

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

AUG 17 2006

**Terri A. Lorenzon, Director
Environmental Quality Council**

IN THE MATTER OF THE APPEAL OF 4W RANCH,)
RANCH L. HARSHBARGER, AND JEAN SHERWIN) DOCKET NO. 04-
HARSHBARGER AND THEIR OBJECTIONS TO) 3801
NPDES PERMIT NOS. 51217, 51233 AND 51373)
)

**MOTION TO DISMISS PETITIONERS' APPEAL AGAINST MERIT ENERGY
COMPANY'S NPDES PERMIT No. 51373**

COMES NOW Merit Energy Company, by and through its attorneys, Sundahl, Powers, Kapp & Martin, LLC, and moves this Council for an Order dismissing Petitioners' Appeal. As grounds therefore, Merit Energy Company states as follows:

1. In order to prevail on the present appeal, Petitioners have the burden of proving that the issuance of the subject NPDES permits has resulted in a measurable degradation of the water quality at their ranch. Petitioners cannot demonstrate this degradation, and cannot prove any basis for this appeal or even a modification of the subject permits. The present permit requires testing to ensure compliance with Chapter 1 Section 20 of the Wyoming Surface Water Quality Standards. Section 20 states as follows:

Agricultural Water Supply. 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.

Id. (emphasis added). Further, none of the conditions necessary for reopening the present permit have been satisfied in this case. *See Permit*, Part III(A)(3).

2. During the deposition of Petitioner Bill Harshbarger, taken on July 27, 2006, Mr. Harshbarger admitted the following, as evidenced by the attached pages:

a. Petitioners have no evidence and cannot prove that any water produced from the Merit Energy Company NPDES Permit No. 51373 reaches any of the Petitioners' lands. Harshbarger Depo., Pps. 69, 118.

b. Petitioners have no evidence and cannot prove that any produced water from the Merit NPDES Permit No. 51373 violates effluent limits or discharge requirements of its Permit. Harshbarger Depo., P. 118

c. Petitioners have no evidence and cannot prove that any produced water from the Merit NPDES Permit No. 51373 violates the more stringent effluent limits or discharge requirements suggested by the Petitioners. Harshbarger Depo., P. 119.

d. Merit Energy Company has complied with its permit requirements under NPDES Permit No. 51373. Harshbarger Depo., P. 119.

e. Petitioners have no evidence and cannot prove that water produced under the NPDES Permit No. 51373 has affected any hay or crop production on Petitioners' lands. Harshbarger Depo., P. 70.

f. Petitioners have no evidence and cannot prove any changes in the river chemistry of the Cheyenne River because of the NPDES Permit No. 51373 produced water. Harshbarger Depo., Pps. 71-72 and 119-120.

g. Petitioners admitted that there has been no impact on their crops, no impact on the yields, and no impact on their agricultural uses. Harshbarger Depo., P. 70.

3. By their own admission, Petitioners cannot prove any measurable decrease in crop or livestock production. Merit Energy remains in full compliance with its NPDES permit and its discharges do not result in any degradation.

4. The objective evidence in this matter also demonstrates that Petitioners suffer no harm from the discharge of CBM water pursuant to the subject permits. The distance from the Merit outfalls to the 4W Ranch point of diversion fluctuate between 57.5 miles and 62.4 miles. The rate of in-stream filtration is at 0.099 cfs per mile. Using the total stream miles between outfalls and the point of diversion, if the entire permitted flow from the NPDES Permit were produced, all of the water would be lost due to in-stream infiltration within 9.5 miles. Even if 100% of the water allowed were produced, the water would not reach the lands of the 4W Ranch. Petitioners have no evidence that, even though with all allotted water pouring down the drain, any water would reach the 4W Ranch. With the actual water production of 0.17 cfs, the produced water is lost due to in-stream infiltration within 1.7 miles of the outfalls.

5. Petitioners have no evidence and cannot prove that any of the water exceeds the parameters or any of the effluent limitations in the permit.

6. It is not possible for the Petitioners to be harmed or affected in any way by Merit's discharge of CBM water pursuant to its permits and this appeal should be dismissed for lack of subject matter jurisdiction. Petitioners have no evidence and cannot prove any damage or degradation. Petitioners cannot rely upon speculation or conjecture. "In Wyoming, we have a long-standing rule that damages cannot be the object of speculation or conjecture." *Reiman Const. Co. v. Jerry Hiller Co.*, 709 P.2d 1271 (Wyo. 1985); *Krist v. Aetna Casualty & Surety*, 667 P.2d 665 (Wyo. 1983); *Chrysler Corp. v.*

Todorovich, 580 P.2d 1123 (Wyo. 1978); *Opheim v. United Mobile Homes, Inc.*, 511 P.2d 1289 (Wyo. 1973); *Blakeman v. Gopp*, 364 P.2d 986 (Wyo. 1961).

7. NPDES Permit Number 51373 was issued to Merit Energy Company on June 15, 2004. (see attached permit).

8. Chapter 1 Section 16 of the Wyoming Environmental Quality Council's General Rules of Practice and Procedure states as follows:

“Unless otherwise provided by these rules or the Environmental Quality Act, all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action.”

9. “Rules adopted pursuant to statutory authority and properly promulgated have the force and effect of law. An administrative agency must follow its own rules and regulations.” *Antelope Valley Imp. v. Bd. Of Equal.*, 992 P.2d 563, 566 (Wyo. 1999).

10. Petitioners never filed an appeal after June 15, 2004, the date the permit issued to Merit Energy Company was filed. (See attached copy of appeal filed on June 3, 2004.) The Wyoming Supreme Court held that a timely appeal of an agency decision is jurisdictional: *Antelope Valley*, 992 P.2d at 567.

Timely filing of a request for administrative review of an agency decision is mandatory and jurisdictional. *Antelope Valley's* untimely filing of its case notice of appeal deprived the Board of subject matter jurisdiction over the appeal. The Board did not have jurisdiction to hear the case, and dismissal was appropriate.

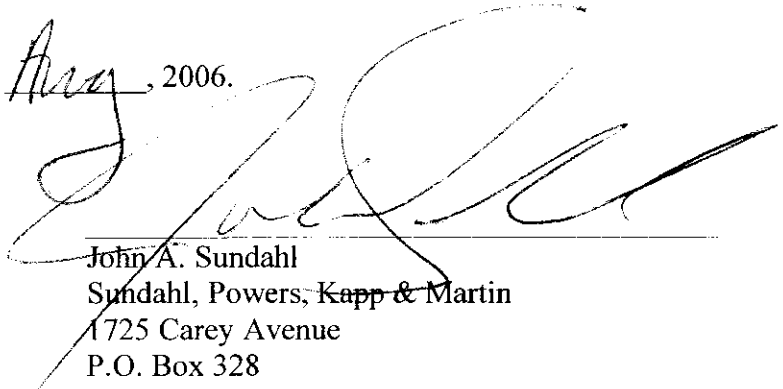
Id. The same is true in the present case. Here, the Petitioners failed to file a timely notice of appeal pursuant to Chapter 1 Section 16. As a result, this Council lacks subject matter jurisdiction to proceed with the case.

11. Finally, Mr. Harshbarger has admitted that he is not objecting to Merit or Barrett's permits as much as he is generally objecting to the idea that any coal bed

methane water could possibly at some unknown point in time reach his property and cause damage. Mr. Harshbarger admitted that he had no particular or special interest in these NPDES permits. See Harshbarger Depo. Page 138. Rather, his objections are directed to the discharge of CBM water in general. Indeed, Mr. Harshbarger's misgivings with CBM water would more properly be addressed in a rule-making forum and not in an adversarial proceeding such as the present appeal.

IN CONCLUSION, Petitioners admit that none of the produced water gets to their lands or reaches the Cheyenne River. There is no degradation to their crops. They have suffered no damage. They have not filed a proper appeal. There is no basis to modify the permits. Accordingly, the appeal should be dismissed.

DATED this 17 day of Aug, 2006.



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CERTIFICATE OF SERVICE

I certify the foregoing pleading was served on this 17 day of Aug 2006, and that copies were served as follows:

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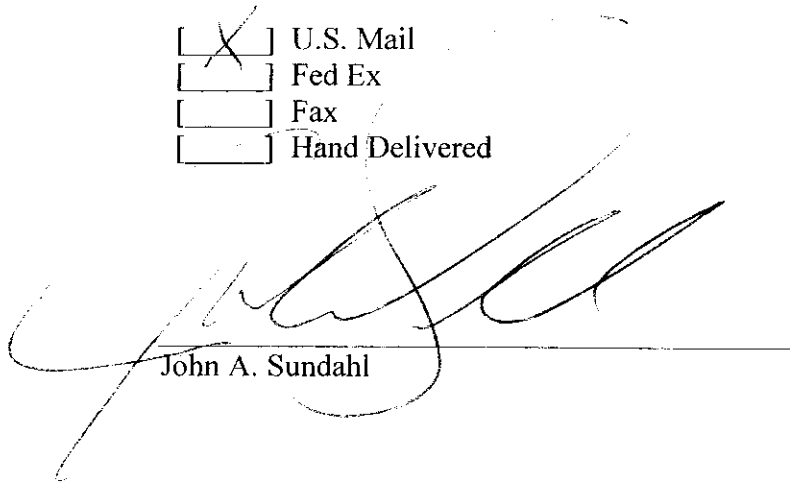
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John A. Sundahl

1 Q. (BY MR. SUNDAHL) No irrigation?
 2 A. Yeah.
 3 Q. In '04, '03 when you said you only got about 30
 4 bales out of the Unk's Pasture, how were you stacking up
 5 with the rest of your stuff? Why were you getting such low
 6 production? Because of no rain?
 7 A. Yeah, uh-huh.
 8 Q. But you did divert water from --
 9 MS. HARSHBARGER: If there had been any.
 10 Q. (BY MR. SUNDAHL) Wasn't there any water then
 11 either?
 12 A. I'm trying to remember. We have Boy Scouts that
 13 come every five years. They were here in 2002, and the
 14 river flooded -- they were here in June, and the river
 15 flooded for about, oh, ten days then.
 16 I think that's when the events -- I think that was
 17 one of the events -- no, I did not have the dam in at that
 18 time. 2002. But I put the dam in 2003, and there was a
 19 flood event that -- there was a flood event in 2003 that
 20 took the dam out.
 21 Q. And didn't get any water on your pastures?
 22 A. Yeah. It put water into the ditch and everything,
 23 but there was not -- there was not enough to push it out
 24 to -- yeah.
 25 Q. And in 2004 no water?

1 evidence that it ever gets here?
 2 A. On the surface -- I've got to say doubtful. But my
 3 concern, our problems, is in the ground water below the
 4 surface.
 5 Q. Let's do -- let's talk about those in two separate
 6 ways. First of all, would you agree with me if I said that
 7 the water produced from all three of these NPDES permits
 8 that are in this lawsuit, this litigation, do not even reach
 9 your property through surface water?
 10 A. Boy, that's a tough -- how can we validate that --
 11 Q. You don't have any evidence that it does, do you?
 12 A. No.
 13 Q. But you said that's not -- and so the water in the
 14 Cheyenne River during the periods that it flows isn't
 15 causing you any harm. If you can get it on your property,
 16 you want it, right?
 17 A. Not necessarily. It depends on the quality and
 18 what we know now versus what we didn't know three years ago
 19 and so forth is a big difference as far as our education
 20 with this problem.
 21 This whole water -- like this flow last June. More
 22 than likely it came down Antelope Creek, but did it come out
 23 of Porcupine Creek or somewhere else.
 24 So that's the problem we're having as far as -- and
 25 then specifically to these three -- with all of the

1 A. No.
 2 Q. And in 2005 you said --
 3 A. Yeah.
 4 Q. -- there was no water -- no, there was good water.
 5 No? Which was it?
 6 A. 2005.
 7 MS. HARSHBARGER: Rain.
 8 MR. SUNDAHL: You had good rain?
 9 MS. HARSHBARGER: It wasn't irrigated.
 10 Q. (BY MR. SUNDAHL) It wasn't because of any
 11 irrigation?
 12 A. Yeah.
 13 Q. Because you didn't have the dam in 2005?
 14 A. Yeah. I had the dam in 2005, yes, I did. But
 15 it --
 16 Q. There was no water in the Cheyenne River?
 17 MS. HARSHBARGER: Correct.
 18 A. It flooded on the 17th of June, but it blew the dam
 19 is what I'm trying to say.
 20 Q. (BY MR. SUNDAHL) And nothing got on your property?
 21 A. Yeah, correct.
 22 Q. Well, is there any way -- can you tell us whether
 23 or not CBM water from my client, Merit Energy, or Bill
 24 Barrett permits even reaches your property? Apparently, it
 25 hasn't in these earlier years. Do you know or have any

1 production that's up there, specifically those three -- I
 2 cannot say yes, that was Merit water coming down from the
 3 stream.
 4 Q. And let's just talk -- first of all, let's clean
 5 out the things that we can all agree on right off the bat.
 6 I think one of them is that CBM water being produced
 7 upstream on any of these drainages isn't increasing the
 8 amount of flow that comes across your ranch in the Cheyenne
 9 River, true?
 10 A. At this point in time, no.
 11 Q. And we can't -- and you agree with me also that the
 12 water produced from these three NPDES permits in dispute
 13 doesn't get to your property on the surface that you know
 14 of?
 15 A. That's correct.
 16 MS. HARSHBARGER: That water that's being
 17 produced now?
 18 MR. SUNDAHL: Right.
 19 Q. (BY MR. SUNDAHL) Also, can we agree that you don't
 20 have any evidence there's been any reduced yield for any of
 21 your crops because of any of the water that has been
 22 produced by these three NPDES permits? True also?
 23 A. Can I ask one question before I answer?
 24 Q. Yes. I want to make sure I'm getting your story
 25 completely.

1 A. Did these three units start producing in 2004?
 2 Q. Ours started in 2005 actually.
 3 A. Well, probably about --
 4 MS. REIMER: 2004.
 5 A. So then the answer is correct.
 6 Q. (BY MR. SUNDAHL) It hasn't affected your
 7 production with any of your crops or the use of your
 8 property?
 9 A. Yeah.
 10 Q. Now, help me understand what your complaint is then
 11 about the surface water, if any. Or is that your complaint
 12 really?
 13 A. That would be part of the complaint.
 14 Q. Tell me what your theory would be if it doesn't get
 15 to you and doesn't affect your yield and doesn't affect your
 16 production and it hasn't caused you any damage.
 17 MS. HARSHBARGER: It hasn't yet.
 18 Q. (BY MR. SUNDAHL) But you agree it hasn't caused
 19 you any damage at all so far, correct?
 20 A. To this date, yeah.
 21 Q. So then help me understand what point you are
 22 trying to bring up with the Environmental Quality Council?
 23 What is your concern then about these three permits?
 24 A. I think our concern is more with the limits that
 25 the DEQ has put on any of CBM production in the state of

1 A. Correct, yeah.
 2 Q. What do you think the SAR limits --
 3 A. Well, the limits now are ten. SAR raised them to
 4 ten. The complexity of soil chemistry is just so -- it's so
 5 complex. It's just so complex that the -- but the biggest
 6 problem is that a one-day measurement of any of these
 7 things, SAR or EC, is well within the limits that DEQ has
 8 established for the Cheyenne River and the drainages.
 9 Q. The limits they've established here for our permit
 10 is the same as they've done elsewhere?
 11 A. Yes. The thing of it is that has always bothered
 12 me is that these over time build up.
 13 Q. What builds up?
 14 A. An EC at 2,000, which is the maximum limit that
 15 you -- that the producers can -- the CBM producers can
 16 charge. One acre-foot, one acre-foot of 2,000 EC is
 17 3,400 pounds of salt.
 18 Q. Where did you get that information?
 19 A. I've got it from various documents here that are in
 20 the -- many of them are in the discovery that I've given.
 21 An EC of 1,300 --
 22 Q. Are you talking about an acre-foot of water?
 23 A. Acre-foot of water is 2,200 pounds of salt. I
 24 don't know how I can get people to visualize because when we
 25 buy salt for our livestock, we buy it by the pallet.

1 Wyoming in relation that the EC at the outflow of 2000 is
 2 too high.
 3 Q. What should it have been?
 4 A. Well, I think it should be 1,300 maximum.
 5 Q. Let me make sure I understand this. You're saying
 6 that you want to make a point that all CBM production from
 7 all wells, any one, should have an EC limit that is --
 8 A. Less than 2,000.
 9 Q. Less than 2,000?
 10 A. Yep.
 11 Q. Do you know whether or not the EC measurements for
 12 any of our waters and any of our permits exceeds that at any
 13 time in 2000?
 14 A. If it does, I hope they shut you down.
 15 Q. But do you have any evidence that it has ever
 16 exceeded?
 17 A. No.
 18 Q. So one of your concerns is EC?
 19 A. Yes, yeah.
 20 Q. Is there another constituent you're concerned
 21 about?
 22 A. Also the SAR.
 23 Q. Is that -- is that concern you have about SAR also
 24 a global concern that you think should apply to all of CBM
 25 wells regardless of whether it causes you any damage or not?

1 It's a little over a ton, which is sold -- so can
 2 you picture taking off into 50 acres that gets irrigated,
 3 and for every acre I place a pallet of salt that's going to
 4 go to that ground at 1,300. At 2,000 EC --
 5 (Interruption at door.)
 6 (Discussion off the record.)
 7 A. So that's what I'm trying to get people to
 8 visualize. Would you purposely go out for every
 9 acre-foot -- let's say -- again, I can't say, but do I put
 10 that 48 hours -- do I put an acre-foot of water on to that
 11 field each year?
 12 This accumulates over the years and over time.
 13 This is what studies, particularly out of Montana State
 14 University, have shown that these -- this accumulates into
 15 the soil. So not only does your soil EC -- and there's a
 16 difference -- there's a distinct difference between the
 17 irrigation water EC, and soil EC, and your plants. Soil EC
 18 is what affects your plants.
 19 Now, if I'm recalling correctly, a discharge like
 20 the outflow of 1,300, an EC of 1,300, would -- if you put it
 21 directly -- if I had an outflow directly on my ranch, put
 22 that right out, then that would elevate the soil EC to
 23 2,000, which they claim is a threshold for alfalfa.
 24 So again, I get different -- I get different
 25 readings on what is a threshold for alfalfa. I get a

1 A. No, I sure don't.
 2 Q. I submitted some requests for production and
 3 requests for admissions to you --
 4 A. Yes.
 5 Q. -- some time ago. I thought maybe we could really
 6 quickly run through those and get answers for those. First
 7 thing I asked you to admit is that you have no evidence that
 8 any water produced from Merit Energy -- and I'm going to
 9 broaden this now to include all three of the permits in this
 10 case -- admit that the water from these permits do not reach
 11 your lands.

12 You have no evidence that they do. I think you
 13 told me that, correct?

14 A. Right.

15 MS. HARSHBARGER: He has no evidence that
 16 they do, but he has no evidence that they don't because of
 17 the underwater streams.

18 Q. (BY MR. SUNDAHL) The second thing I asked you was
 19 do you admit that you have no evidence that any produced
 20 water from any of these permits violated any of the limits
 21 or discharge of the permit. Do you agree that's true?

22 A. I got my copy here.

23 Q. Is that a yes?

24 A. No, we have no evidence.

25 Q. Then the third one was whether you have any

1 of these three permits?

2 A. I need further study -- and all I got from this
 3 here --

4 Q. That draft, Exhibit 32.

5 A. There's several appendices that I did not get
 6 because of the volume and so forth. So I need -- I would
 7 like to look at those.

8 Q. Then if we go to the request to produce documents,
 9 if you have that handy. You've now given us today all water
 10 testing you've done?

11 A. Correct.

12 Q. From any wells, and from any water from the
 13 Cheyenne River, 1 and 2?

14 A. Correct.

15 Q. You've given us the soil reports, all of them that
 16 you had?

17 A. Correct.

18 Q. You've given us the raw information, which was that
 19 fax letter that you had?

20 A. Yeah.

21 Q. And you've given us verbally the production
 22 records, and I think you told us there hasn't been any
 23 change in production for the last five growing seasons that
 24 would be potentially attributable to the water being --

25 A. That's correct.

1 evidence that any of the three permits in this case violate
 2 even the more stringent limits that you suggested to us
 3 today.

4 A. We don't have any evidence, no.

5 Q. And the fourth one was admit -- and I'll ask
 6 whether both Merit and Bill Barrett have complied as far as
 7 you know with their permit requirements?

8 A. Well, I'm not privy to the samples.

9 Q. You're not aware of any evidence that there has
 10 been a lack of compliance. That's all I'm trying to find
 11 out. Is that true? You have to respond audibly.

12 A. I shook my head yes.

13 Q. You have no evidence that any water produced from
 14 the permits have affected any hay or crop production. I
 15 think you've already told us the answer to that is no, you
 16 have no evidence, correct?

17 A. That's correct, yeah.

18 Q. And you don't have any soil reports other than your
 19 Exhibit 5. That's the one you showed us.

20 A. I was going to admit that Phillips soil test, yeah.

21 Q. You're going to supplement that by adding that in
 22 there?

23 A. Yeah.

24 Q. And you admit you have no evidence of any changes
 25 in the river chemistry of the Cheyenne River because of any

1 Q. -- produced from the permits. Am I right in that?

2 A. That's correct.

3 Q. I don't want to have you go through this again if
 4 we don't need to. Have you done any testing on the crops
 5 itself?

6 THE DEPONENT: We never have, have we?

7 A. You mean as far as the protein levels?

8 Q. (BY MR. SUNDAHL) That kind of stuff that you
 9 sometimes see with alfalfa.

10 A. If we see the cows eating it, why -- well, we know
 11 the cows like millet better than alfalfa. They really like
 12 the crested wheat and alfalfa mixed grass.

13 Q. Do you have a cow/calf operation?

14 A. Yes, uh-huh.

15 MR. SUNDAHL: I don't have any other
 16 questions. Have I got everything marked as evidence that we
 17 need to in this -- when we were passing things around?

18 MR. BARRASH: If you want to take that one
 19 for the reporter, the top one, yeah. Well, unless you want
 20 to refer to it while we're doing it.

21 Q. (BY MR. SUNDAHL) Sir, I want to make sure -- I
 22 want you to tell me your concerns. And I -- if there's
 23 something we haven't talked about yet, please --

24 MS. HARSHBARGER: One of my concerns -- and
 25 of course, it doesn't apply just to you three, you know.

1 to reread what's already asked. There might be some things
 2 I want to make sure I'm understanding.
 3 One is right there at the end as you were talking.
 4 I want to make sure I understand this. Earlier when you
 5 were talking about problems with the Runway Meadow, I think
 6 you were saying that you watered that or irrigated out of --
 7 you had a pit that was dug that filled up naturally. That
 8 was ground water from the alluvium?
 9 MS. HARSHBARGER: It's into this underground,
 10 yes.
 11 Q. (BY MR. BARRASH) That's kind of a shallow aquifer.
 12 You're not drilling way down?
 13 A. That's correct.
 14 Q. So that's kind of a stream bank loss or whatever,
 15 the flow coming down. So that's what you were applying to
 16 the Runway Meadow?
 17 A. Correct.
 18 Q. Where you said hindsight -- you were putting clear
 19 water on that you think was harming it over time, that in
 20 hindsight you wouldn't -- but you weren't -- that was -- you
 21 weren't choosing which water filled up that pit. That was
 22 just the water that filled up, and you applied it. That's
 23 going back the 19 years or whatever?
 24 A. And longer. I really don't know the history.
 25 MS. HARSHBARGER: It was irrigated there by

1 the same source.
 2 Q. (BY MR. BARRASH) So if CBM water then, rather than
 3 flowing down the channel, was infiltrating and coming down
 4 the alluvium, then that's pretty much the same source of
 5 water that was getting applied to Runway in the past except
 6 that that didn't have CBM. But CBM would be in that same
 7 flow pattern to get there?
 8 A. The way I interpret -- what I've just studied on
 9 that, that's correct.
 10 Q. So it sounds like though even before CBM water that
 11 you had concerns that that shallow alluvium water was
 12 souring your soil on the meadow so that if the standard -- I
 13 mean, so you quit applying it?
 14 A. Correct.
 15 Q. So if -- let's say in Unk's Meadow there was
 16 subirrigation not that you were actively doing, but just
 17 because there was shallow water in that alluvium, that would
 18 have been the same quality water as you were actively
 19 applying to Runway?
 20 A. That would be correct, yes. I think that water --
 21 what you're saying is basically there's a water table there
 22 on both sides?
 23 Q. Yeah. So I understand your concern about CBM
 24 water. I'm not trying to convince you one way or the other.
 25 But if for the last 19 or 20 years there was this shallow

1 alluvium flow, natural flow, coming down or even before CBM
 2 that you were feeling was detrimental to your --
 3 I mean, put it this way: If you were -- if it was
 4 causing a problem because you were actively applying it at
 5 Runway, but if the same water was subirrigating Unk's, it's
 6 all the same water?
 7 MS. HARSHBARGER: The forage, the alfalfa and
 8 stuff would probably not go down that far to that water. It
 9 mostly gets surface water, but it's in the top part. It
 10 wouldn't go down the depth of that.
 11 Q. (BY MR. BARRASH) So you don't think that the
 12 subirrigation at Unk's with that water would be effective?
 13 That's what I'm wondering.
 14 If CBM water -- if one of your concerns is
 15 infiltrating and then coming on down that way rather than
 16 flowing in the channel itself, why would that be having a
 17 different effect than that historic water that you thought
 18 caused the problem on Runway but wouldn't cause a problem on
 19 Unk's because the roots wouldn't get down there? Why would
 20 CBM be any different?
 21 A. By coming underground.
 22 Q. If it came underground, if it was already before
 23 that causing problems at Runway, and you're saying at Unk's,
 24 it wouldn't be tapping into that water?
 25 MS. HARSHBARGER: It might raise it up.

1 Q. (BY MR. BARRASH) So you're saying the volume might
 2 raise it up. If it did raise it up, you still -- okay. The
 3 quality of it though was already a problem for you in the
 4 first place I thought you were saying at Runway because you
 5 thought that should apply.
 6 So it's the quality of the water anyway. So CBM
 7 you would be more concerned that it might raise the water
 8 table than it would change the quality because you were
 9 already concerned about the quality?
 10 MS. HARSHBARGER: It might change the -- it
 11 would be just more of the same and worse.
 12 Q. (BY MR. BARRASH) But I mean as far as reducing --
 13 like it says measurable decrease -- or it sounded like at
 14 least like at Runway there wasn't much to decrease. It was
 15 pretty much already -- you had already -- you had already
 16 decided that there -- that that had been damaged by that
 17 kind of water?
 18 A. Forest production, yes.
 19 MS. HARSHBARGER: We would hope that over
 20 time and with some natural rains, it would leach that out so
 21 it would get back up to producing fields if you don't put
 22 more crappy water on it.
 23 MR. BARRASH: You mean Runway?
 24 MS. HARSHBARGER: Yes.
 25 Q. (BY MR. BARRASH) I had one question, which we were

1 saying was Exhibit 13. It was that draft study, that this
2 one, the Cheyenne River Niobrara study. I think in the back
3 it said event sampling. This didn't really have -- this
4 didn't seem like it really had the sampling data in here.

5 A. No. That's appendices and so forth, which I
6 haven't --

7 Q. Then I notice they do include Dull Center data
8 among these, but it said that event sampling during the
9 program shows a significant reduction in specific
10 conductance. That's the EC, EC specific conductor?

11 A. Yeah.

12 Q. And potential SAR during runoff events. "Flow
13 during runoff events is applicable for irrigation and could
14 be pumped and stored for later use." That was this first
15 paragraph that I was reading from.

16 A. What they're saying and what -- the flood event
17 gives you an enormous amount of water. It gives you an
18 enormous amount of water for -- okay.

19 Let's -- hypothetically, let's say we have four
20 inches of clear water running across the ranch at one time.
21 And then when we get that flood event, at the clear channel
22 might be six or eight feet wide or four inches deep. When
23 the flood event comes, the water is 50 or 60 foot wide,
24 anywhere from five, six, seven foot deep in some parts.

25 So what you have done -- you just really have

1 Q. So the likelihood would be that any time water
2 going on your land that contains CBM water would only be
3 happening when there's a large volume that would be lower
4 ECs?

5 A. That's correct, yes.

6 Q. And natural water -- natural water has EC -- has an
7 EC level too. As a matter of fact, that's part of the
8 concern, is that coalbed methane increases the EC of the
9 water, but it's not adding something that never used to be
10 there as far as EC level?

11 MS. HARSHBARGER: Well, we all have some EC
12 levels.

13 Q. (BY MR. BARRASH) That's what I mean, even before
14 then. So again, if aside from this fact that if the volume
15 of water would reduce the ECs -- that to whatever extent
16 there's an EC -- an EC level in the water, when it would be
17 flood irrigating your fields, it's going to have whatever
18 salt load corresponds to that EC level, whether it's from
19 coalbed methane water or natural water. The EC is a
20 standard. It's not tied strictly to coalbed methane?

21 A. Right.

22 Q. So as far as putting the pallets of salt that you
23 were talking about -- I mean, flood irrigating was putting a
24 certain amount of salt on there anyway. It just depends on
25 what the EC level of that water was, not whether it was

1 deluded the heck out of that clear water. It's CBM water or
2 natural flow. So it -- that's why if you have a flow or you
3 take it out of the beaver dam or something up above us and
4 would test high, 25 or 4,000 like that one thing that we --
5 that would be --

6 There's such a volume of water coming down that
7 when you -- so you have that big spike in the river flow,
8 your EC goes down almost correspondently. This one is
9 anything that wheat -- or whenever the flow -- but when it
10 settles back down, it starts running clear. That's when the
11 fellows downstream stop pumping.

12 Q. So you recognize there's like an inverse
13 relation -- I mean, a correlation to an inverse relation
14 that the higher the flow, the lower EC would be?

15 A. Correct, uh-huh.

16 Q. So coalbed methane you hardly ever see any water
17 coming down the channel to your ranch except when there's
18 storm events in the spring?

19 A. Right.

20 Q. So CBM water may be being discharged at many other
21 times, but the only times, Number 1, it even gets there, and
22 Number 2, would be enough quantity to trigger a flood
23 irrigation on your fields would be when it's mixed with a
24 high flow event?

25 A. Yes.

1 coming from the coalbed methane or natural water?

2 A. Yeah.

3 Q. And then, you know, we spent a lot of time looking
4 at that map. And certainly it shows there is a lot of
5 coalbed methane discharged further up in those drainages.

6 So whatever's coming down -- whatever water quality
7 values we can extract or get ahold of above your ranch,
8 below that, that would be the combined water quality from
9 all of those. So any contribution from these three permits
10 would only be a fraction of what that is normally?

11 A. Sure.

12 Q. Granted, that may be one of the questions, is when
13 you have commingled discharge, is how do you determine the
14 contribution of any particular discharge to that overall
15 quality?

16 MS. HARSHBARGER: See, that's your job, to
17 prevent that overall quality from all of them.

18 MR. BARRASH: That's the challenges, and I
19 know you were at that meeting in Buffalo. No one's
20 pretending there's no challenge that needs to be sorted out.
21 It's getting plenty of attention.

22 Q. (BY MR. BARRASH) I've got my notes all over, but I
23 think, as I say, John covered a lot of these things. So if
24 I sift through -- the Phillips Conoco project, did you --
25 well, DEQ never issued that permit. So you never had to

1 contest that one?

2 A. No, we did not.

3 Q. And I think John was asking you about this. Is it
4 accurate or fair to say that really these three permits --
5 that your objections go beyond these three, and this is
6 more -- these are more I guess the opportunity to raise your
7 objections in general more than that the objections are
8 unique to these particular permits?

9 MS. HARSHBARGER: Just their good luck.

10 Q. (BY MR. BARRASH) The concerns you have are not
11 unique to these permits?

12 A. That's correct.

13 MS. HARSHBARGER: I think you commented on
14 almost all of them, haven't you?

15 THE DEPONENT: I finally ran out of comments.

16 Q. (BY MR. BARRASH) I think you said -- you say --
17 I'm trying to make sure I understood what normal irrigation
18 and normal conditions -- it seems like -- was it going back
19 to the late '90s? Where would you draw the line in your
20 mind between when the --

21 I know in your answers -- and I think your answers
22 are very good, but you were talking about normal -- you said
23 under normal weather and -- you said under normal weather
24 and irrigation conditions -- yeah, under normal weather and
25 irrigation conditions.

1 that you would get one major flooding that applied the water
2 for 48 hours.

3 Then you breached the dam, and that was your one
4 major flood irrigation for the year. And then you got
5 whatever rain and stuff you got. But in terms of flood
6 irrigation, normal conditions would be one 48-hour
7 application?

8 A. Yeah.

9 Q. Because once you breached the dam, unless you
10 rebuild it, you couldn't do that again?

11 A. That's right. If the river is running, there's no
12 way you can keep that sand in place long enough to --

13 Q. So it would be either one or none, I guess. It was
14 one or the other. You either would have one 48-hour flood
15 irrigation or none. You couldn't have more than one without
16 rebuilding the dam?

17 A. Correct.

18 Q. So how long has it been now since -- I remember you
19 talking for a while you didn't build the dam just because
20 you --

21 MS. HARSHBARGER: We were getting rain.

22 Q. (BY MR. BARRASH) So you didn't need it. So when
23 do you think -- have conditions stayed the same? When do
24 you see the change from what were your normal conditions?

25 MS. HARSHBARGER: It's been five years of

1 When you say that, what in your mind -- were you
2 referring to, period of time or the norm keeps changing
3 because of the recent years? What were the -- what are
4 you -- what do you consider normal conditions, and when were
5 they that way and are they still?

6 A. Normal conditions. I've been keeping a tally, and
7 of course, it corresponds with the Dull Center of rainfall.
8 And it's roughly right around 12 inches that we get
9 annually. Normally, we'll get the bulk of this moisture in
10 late March, April, May, and into June. That is our growing
11 season for grasses and alfalfa.

12 It's also during that period of time where we had
13 natural flow in the river that we could -- that diverts
14 water onto the Unk's Meadow. So that was the normal. On
15 that thing I think you were asking -- oh, I said we averaged
16 about -- total hay production was 250 bales annually. I
17 think I mentioned that, but that is sort of our normal. Is
18 that what you wanted from that answer?

19 Q. The normal for irrigating conditions. So that was
20 when you got most of the stream flowing. We're talking
21 about surface water irrigation down the channel, not
22 subirrigation.

23 A. Right.

24 Q. So most of that was storm or runoff during spring
25 in those volumes, and so normally -- I think you told John

1 drought.

2 A. It was less than five years. They talk about the
3 droughts in the West and so forth. I don't think we felt
4 the drought on our ranch land or on our alfalfa meadow, that
5 Unk's Pasture, until about 2003.

6 In other words, there was probably enough residual
7 moisture from when I had it and the abundance of rainfall
8 that we had adequate moisture to produce our forage crops.
9 So it's really a factor of this dry period, drought period
10 of time.

11 It's really affected us -- well, 2003 and 2004 we
12 had very little production of alfalfa in Unk's or even the
13 other pastures. Last spring we had -- well, between May and
14 June, end of June, we had about seven inches of rain, which
15 is in the high growing season. That's why we came back to
16 almost normal on our forage production overall without
17 irrigation.

18 Q. (BY MR. BARRASH) That was last year?

19 A. That was last year.

20 Q. It was wetter in Cheyenne last year too.

21 A. So does that sort of answer what was normal?

22 Q. Yes. So you could separate -- if you had enough
23 rain, it might not even be enough to flood irrigate, but
24 that would be enough to where you wouldn't need to flood
25 irrigate?

STATEMENT OF BASIS

New

APPLICANT NAME: Merit Energy Company

MAILING ADDRESS: 13727 Noel Road, Suite 500
Dallas, TX 75240

FACILITY LOCATION: Tuit Draw CBM facility located in the NENW, SWSE, NESW, SWSW of Section 34, the NWNW of Section 35, Township 43 North, Range 72 West in Campbell County. The produced water will be discharged to Little Porcupine Creek and its unnamed ephemeral tributaries (class 3B water), in the Cheyenne River (class 2ABWW) watershed. The daily maximum permitted discharge flow rate for this facility is 0.86 MGD from the Wyodak coal seam. There are 5 outfalls in this permit.

NUMBER: WY0051373

This facility is a typical coal bed methane production facility in which groundwater is pumped from a coal bearing formation resulting in the release of methane from the coal bed. The permit authorizes the discharge to the surface of groundwater produced in this way provided the effluent quality is in compliance with effluent limits that are established by this permit. In developing effluent limits, all federal and state regulations and standards have been considered and the most stringent requirements incorporated into the permit. The EPA Effluent Guidelines and Standards for Oil and Gas Extraction Point Source Category (Part 435, Subpart E) predate the development of coal bed methane extraction technology; however the technology is similar enough to conventional gas extraction that, in the professional judgment of the WDEQ, this effluent limit guideline is appropriately applied to coal bed methane gas production. The guideline limits oil and grease effluent concentrations to less than 35 mg/l and requires that discharges of produced water be used to enhance agricultural production and/or wildlife propagation. In this case, the permittee and landowner(s) have determined that the discharged water will be used for stock watering. Furthermore, the Water Quality Division has determined that the proposed discharged water is of sufficient quality to support this use. This permit does not cover activities associated with discharges of drilling fluids, acids, stimulation waters or other fluids derived from the drilling or completion of the wells.

The permittee has chosen option 2 of the coal bed methane permitting options. Under this permitting option, the produced water is immediately discharged to a class 2 or class 3 receiving stream which is eventually tributary to a class 2AB perennial water of the state. The permit establishes effluent limits for the end of pipe, which are protective of all the designated uses defined in Chapter 1 of Wyoming Water Quality Rules and Regulations. This may include drinking water, game and non-game fish, fish consumption, aquatic life other than fish, recreation, agriculture, wildlife, industry and scenic value.

Permit effluent limits are based on federal and state regulations and are effective as of the date of issuance. The daily maximum discharge flow rate for this facility is 0.86 MGD and must be monitored monthly. The permit limits total petroleum hydrocarbons to 10 mg/l and must be monitored yearly. The pH must remain within 6.5 and 8.5 standard units. Effluent limits for total dissolved solids (5,000 mg/l) and sulfates (3,000 mg/l) are included to protect for stock and wildlife watering. These limits are based upon Wyoming Water Quality Rules and Regulations, Chapter 7 and apply to discharge from any permitted outfall. In addition, the permit establishes a radium 226 limit of 1 pCi/l, a dissolved manganese limit of 910 µg/l, a total barium limit of 1,800 µg/l, a total arsenic limit of 2.4 µg/l and a chlorides limit of 46 mg/l, all of which are to be monitored yearly. These limits are based on standards for class 2AB waters which are intended to protect for the above listed

designated uses and reflect the application of the antidegradation provisions required under Chapter 1 of the Wyoming Water Quality Rules and Regulations. A dissolved iron limit of 1,000 µg/l is also included for outfalls that are greater than or equal to one mile from a class 2 stream. This is to protect class 3B waters and is to be monitored yearly.

Results are to be reported twice-yearly and if no discharge occurs then "no discharge" is to be reported. The permit also requires that an initial monitoring of the effluent be conducted within the first 60 days of discharge and the results submitted to WDEQ and the U.S. Environmental Protection Agency within 120 days of the commencement of discharge.

In order to monitor and regulate coal bed methane discharge for compliance with Chapter 1, Section 20 (protection of agricultural water supply), effluent limits for sodium adsorption ratio (SAR) and specific conductance are included in this permit. The Wyoming DEQ has determined that an SAR of 10 and specific conductance of 2,000 micromhos/cm is intended to be protective of agriculture use in the Belle Fourche River and Cheyenne River drainages. The specific conductance limit of 2,000 micromhos/cm is based on the threshold value for alfalfa which is considered to be the most salt sensitive plant irrigated in northeastern Wyoming (USDA George E. Brown Jr. Salinity Laboratory, Salt Tolerance Database, Grasses and Forage Crops). The SAR limit of 10 was determined to not reduce the rate of infiltration relative to ambient water quality in the Belle Fourche and Cheyenne Rivers, given the specific conductance threshold referenced above as ascertained from Figure 3 (page 44) of Agricultural Salinity and Drainage, Hanson et al., 1999 revision. Additionally, a SAR limit of 10 and specific conductance limit of 2,000 micromhos/cm will maintain the baseline C3-S2 irrigation suitability category for these drainages (see Figure 25, of Diagnosis and Improvement of Saline and Alkali Soils, US Dept. of Agricultural Handbook No. 60, 1954). Monitoring will be required for total alkalinity, dissolved calcium, dissolved magnesium, dissolved sodium, bicarbonate, sodium adsorption ratio and specific conductance monthly at the outfall(s) during the irrigation months of April, May, June, July, August and September.

There shall be no discharge of floating solids or visible foam in other than trace amounts, nor shall the discharge cause formation of visible deposits of iron, hydrocarbons or any other constituent on the bottom or shoreline of the receiving water. In addition, erosion control measures will be implemented to prevent significant damage to or erosion of the receiving water channel at the point of discharge.

The discharge of wastewater and the effluent limits that are established in this permit have been reviewed to ensure that the levels of water quality necessary to protect the designated uses of the receiving waters are maintained and protected. An antidegradation review has been conducted and verifies that the permit conditions, including the effluent limitations established, provide a level of protection to the receiving water of Wyoming surface water quality standards.

Self monitoring of effluent quality and quantity is required on a regular basis with reporting of results semiannually. The permit is scheduled to expire on March 31, 2009.

Becky Peters
Water Quality Division
Department of Environmental Quality
January 29, 2004

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, (hereinafter referred to as "the Act"), and the Wyoming Environmental Quality Act,

Merit Energy Company

is authorized to discharge from the wastewater treatment facilities serving the

Tuit Draw CBM facility

located in

the NENW, SWSE, NESW, SWSW of Section 34, the NWNW of Section 35, Township 43 North, Range 72 West in Campbell County

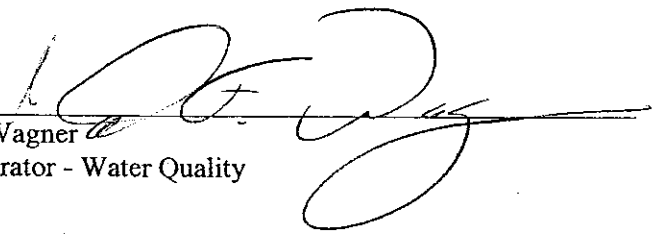
to receiving waters named

Little Porcupine Creek and its unnamed ephemeral tributaries (class 3B water), in the Cheyenne River (class 2ABWW) watershed

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II and III hereof.

The permit shall become effective on the date that it is signed below by the Director of the Department of Environmental Quality below.

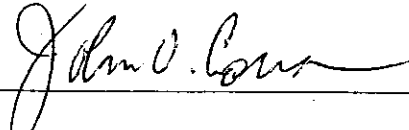
This permit and the authorization to discharge shall expire at midnight, March 31, 2009.



John F. Wagner
Administrator - Water Quality

6/1/05

Date



John V. Corra
Director - Department of Environmental Quality

6/1/05

Date

PART I

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

Effective immediately and lasting through March 31, 2009, the quality of effluent discharged by the permittee shall, at a minimum, meet the limitations set forth below. The permittee is authorized to discharge from outfalls(s) serial number(s) 001 - 005.

- Such discharges shall be limited as specified below:

Effluent Limits

Effluent Characteristic	Daily Maximum
Chlorides, mg/l	46
Dissolved Iron, µg/l	1000
Dissolved Manganese, µg/l	910
pH, su	6.5 - 8.5
Sodium Adsorption Ratio	10
Specific Conductance, micromhos/cm	2000
Sulfates, mg/l	3000
Total Arsenic, µg/l	2.4
Total Barium, µg/l	1800
Total Dissolved Solids, mg/l	5000
Total Flow, MGD**	0.86
Total Petroleum Hydrocarbons (TPH), mg/l*	10
Total Radium 226, pCi/l	1

*Acceptable methods for this parameter are 1664 in the latest edition of Standard Methods for the Examination of Water and Wastewater and EPA SW846 Method 8015 (modified) for Total Extractable Petroleum Hydrocarbons.

**This shall be the combined flow from outfall(s) 001 - 005.

The daily maximum permitted discharge flow rate for this facility is 0.86 million gallons per day (MGD). The effluent discharged at this facility will originate from the Wyodak coal seam.

The pH shall not be less than 6.5 standard units nor greater than 8.5 standard units in any single grab sample.

Information gathered from the water quality monitoring stations may result in modification of the permit to protect existing uses on the tributary and the mainstem.

There shall be no discharge of floating solids or visible foam in other than trace amounts, nor shall the discharge cause formation of a visible sheen or visible hydrocarbon deposits on the bottom or shoreline of the receiving water.

All waters shall be discharged in a manner to prevent erosion, scouring, or damage to stream banks, stream beds, ditches, or other waters of the state at the point of discharge. In addition, there shall be no deposition of substances in quantities which could result in significant aesthetic degradation, or degradation of habitat for aquatic life, plant life or wildlife; or which could adversely affect public water

supplies or those intended for agricultural or industrial use.

2. Discharges shall be monitored by the permittee as specified below:

a. Monitoring of the Initial Discharge

Within 60 days of commencement of discharge, a sample shall be collected from each outfall and analyzed for the 24 constituents specified below, at the required detection limits. Within 120 days of commencement of discharge, a summary report on the produced water must be submitted to the Wyoming Department of Environmental Quality and the U.S. EPA Region 8 at the addresses listed below. This summary report must include the results and detection limits for each of the 24 constituents. In addition, the report must include written notification of the established location of the discharge point (refer to Part I.B.11). This notification must include a confirmation that the location of the established discharge point(s) is within 1,510 feet of the location of the identified discharge point(s), is within the same drainage, and discharges to the same landowner's property as identified on the original application form. The legal description and location in decimal degrees of the established discharge point(s) must also be provided. After receiving the monitoring results for the initial discharge, the effluent limits and monitoring requirements established in this permit may be modified.

Parameter	Required Detection Limits & Units
Alkalinity, Total	1 mg/l as CaCO ₃
Aluminum, Total Recoverable	50 µg/l
Arsenic, Total	1 µg/l
Barium, Total	100 µg/l
Bicarbonate	10 mg/l
Cadmium, Dissolved	5 µg/l
Calcium, Dissolved	50 µg/l, report as meq/l
Calcium, Dissolved	50 µg/l, report as mg/l
Chlorides	5 mg/l
Copper, Dissolved	10 µg/l
Dissolved Solids, Total	5 mg/l
Hardness, Total	10 mg/l as CaCO ₃
Iron, Dissolved	50 µg/l
Lead, Dissolved	2 µg/l
Magnesium, Dissolved	100 µg/l, report as meq/l
Magnesium, Dissolved	100 µg/l, report as mg/l
Manganese, Dissolved	50 µg/l
Mercury, Dissolved	1 µg/l
PH	to 0.1 standard units
Radium 226, Total	0.2 pCi/l
Selenium, Total Recoverable	5 µg/l
Sodium Adsorption Ratio	Calculated as unadjusted ratio
Sodium, Dissolved	100 µg/l, report as meq/l
Sodium, Dissolved	100 µg/l, report as mg/l
Specific Conductance	5 micromhos/cm
Sulfates	10 mg/l
Zinc, Dissolved	50 µg/l

**Dissolved is the value based on the dissolved amount, which is the amount that will pass through a 0.45 µm membrane filter prior to acidification to pH 1.5 - 2.0 with nitric acid. Total is the value expressed in terms of total recoverable metal in the water column.

Initial monitoring reports are to be sent to the following addresses:

Planning and Targeting Program, 8ENF-PT
Office of Enforcement, Compliance, and Environmental Justice
U.S. EPA Region 8
999 18th St., Suite 300
Denver, CO 80202-2466

and

Wyoming Department of Environmental Quality
Water Quality Division
Herschler Building, 4 West
122 West 25th Street
Cheyenne, WY 82002

b. Routine Monitoring End of Pipe Outfall(s) 001 – 005

For the duration of the permit, at a minimum, samples for the constituents described below shall be collected at the indicated frequencies. The first routine monitoring for the time frame during which the monitoring of initial discharge occurs will, at a minimum, consist of flow measurements for the duration of the six-month monitoring time frame. Monitoring will be based on semi-annual time frames, from January through June, and from July through December.

Parameter	Measurement Frequency	Sample Type
Bicarbonate	Monthly April through September	Grab
Chloride	Annually	Grab
Dissolved Calcium	Monthly April through September	Grab
Dissolved Iron	Annually	Grab
Dissolved Manganese	Annually	Grab
Dissolved Magnesium	Monthly April through September	Grab
pH	Once Every Six Months	Grab
Radium 226	Annually	Grab
Dissolved Sodium	Monthly April through September	Grab
Sodium Adsorption Ratio	Monthly April through September	Calculated
Specific Conductance	Monthly April through September	Grab
Sulfate	Annually	Grab
Total Alkalinity	Monthly April through September	Grab
Total Arsenic	Annually	Grab
Total Barium	Annually	Grab
Total Flow - (MGD)	Monthly	Continuous
Total Petroleum Hydrocarbons*	Annually	Grab

*Acceptable methods for this parameter are 1664 in the latest edition of Standard Methods for the Examination of Water and Wastewater and EPA SW846 Method 8015 (modified) for Total Extractable Petroleum Hydrocarbons.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s): At the outfall of the final treatment unit which is located out of the natural drainage and prior to admixture with diluent waters at outfall(s) 001 – 005.

B. MONITORING AND REPORTING

1. Representative Sampling

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. All samples shall be taken at the monitoring points specified in this permit and, unless otherwise specified, before the effluent joins or is diluted by any other waste stream, body of water, or substance. Monitoring points shall not be changed without notification to and approval by, the permit issuing authority.

2. Reporting

Results of initial monitoring, including the date the discharge began, shall be summarized on a Monitoring Report Form for Monitoring of Initial Discharge and submitted to the state water pollution control agency at the address below postmarked no later than 120 days after the commencement of discharge..

Results of routine end of pipe and water quality station monitoring during the previous six (6) months shall be summarized and reported semiannually on a Discharge Monitoring Report Form (DMR). If the discharge is intermittent, the date the discharge began and ended must be included. The information submitted on the first semiannual DMR shall contain a summary of flow measurements and any additional monitoring conducted subsequent to the submittal of the initial monitoring report. If required by this permit, whole effluent toxicity (biomonitoring) results must be reported on the most recent version of EPA Region VIII's Guidance for Whole Effluent Reporting. Monitoring reports must be submitted to the state water pollution control agency at the following address postmarked no later than the 15th day of the second month following the completed reporting period. The first report is due on August 15, 2005.

Legible copies of these, and all other reports required herein, shall be signed and certified in accordance with the Signatory Requirements contained in Part II.A.11.

Wyoming Department of Environmental Quality
Water Quality Division
Herschler Building, 4 West
122 West 25th Street
Cheyenne, WY 82002
Telephone: (307) 777-7781

If no discharge occurs during the reporting period, "no discharge" shall be reported. If discharge is intermittent during the reporting period, sampling shall be done while the facility is discharging.

3. Definitions

- a. The "monthly average" shall be determined by calculating the arithmetic mean (geometric mean in the case of fecal coliform) of all composite and/or grab samples collected during a calendar month.

- b. The "weekly average" shall be determined by calculating the arithmetic mean (geometric mean in the case of fecal coliform) of all composite and/or grab samples collected during any week.
- c. The "daily maximum" shall be determined by the analysis of a single grab or composite sample.
- d. "MGD", for monitoring requirements, is defined as million gallons per day.
- e. "Net" value, if noted under Effluent Characteristics, is calculated on the basis of the net increase of the individual parameter over the quantity of that same parameter present in the intake water measured prior to any contamination or use in the process of this facility. Any contaminants contained in any intake water obtained from underground wells shall not be adjusted for as described above and, therefore, shall be considered as process input to the final effluent. Limitations in which "net" is not noted are calculated on the basis of gross measurements of each parameter in the discharge, irrespective of the quantity of those parameters in the intake waters.
- f. A "composite" sample, for monitoring requirements, is defined as a minimum of four grab samples collected at equally spaced two hour intervals and proportioned according to flow.
- g. An "instantaneous" measurement for monitoring requirements is defined as a single reading, measurement, or observation.
- h. A "pollutant" is any substance or substances which, if allowed to enter surface waters of the state, causes or threatens to cause pollution as defined in the Wyoming Environmental Quality Act, Section 35-11-103.
- i. "Total Flow" is the total volume of water discharged, measured on a continuous basis and reported as a total volume for each month during a reporting period. The accuracy of flow measurement must comply with Part III.A.1.

4. Test Procedures

Test procedures for the analysis of pollutants, collection of samples, sample containers, sample preservation, and holding times, shall conform to regulations published pursuant to 40 CFR, Part 136, unless other test procedures have been specified in this permit.

5. Recording of Results

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

- a. The exact place, date and time of sampling;
- b. The dates and times the analyses were performed;
- c. The person(s) who performed the analyses and collected the samples;
- d. The analytical techniques or methods used; and
- e. The results of all required analyses including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine the results.

6. Additional Monitoring by Permittee

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the Discharge Monitoring Report Form. Such increased frequency shall also be indicated.

7. Records Retention

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the administrator at any time. Data collected on site, copies of Discharge Monitoring Reports and a copy of this NPDES permit must be maintained on site during the duration of activity at the permitted location.

8. Penalties for Tampering

The Act provides that any person who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than two years per violation, or both.

9. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any Compliance Schedule of this permit shall be submitted no later than 14 days following each schedule date.

10. Facility Identification

All facilities discharging produced water shall be clearly identified with an all-weather sign posted at each outfall and flow monitoring locations (points of compliance). This sign shall, as a minimum, convey the following information:

- a. The name of the company, corporation, person(s) who holds the discharge permit, and the NPDES permit number;
- b. The contact name and phone number of the person responsible for the records associated with the permit,
- c. The name of the facility (lease, well number, etc.) and the outfall number as identified by the discharge permit.

11. Identification and Establishment of Discharge Points

According to 40 CFR 122.21(k)(1), the permittee shall identify the expected location of each discharge point on the appropriate NPDES permit application form. The location of the discharge point must be identified to within an accuracy of 15 seconds. This equates to a distance of 1,510 feet.

In order for the permit not to be subjected to additional public notice, the location of the established discharge point must be within 1,510 feet of the location of the discharge point originally identified on the permit application. In addition, the discharge must be within the same drainage and must discharge to the same landowner's property as identified on the original application form. If the three previously stated requirements are not satisfied, modification of the discharge point location(s) constitutes a major modification of the permit as defined in Part I.B.12. The permittee shall provide written notification of the establishment of each discharge point in accordance with Part I.A.2.a above.

12. Location of Discharge Points

As of the date of permit issuance, authorized points of discharge were as follows:

outfall	direction	section	width	length	latitude	longitude	receiving stream
001	NENW	34	43	72	43.66342	105.49491	*UET to Little Porcupine Creek
002	SWSE	34	43	72	43.65162	105.49127	*UET to Little Porcupine Creek
003	NESW	34	43	72	43.65598	105.49438	*UET to Little Porcupine Creek
004	SWSW	34	43	72	43.65060	105.49676	*UET to Little Porcupine Creek
005	NWNW	35	43	72	43.65973	105.49169	*UET to Little Porcupine Creek

*UET = unnamed ephemeral tributary

Requests for modification of the above list will be processed as follows. If the requested modification satisfies the definition of a minor permit modification as defined in 40 CFR 122.63 modifications will not be required to be advertised in a public notice. A minor modification constitutes a correction of a typographical error, increase in monitoring and/or reporting, revision to an interim compliance schedule date, change in ownership, revision of a construction schedule for a new source discharger, deletion of permitted outfalls, and/or the incorporation of an approved local pretreatment program.

A request for a minor modification must be initiated by the permittee by completing the form titled National Pollutant Discharge Elimination System Permit Modification Application For Coal Bed Methane. Incomplete application forms will be returned to the applicant.

The outfalls listed in the above table may be moved from the established location without submittal of a permit modification application provided all of the following conditions are satisfied:

1. The new outfall location is within 2640 feet of the established outfall location.
2. The new outfall location is within the same drainage or immediate permitted receiving waterbody.
3. There is no change in the affected landowners.
4. Notification of the change in outfall location must be provided to the NPDES Permits Section on a form provided by the WQD Administrator within 10 days of the outfall location change. The form must be provided in duplicate and legible maps showing the previous and new outfall location must be attached to the form.

Moving an outfall location without satisfying the four above listed conditions will be considered a violation of this permit and subject to full enforcement authority of the WDQ.

An outfall relocation as described above will not be allowed if the new outfall location is less than one mile from the confluence of a Class 2 waterbody and the dissolved iron limits established in the permit for the outfall are based upon Class 3 standards.

PART II

A. MANAGEMENT REQUIREMENTS

1. Changes

The permittee shall give notice to the administrator of the Water Quality Division as soon as possible of any physical alterations or additions to the permitted facility. Notice is required when:

- a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR 122.29 (b); or
- b. The alteration or addition could change the nature or increase the quantity of pollutants discharged.

2. Noncompliance Notification

- a. The permittee shall give advance notice of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.
- b. The permittee shall report any noncompliance which may endanger health or the environment as soon as possible, but no later than 24 hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Quality Division, Wyoming Department of Environmental Quality at (307) 777-7781.
- c. A written submission shall be provided within five (5) days of the time that the permittee becomes aware of a noncompliance circumstance as described in paragraph c. above.

The written submission shall contain:

- (1) A description of the noncompliance and its cause;
 - (2) The period of noncompliance, including exact dates and times;
 - (3) The estimated time noncompliance is expected to continue if it has not been corrected; and
 - (4) Steps taken or planned to reduce, eliminate and prevent reoccurrence of the noncompliance.
- d. The following occurrences of unanticipated noncompliance shall be reported by telephone to the Water Quality Division, Watershed Management Section, NPDES Program (307) 777-7781 by the first workday following the day the permittee became aware of the circumstances.
 - (1) Any unanticipated bypass which exceeds any effluent limitation in the permit;
 - (2) Any upset which exceeds any effluent limitation in the permit; or
 - (3) Violation of a maximum daily discharge limitation for any of the pollutants listed in the permit.
 - e. The administrator of the Water Quality Division may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Quality Division, Watershed Management Section, NPDES Program (307) 777-7781.
 - f. Reports shall be submitted to the Wyoming Department of Environmental Quality at the address in Part I under Reporting and to the Planning and Targeting Program, 8ENF-PT, Office of Enforcement, Compliance, and Environmental Justice, U.S. EPA Region 8, 999 18th St., Suite 300, Denver, CO 80202-2466.

- g. The permittee shall report all instances of noncompliance that have not been specifically addressed in any part of this permit at the time the monitoring reports are due.

3. Facilities Operation

The permittee shall, at all times, properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.

4. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact to waters of the state resulting from noncompliance with any effluent limitations specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

5. Bypass of Treatment Facilities

- a. Bypass means the intentional diversion of waste streams from any portion of a treatment facility.
- b. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs c. and d. of this section. Return of removed substances to the discharge stream shall not be considered a bypass under the provisions of this paragraph.
- c. Notice:
 - (1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice at least 60 days before the date of the bypass.
 - (2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.A.2.
- d. Prohibition of bypass.
 - (1) Bypass is prohibited and the administrator of the Water Quality Division may take enforcement action against a permittee for a bypass, unless:
 - (a) The bypass was unavoidable to prevent loss of life, personal injury or severe property damage;
 - (b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
 - (c) The permittee submitted notices as required under paragraph c. of this section.
- e. The administrator of the Water Quality Division may approve an anticipated bypass, after considering its adverse effects, if the administrator determines that it will meet the three conditions listed above in paragraph d. (1) of this section.

6. Upset Conditions

- a. Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improper designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.
- b. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the requirements of paragraph c. of this section are met.
- c. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs or other relevant evidence that:
 - (1) An upset occurred and that the permittee can identify the cause(s) of the upset;
 - (2) The permitted facility was at the time being properly operated;
 - (3) The permittee submitted notice of the upset as required under Part II.A.2; and
 - (4) The permittee complied with any remedial measures required under Part II.A.4.
- d. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

7. Removed Substances

Solids, sludges, filter backwash or other pollutants removed in the course of treatment or control of wastewaters or intake waters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering waters of the state.

8. Power Failures

In order to maintain compliance with the effluent limitations and prohibitions of this permit, the permittee shall either:

- a. In accordance with a schedule of compliance contained in Part I, provide an alternative power source sufficient to operate the wastewater control facilities; or
- b. If such alternative power source as described in paragraph a. above is not in existence and no date for its implementation appears in Part I, take such precautions as are necessary to maintain and operate the facility under its control in a manner that will minimize upsets and insure stable operation until power is restored.

9. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the federal act and the Wyoming Environmental Quality Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give the administrator of the Water Quality Division advance notice of any planned changes at the permitted facility or of any activity which may result in permit noncompliance.

10. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

11. Signatory Requirements

All applications, reports or information submitted to the administrator of the Water Quality Division shall be signed and certified.

- a. All permit applications shall be signed as follows:
 - (1) For a corporation: by a responsible corporate officer;
 - (2) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;
 - (3) For a municipality, state, federal or other public agency: by either a principal executive officer or ranking elected official.

- b. All reports required by the permit and other information requested by the administrator of the Water Quality Division shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - (1) The authorization is made in writing by a person described above and submitted to the administrator of the Water Quality Division; and
 - (2) The authorization specified either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position.

- c. If an authorization under paragraph II.A.11.b. is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph II.A.11.b must be submitted to the administrator of the Water Quality Division prior to or together with any reports, information or applications to be signed by an authorized representative.

- d. Any person signing a document under this section shall make the following certification:

"I certify, under penalty of law, that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

B. RESPONSIBILITIES

1. Inspection and Entry

If requested, the permittee shall provide written certification from the surface landowner(s), if different than the

permittee, that the administrator or the administrator's authorized agent has access to all physical locations associated with this permit including well heads, discharge points, reservoirs, monitoring locations, and any waters of the state.

The permittee shall allow the administrator of the Water Quality Division or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

- a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit;
- b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- c. Inspect, at reasonable times, any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under this permit; and
- d. Sample or monitor, at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the federal act, any substances or parameters at any location.

2. Transfer of Ownership or Control

In the event of any change in control or ownership of facilities from which the authorized discharges emanate, the permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the regional administrator of the Environmental Protection Agency and the administrator of the Water Quality Division. The administrator of the Water Quality Division shall then provide written notification to the new owner or controller of the date in which they assume legal responsibility of the permit. The permit may be modified or revoked and reissued to change the name of the permittee and incorporate such other requirements as described in the federal act.

3. Availability of Reports

Except for data determined to be confidential under Section 308 of the federal act, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Wyoming Department of Environmental Quality and the regional administrator of the Environmental Protection Agency. As required by the federal act, effluent data shall not be considered confidential. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the federal act.

4. Toxic Pollutants

The permittee shall comply with effluent standards or prohibitions established under Section 307 (a) of the federal act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

5. Changes in Discharge of Toxic Substances

Notification shall be provided to the administrator of the Water Quality Division as soon as the permittee knows of, or has reason to believe:

- a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

- (1) One hundred micrograms per liter (100 µg/l);
 - (2) Two hundred micrograms per liter (200 µg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;
 - (3) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21 (g) (7); or
 - (4) The level established by the director of the Environmental Protection Agency in accordance with 40 CFR 122.44 (f).
- b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
- (1) Five hundred micrograms per liter (500 µg/l);
 - (2) One milligram per liter (1 mg/l) for antimony;
 - (3) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21 (g) (7); or
 - (4) The level established by the director of the Environmental Protection Agency in accordance with 40 CFR 122.44 (f).

6. Civil and Criminal Liability

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance. As long as the conditions related to the provisions of "Bypass of Treatment Facilities" (Part II.A.5), "Upset Conditions" (Part II.A.6), and "Power Failures" (Part II.A.8) are satisfied then they shall not be considered as noncompliance.

7. Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

8. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities or penalties to which the permittee is or may be subject under Section 311 of the federal act.

9. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities or penalties established pursuant to any applicable state or federal law or regulation. In addition, issuance of this permit does not substitute for any other permits required under the Clean Water Act or any other federal, state, or local law.

10. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights nor any infringement of federal, state or local laws or regulations.

11. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application should be submitted at least 180 days before the expiration date of this permit.

12. Duty to Provide Information

The permittee shall furnish to the administrator of the Water Quality Division, within a reasonable time, any information which the administrator may request to determine whether cause exists for modifying, revoking and reissuing or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the administrator, upon request, copies of records required by this permit to be kept.

13. Other Information

When the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or any report to the administrator of the Water Quality Division, it shall promptly submit such facts or information.

14. Permit Action

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

PART III

A. OTHER REQUIREMENTS

1. Flow Measurement

At the request of the administrator of the Water Quality Division, the permittee must be able to show proof of the accuracy of any flow measuring device used in obtaining data submitted in the monitoring report. The flow measuring device must indicate values of within plus or minus ten (10) percent of the actual flow being measured.

2. 208(b) Plans

This permit may be modified, suspended or revoked to comply with the provisions of any 208(b) plan certified by the Governor of the State of Wyoming.

3. Reopener Provision

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary) or other appropriate requirements if one or more of the following events occurs:

- a. The state water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit;
- b. A total maximum daily load (TMDL) is developed and approved by the state and/or the Environmental Protection Agency which specifies a wasteload allocation for incorporation in this permit;
- c. A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit;
- d. Downstream impairment is observed and the permitted facility is contributing to the impairment;
- e. The limits established by the permit no longer attain and/or maintain applicable water quality standards;
- f. The permit does not control or limit a pollutant that has the potential to cause or contribute to a violation of a state water quality standard.

- g. If new applicable effluent guidelines and/or standards have been promulgated and the standards are more stringent than the effluent limits established by the permit.
- h. In order to protect water quality standards in neighboring states, effluent limits may be incorporated into this permit or existing limits may be modified to ensure that the appropriate criteria, water quality standards and assimilative capacity are attained.

4. Permit Modification

After notice and opportunity for a hearing, this permit may be modified, suspended or revoked in whole or in part during its term for cause including, but not limited to, the following:

- a. Violation of any terms or conditions of this permit;
- b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;
- c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge; or
- d. If necessary to comply with any applicable effluent standard or limitation issued or approved under Sections 301(b) (2) (C) and (D), 304 (b) (2) and 307 (a) (2) of the federal act, if the effluent standard or limitation so issued or approved:
 - (1) Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or
 - (2) Controls any pollutant not limited in the permit.

5. Toxicity Limitation - Reopener Provision

This permit may be reopened and modified (following proper administrative procedures) to include a new compliance date, additional or modified numerical limitations, a new or different compliance schedule, a change in the whole effluent protocol or any other conditions related to the control of toxicants if one or more of the following events occur:

- a. Toxicity was detected late in the life of the permit near or past the deadline for compliance;

- b. The TRE results indicate that compliance with the toxic limits will require an implementation schedule past the date for compliance and the permit issuing authority agrees with the conclusion;
- c. The TRE results indicate that the toxicant(s) represent pollutant(s) that may be controlled with specific numerical limits and the permit issuing authority agrees that numerical controls are the most appropriate course of action;
- d. Following the implementation of numerical controls on toxicants, the permit issuing authority agrees that a modified whole effluent protocol is necessary to compensate for those toxicants that are controlled numerically;
- e. The TRE reveals other unique conditions or characteristics, which, in the opinion of the permit issuing authority, justify the incorporation of unanticipated special conditions in the permit.

6. Severability

The provisions of this permit are severable and if any provision of this permit, or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this permit, shall not be affected thereby.

7. Penalties for Falsification of Reports

The federal act provides that any person who knowingly makes any false statement, representation or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation or by imprisonment for not more than two years per violation or both.