

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

IN THE MATTER OF THE APPEAL AND REVIEW OF )  
THE DECISION REGARDING THE PROPOSED ) File No. 06-3802  
WYOMING POLLUTANT DISCHARGE ELIMINATION)  
SYSTEM (WYPDES) PERMIT WY0052761 )  
(YATES-NEMESIS POD), DATED DECEMBER 17, 2005)

**YATES PETROLEUM CORPORATION'S  
REPLY TO RESPONSE TO MOTION TO DISMISS**

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

**I. Yates' Motion to Dismiss Was Appropriate Under Wyoming Civil Procedure, Wyoming Caselaw and the Facts**

Although Yates has voluntarily withdrawn its Motion to Dismiss for Lack of Prosecution (the Motion to Dismiss), the Motion to Dismiss was appropriate under the Environmental Quality Council's (the Council's) Rules of Practice and Procedure (RP&P), the Wyoming Rules of Civil Procedure, caselaw and the facts. The Council's Rules of Practice and Procedure incorporate the Wyoming Rules of Civil Procedure. 2 RP&P § 14(a). Rule 41(b)(1) of the Wyoming Rules of Civil Procedure states that "For failure of the plaintiff to prosecute or to comply with these rules or any order of the Court, a defendant may move for dismissal of an action or of any claim against defendant." WY. R. CIV. P. 41(b)(1). The Wyoming Supreme Court has interpreted this rule to allow dismissal with prejudice where a party fails to meet a burden of proof. *See Wilkinson v. Wyoming Workers' Safety and Compensation Division*, 991 P.2d 1228, 1233

(Wyo. 1999). In addition, dismissal of an action with prejudice may be appropriately granted by an administrative law body such as the Council. *Id.*

In this case, Tear Drop Ranch has failed to meet any burden of proof and has merely offered blanket statements without legal or scientific basis or justification to the Council. Under the law, the proponent of an action must take steps to prosecute its case. WY. R. CIV. P. 41(b)(1).

## **II. Tear Drop Must do More than Merely File a Notice of Appeal**

Tear Drop asserts that it is “not required by any law to provide further justification for its notice of appeal or petition for review.” Essentially, Tear Drop asserts that it need only file a notice of appeal and do nothing more than make general assertions. In other words, Tear Drop asserts that it has no burden of proof. This position is contrary to Wyoming law. In *Knight v. Environmental Quality Council*, 805 P.2d 268 (Wyo. 1991), the Wyoming Supreme Court found that a petitioner protesting the issuance of an injection permit in front of the EQC must meet his burden of proof in protesting a permit. *Knight*, at 275.<sup>1</sup> Tear Drop failed to provide any proof of the assertions stated in its Petition. Furthermore, the legal positions taken in the Petition are unfounded.

Yates understands that it, too, has a burden of proof concerning whether its permit application and the resulting permit issued by the Wyoming Department of

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<sup>1</sup> The Wyoming Supreme Court has also stated:

The burden of persuasion is attached to the party who “runs the risk of nonpersuasion.” [Citing 1 D. Louisell & C. Mueller, *Federal Evidence* § 66 (1977).] During a trial, this means if the “party with the burden of persuasion has not sustained by a fair preponderance of the evidence – if the evidence is in equipoise or the opposing party’s preponderates – the party with the burden must fail.” *Id.*

*Casper Iron & Metal v. Unemployment Insurance Commission*, 845 P.2d 387, 393 (Wyo. 1993). Hence, Tear Drop must meet at least some level of proof. That level of proof must be “more than a mere scintilla of evidence” and more than a “mere suspicion that a fact exists.” *Knight* at 274.

Environmental Quality (WDEQ) meet applicable state laws. (*See, e.g., In the Matter of Objections to the Permit Application of Thunder Basin Coal Company*, 1986 WL 222836 (Wyo. Dept. Env. Qual.)) Yates has met this burden by providing specific legal, scientific and factual arguments and information in its Motion for Leave to Intervene and Response in Opposition to Petition for Review, Notice of Appeal and Request for Contested Case Hearing (Response to Petition), dated March 28, 2006.

As to Tear Drop's assertion that Yates has "filed no response to [Tear Drop's] Petition," this is patently untrue. Yates filed its Response to Petition on March 28, 2006 and responded to each of the assertions raised in Tear Drop's Petition and showed why these assertions are unfounded.

### **III. An Award of Costs and Attorney's Fees is Inappropriate**

The EQC's rules concerning the award of costs and attorney's fees are set forth under Chapter 5 of the RP&P. Chapter 5 sets forth an award of costs and fees from the permittee to a person other than the WDEQ only in administrative proceedings reviewing enforcement actions. 5 RP&P § 2(a)(i). The matter at hand is a contested case hearing concerning the issuance of a permit and not an enforcement action. No other rule concerning an award of attorney's fees is applicable in this case.

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For the foregoing reasons, Yates Motion to Dismiss for Lack of Prosecution was not inappropriate. Finally, an award of costs and attorney's fees is not allowed under the Council's rules.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of October, 2006.



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ATTORNEYS FOR YATES PETROLEUM CORPORATION

**Certificate of Service**

I certify that on this 19<sup>th</sup> day of October, 2006, service of a true and complete copy of Yates' Petroleum Corporation's Reply to Response to Motion to Dismiss in File No. 06-3802 was made upon each party or attorney of record herein as indicated below.

The ORIGINAL and ten (10) copies were filed by private carrier on October 19<sup>th</sup>, 2006 with:

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