

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

IN THE MATTER OF THE APPEAL AND REVIEW OF)
THE DECISION REGARDING THE PROPOSED)
WYOMING POLLUTANT DISCHARGE ELIMINATION)
SYSTEM (WYPDES) PERMIT WY0052761)
(YATES - NEMESIS POD), DATED DECEMBER 17, 2005)

File No. 06-3802

FILED

OCT 16 2006

RESPONSE TO MOTION TO DISMISS

Terri A. Lorenzon, Director
Environmental Quality Council

COMES NOW Tear Drop Cattle Company, LLC ("Tear Drop"), by and through its undersigned attorney, and hereby responds to Yates Petroleum ("Yates") Corporation's Motion to Dismiss for Lack of Prosecution, dated September 27, 2006, as follows:

1.

A motion for failure to prosecute under the circumstances is not warranted by any of the existing facts and it is clearly unwarranted by law. Tear Drop has sent a letter to Yates requesting that the motion be withdrawn or Tear Drop will file for costs and fees for a frivolous motion as there is no lawful grounds for the motion.

2.

Tear Drop is not required to perfect its appeal other than by means of filing the petition for review of the agency action to the EQC, which Tear Drop did. The Petition was six (6) pages in length and included the petition for review and request for a contested case hearing which was not yet been set by the EQC. Yates has filed no response to the Petition. Yates has taken no depositions of the officers of Tear Drop Cattle Company, LLC. Rule 55 of the Wyoming Rules of Civil Procedure is not applicable to the procedures in a review of an agency decision. The default provisions apply to complaints for affirmative relief. Tear Drop is not required by any law to provide further justification for its notice of appeal or petition for review. Tear Drop is not required to contact Yates or is it

required to receive any additional information from Yates regarding the above-captioned matter. Tear Drop has not failed to timely prosecute the appeal. The filing of the notice of appeal and petition for review were timely filed under all rules applicable. Tear Drop is not required to file "additional motions, submit information, seek a hearing date or otherwise take steps to move forward in this matter." Contrary to the statement contained in Yates' Motion to Dismiss, Tear Drop requested a contested case hearing simultaneously with its petition for review and notice of appeal. There is no law which requires that a petitioner in a petition for review to take "other steps" to prosecute its case. The statements by counsel in Yates' Motion are groundless and unwarranted under any Wyoming or federal law.

WHEREFORE, Tear Drop requests that the Motion to Dismiss be denied; that this matter be set for hearing at the earliest possible time; and that Tear Drop be awarded its costs and attorney's fees for responding to this motion.

DATED this 13th day of October, 2006.

KIRVEN and KIRVEN, P.C.:

By 

DENNIS M. KIRVEN, Attorney for
Petitioner

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CERTIFICATE OF SERVICE

I, **DENNIS M. KIRVEN**, of Kirven and Kirven, P.C., attorneys for Petitioners, certify that I served a true and correct copy of the foregoing "Response to Motion to Dismiss" as follows:

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on the 13th day of October, 2006.



DENNIS M. KIRVEN