

FILED

OCT 27 2006

Terri A. Lorenzon, Director
Environmental Quality Council

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

IN THE MATTER OF THE APPEAL)
OF 4W RANCH, ROBERT L.)
HARSHBARGER, AND JEAN)
SHERWIN HARSHBARGER AND)
THEIR OBJECTIONS TO NPDES)
PERMITS NOS. WY0051217,)
WY0051233 & WY0051373)

Docket No. 04-3801

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (BIG
PORCUPINE PERMIT NO. WY0051233)**

Bill Barrett Corporation ("BBC") submits the following proposed Findings of Fact and Conclusions of Law for use and adoption by the Council in supporting its decision in this matter:

FINDINGS OF FACT

1. On April 5, 2004, the Wyoming Department of Environmental Quality, Water Quality Division ("DEQ") issued National Pollution Discharge Elimination System ("NPDES") Permit Nos. WY0051217 (the Palm Tree Project Permit) and WY0051233 (the Big Porcupine Project Permit) to Bill Barrett Corporation ("BBC"). Both permits impose effluent limits of 2000 micromhos/cm for specific conductance ("EC"), a Sodium Absorption Ratio ("SAR") limit of 10, and pH limits between 6.5 and 8.5. Flow is limited to 3.4 million gallons per day ("MGD") under the Big Porcupine Project Permit and 4.4 MGD under the Palm Tree Project Permit.

2. BBC began discharging under the Palm Tree Project Permit in September of 2004 and Big Porcupine Project Permit in December of 2004.¹ At its peak, the Palm Tree Project discharged 0.7551 MGD in December of 2004 and the Big Porcupine Project discharged 0.3782 MGD in March of 2005.² As of June 2006, the Palm Tree Project was discharging 0.1735 MGD and the Big Porcupine Project was discharging 0.1456 MGD.³ Discharge is in compliance with the effluent limitations placed on both permits.

3. The Big Porcupine Project, specifically, discharges from four outfalls upstream of the North Antelope Rochelle Coal Mine in the Porcupine drainage. Water discharged under the permit flows into four large mine collection reservoirs built to withstand very large storm events. Downstream of the reservoirs, Porcupine Creek no longer exists as the mine has removed the overburden and coal which once formed the Porcupine drainage and alluvium. Water in the reservoirs is used by the mine for dust suppression and other mine operations.⁴ Water discharged under the Big Porcupine Permit cannot move downstream of the reservoirs and mine site, either on the surface or through the alluvium.⁵ The mine is approximately 32 miles upstream of the 4W Ranch.⁶

¹ BBC Exhibit 6.

² *Id.*

³ *Id.*

⁴ Tr. of Hearing Proceedings, Vol. II, pp. 276-78; BBC Exhibit 3.

⁵ Tr., Vol. II, pp. 278-79.

⁶ Tr., Vol. I, p. 72.

4. On June 2, 2004, Major Robert L. Harshbarger and Jean Sherwin Harshbarger, owners of the 4W Ranch (“Appellants”), which uses water from the Cheyenne River for irrigation when available, appealed the issuance of the Big Porcupine Project Permit and Palm Tree Project Permit along with Permit No. WY0051373. The appeal of Permit No. WY0051373 was resolved prior to the hearing. BBC intervened in support of DEQ’s issuance of the permits.

5. Appellants brought five claims before the Council:

- That the permits violate Wyoming Water Quality Rules and Regulations (“WQRR”), Chapter 1, Section 20, which protects against “measurable decrease in crop or livestock production.”
- That the permits violate WQRR, Chapter 1, Section 8(a)(ii) standards that protect existing uses from new sources of pollution.
- That the permits violate WQRR, Chapter 1 standards for the prevention of “esthetic degradation.”
- That the permits violate their own terms which prohibit injury to private property or invasion of personal rights.
- That the permits impair existing water rights at the 4W Ranch.

6. To date, Appellants have observed no change in surface flows of the Cheyenne River attributable to discharge under the BBC permits. Appellants have

observed no measurable decrease in crop production attributable to discharge under the BBC NPDES permits.⁷ Appellants presented no evidence that water discharged under the BBC permits reaches the 4W Ranch on the surface or through the alluvium.

7. Assuming water discharged under the BBC permits could reach the 4W Ranch, substantial mixing with natural flows would occur before any water would be applied to the Appellants' irrigated acreage at the Unc's meadow.⁸ Appellants did not provide any evidence of subirrigation of their alfalfa meadows. Appellants testified that water in the Cheyenne alluvial aquifer has historically been of poor quality and unsuitable for irrigation.⁹

CONCLUSIONS OF LAW

8. Appellants have failed to meet their burden to show that the Big Porcupine Project Permit has caused or will cause a measurable decrease in crop or livestock production at the 4W Ranch. Appellants have failed to demonstrate that the permit is not protective of existing uses, that the permit injures private property rights, or that the permit impairs existing water rights at the 4W Ranch. Appellants admit that no standard for "esthetic degradation" exists in the WQRR.¹⁰ Therefore, Appellants have failed to meet their burden to show cause why the Big Porcupine Project Permit should be modified.

⁷ Tr., Vol. I, p. 111-12.

⁸ Tr., Vol. I, pp. 80-83.

⁹ Tr., Vol. I, pp. 87-89, 115-16.

¹⁰ Tr., Vol. I, pp. 120-21.

IT IS HEREBY ORDERED that Permit No. WY0051233, the Big Porcupine Project Permit, is **AFFIRMED**.

DATED October 27, 2006.



Hadassah Reimer
Mark R. Ruppert
Jack D. Palma
HOLLAND & HART, LLP
2515 Warren Ave., Suite 450
Cheyenne, WY 82001
(307) 778-4200
(307) 778-8175 (fax)

Attorneys for Permittee Bill Barrett
Corporation

CERTIFICATE OF SERVICE

I certify that on October 27, 2006, a copy of the foregoing document was filed with the Environmental Quality Council, and served on the following by:

- U.S. Mail, postage prepaid
- Hand Delivery
- Fax
- Electronic Service by LexisNexis File & Serve

Michael Barrash
Senior Assistant Attorney General
DEQ/Water Quality Division
123 Capitol Building
Cheyenne, WY 82002

Robert L. Harshbarger
Jean Sherwin Harshbarger
4W Ranch, 1162 Lynch Road
Newcastle, WY 82701

John Sundahl
Sundahl, Powers, Kapp & Martin
1725 Carey Avenue
P.O. Box 328
Cheyenne, WY 82003-0328

A handwritten signature in black ink, appearing to read 'Robert L. Harshbarger', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'R' and 'H'.