitations for coal bed methane produced water. The Policy employs the same formula unilaterally imposed by the Council as a default permit limitation. DEQ, however, has yet to issue a permit with the ratio limitation, and will need time to contemplate the best way to implement and enforce such a limitation. Given the desirability of setting, implementing, and enforcing discharge limitations in a consistent fashion, remand of the Council's decision on the Palm Tree Project Permit to DEQ with the directive to set and implement limits using the forthcoming Policy is appropriate. This approach will avoid the undesirable situation of discharge limitations that are inconsistent from operator to operator for similar environmental conditions.

BACKGROUND

On June 2, 2004, the Harshbargers challenged DEQ's issuance of the Palm Tree Project Permit and the Big Porcupine Project Permit, claiming, among other things, that discharge under the permits would violate Chapter 1, Section 20. Chapter 1, Section 20 provides that degradation of waters from discharges "shall not be of such an extent to cause a measurable decrease in crop or livestock production." The Harshbargers, concerned with the protection of their surface-irrigated alfalfa meadows and sub-irrigated cottonwood trees and riparian areas from salt-loading, argued that discharge under BBC's permits would reach their property and cause a measurable decrease in crop production. They advocated reducing the permit limit for EC from 2000 to 1300 and the permit limit for SAR from 10 to 8. Tr., Vol. I, at 64-65.

At the hearing, BBC's and DEQ's defense of the permit limits focused on the specific claims brought by the Harshbargers. BBC presented evidence that surface water discharged under the Palm Tree Project Permit does not reach the 4W Ranch, but percolates into the channel 69 miles upstream. Further, even if the surface water did reach the 4W Ranch, before application through surface irrigation, the water would be mixed with substantial quantities of natural flows. Finally, should infiltration occur as alleged, the discharged water would likely be of higher quality than the subsurface water quality of the Cheyenne River drainage as measured at the 4W Ranch. Tr., Vol. II, at 288-90. In short, the Harshbargers failed to demonstrate a measurable decrease in crop or livestock production attributable to BBC discharges sufficient to warrant termination or modification of the discharge permits for the protection of the 4W Ranch.

During the hearing, discussion of the Hanson Diagram and the relationship between EC and SAR was limited to brief cross-examination of the DEQ's witnesses. Tr., Vol. I, at 182-84, 89-91 & Vol. II, at 241-44. Though the issue was never raised by the Harshbargers, the Council explained that it had been recently educated on the issue in another hearing. Tr., Vol. I, at 190-91. The Council determined that for the Palm Tree Project Permit to be protective of irrigation, the relationship between SAR and EC should be maintained to prevent a reduction in soil infiltration. The Council imposed the condition that $SAR = 7.1 \times EC - 2.48$, without further explanation of how and when the condition would be implemented and without giving BBC, the Harshbargers, or

DEQ an opportunity to gather and consider data on this very technical and significant condition.

Given the uncertainties inherent in the decision and DEQ's consideration of a draft Policy to address just such issues, BBC asks, pursuant to EQC Rules of Practice and Procedure, Chapter IV, Section 1, that the Council modify its decision to include a remand to the DEQ, for further review, implementation and guidance consistent with the final Agricultural Use Policy.

ARGUMENT

At the close of the hearing on September 28, 2006, the Council imposed the condition on the Palm Tree Project Permit that a relationship, as defined by a specific equation, between SAR and EC be maintained. The decision leaves BBC, and likely the DEQ which will be tasked with administering the decision, with a number of questions, including whether the condition should be applied as an end-of-pipe standard and how compliance will be monitored.

BBC considers itself a responsible operator and will comply with the EQC's order, assuming it is enforceable under the law. BBC's concern, however, is that the Council's decision does not—and could not under the limited evidence in the Record—specifically provide for how and when the condition will be applied, and BBC will inadvertently find itself in non-compliance when the Council issues its order. Importantly, BBC's discharges under the Palm Tree Project Permit do not presently

meet the ratio requirement at the end-of-pipe. The EC value of this good quality water, some of the best in the Powder River Basin, is so low that the relatively low SAR value remains too high to meet the ratio requirement. To comply with an end-of-pipe condition, BBC would be required to add gypsum (salt) to the water at each discharge location to raise the EC. It seems counter-intuitive for BBC to increase salinity in order to meet the ratio requirement, which is intended to protect water quality, and directly contrary to the Harshbargers' concern regarding salt-loading.

If, however, the condition is imposed as discharge is applied to irrigable soil, the water will likely pick up natural salts in the drainage as it moves through the system or have mixed with natural flows to meet the condition as applied to the soils. Further, discharge from only one of BBC's outfalls under the Palm Tree Project Permit has ever been applied to irrigation, which irrigation has now ceased for lack of sufficient quantities. Would the ratio be applied to all outfalls, or only those for which irrigation is established? These and other uncertainties lead BBC to believe DEQ is best suited to fill in the details in implementation of the Council's decision.

Indeed, DEQ has expertise in the application of EC and SAR standards to coal bed methane discharges. DEQ is currently considering and apparently is close to finalizing its Agricultural Use Protection Policy that deals directly with EC and SAR limits and the relationship between the two for the protection of irrigation. *See* 5th Draft, Agricultural Use Protection Policy, *available at* http://deq.state.wy.us/wqd/events/ADV_BD/Adv_Bd_08_02_06/AG_POLICY_5TH_DRAFT.pdf. According

to DEQ, the Policy will be presented to the Council for review along with revisions to Chapter 1 early next year. The Policy contemplates a three-tier process for setting limits. Under Tier I, absent additional site-specific information, a default limit on SAR of 10 is set and the relationship between SAR and EC must be maintained based on the actual EC concentrations in the discharge. Under Tiers II and III, the EC and SAR limits may be modified from the default limits if sufficient site-specific information, such as background water quality, local soil conditions, and irrigation practices, is available. Given DEQ's expertise and careful consideration of the EC and SAR limits necessary for the protection of agriculture, DEQ should be given the opportunity to analyze and set forth the specific requirements for implementation of the Council's condition on the Palm Tree Project Permit, as the first permit to operate under the ratio requirement.

The remand order also should provide sufficient flexibility for the DEQ to consider a Tier II or Tier III analysis in determining where, when, and whether a ratio condition should be applied to discharge under the Palm Tree Project Permit. Given the limited scope of the Harshbargers' allegations, neither DEQ nor BBC were put on notice nor prepared to present site-specific scientific evidence at the hearing in September relating to the background water quality, soil types and conditions, and irrigation practices (or lack thereof) at the discharge locations for the Palm Tree Project Permit. Rather, the hearing was focused on the alleged impacts to the 4W Ranch. The only testimony specific to the discharge area was by Mr. Jerry Moore, who irrigated for two seasons until sufficient quantities were no longer available and who also testified

that the soil in his irrigated field was “really sandy loam.” Tr., Vol. II, at 342-43, 47. The remand order should give BBC the opportunity to present and the DEQ the ability to consider site-specific information to determine how and where to apply the ratio—such an approach mirrors the flexibility in the Policy which only applies the EC/SAR ratio in a default Tier I setting.

Finally, any potential irrigators on Nine Mile or Antelope Creeks will not be harmed by a slight delay in implementation if the Palm Tree Project Permit is remanded to DEQ to consider new limitations consistent with the final Policy. As was discussed at the hearing, water production under the Palm Tree Project Permit has peaked and is on the decline. Current discharges are no longer sufficient to support irrigation. On the other hand, the benefit of a remand to DEQ for consistency in implementation of the Policy is great. Thus, remand is appropriate in these circumstances.

BBC has discussed this Motion for Remand with DEQ and Major Harshbarger. DEQ has indicated that it supports the remand approach and counsel for DEQ intends to file a separate pleading addressing DEQ’s position on BBC’s Motion for Remand. Major Harshbarger does not oppose to the Motion for Remand.

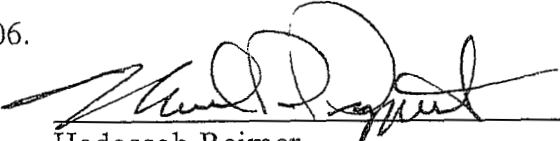
CONCLUSION

The Council’s decision to impose an EC/SAR ratio requirement on the Palm Tree Project Permit is motivated by an apparent and logical desire to be consistent with DEQ’s move toward such an approach in the default provisions of the Policy. A

number of unanswered questions, however, regarding the implementation of the ratio remain. DEQ, the agency charged with issuing and enforcing discharge permits, has the expertise to address those questions not considered during this limited hearing. WYO. STAT. ANN. § 35-11-109 (LexisNexis 2005). Therefore, BBC respectfully moves that the Council modify its decision to include a remand to DEQ for further clarification and implementation consistent with the Environmental Quality Act, WQRRs, and the Policy. EQC, Rules of Practice and Procedure, Chapter IV, Section 1(c).

Specifically, BBC moves that the EQC in its Order on the Palm Tree Project Permit remand the decision to DEQ, withdraw or withhold instruction on implementation of the permit condition, and stay enforcement of the decision until the revisions to Chapter 1 are approved and the Agricultural Use Policy is reviewed by the Council. Once finalized, the EQC should direct DEQ to apply the Policy, including the default permit limitations and the required relationship between EC and SAR, if no additional site-specific information is provided by BBC. If BBC provides DEQ with site-specific information regarding background water quality, soil type and condition, or irrigation practices, then DEQ should, consistent with its Policy once finalized, apply a Tier II or Tier III analysis taking into account the site-specific information and apply EC and SAR limits accordingly.

DATED this 3 day of November, 2006.



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CERTIFICATE OF SERVICE

I certify that on November 3, 2006, a copy of the foregoing document was filed with the Environmental Quality Council, and served on the following by:

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