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MAR 29 2006

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

**Terri A. Lorenzon, Director
Environmental Quality Council**
File No. 06-3802

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)

**YATES PETROLEUM CORPORATION’S MOTION FOR LEAVE TO
INTERVENE AND RESPONSE IN OPPOSITION TO PETITION FOR REVIEW,
NOTICE OF APPEAL AND REQUEST FOR CONTESTED CASE HEARING**

The undersigned Intervenor-Respondent, Yates Petroleum Corporation (“Yates”), hereby files its motion for leave to intervene and for permission to file a Response in opposition to the above-captioned petition filed by Tear Drop Ranch (“Petitioner”). Petitioner’s request for a contested case should be denied.

I. BACKGROUND

Yates is a coal bed natural gas producer with operations in the Powder River Basin of Wyoming. Petitioner is a landowner protesting the issuance of one of Yates’ discharge permits. Petitioner, through its attorney, filed a Petition for Review, Notice of Appeal and Request for Contested Case Hearing with the Environmental Quality Council on January 26, 2006. The Petition appeals permit number WY0052761, which is a Wyoming Pollution Discharge Elimination System (WYPDES) permit authorizing Yates to discharge produced water from coal bed natural gas operations. The permit was issued to Yates on December 17, 2005.

II. YATES HAS A RIGHT TO INTERVENE AS ITS PERMIT IS AT ISSUE

Under the Environmental Quality Council’s rules of practice and procedure, “any person interested in obtaining relief the sought by a party *or otherwise interested in the*

determination of a proceeding... pending before the Council may petition for leave to intervene in such proceeding prior to or at the date of hearing.” 2 Rules of Practice & Procedure (RP&P) § 7(a) (italics added). Yates is a person “otherwise interested in the determination” of this proceeding. As mentioned above, it is Yates’ permit and, hence, Yates’ right to discharge which is directly at issue in this proceeding. Essentially, Petitioner is asking the Council to invalidate the Department’s decision to issue the permit to Yates. *See*, Petition, p. 5. Yates has a legal right granted by the Department to discharge water in accordance with the permit and, if the Department’s decision to issue the permit is denied, Yates’ rights will be adversely affected by the outcome of the proceeding.¹ Yates therefore respectfully requests that its motion to intervene be granted.

III. PETITIONER’S REQUEST FOR A CONTESTED CASE SHOULD BE DENIED AS IT HAS FAILED TO ALLEGE ANY MERITORIOUS CLAIMS

A. The Surface Use Agreement Contemplates Ongoing Negotiations Regarding Reservoir Locations and Yates has Engaged in Good Faith Negotiations

Petitioner objects to the permit application on the grounds that the application misrepresents the existing agreement between itself and Yates (i.e., that there is no current agreement regarding surface discharge of produced water). There is a written surface use agreement between the parties, and Yates is required to obtain written approval, under the agreement, prior to discharge. Yates remains committed to obtaining that approval prior to discharge.

¹ A “contested case” is defined as “a proceeding including but not restricted to ratemaking, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing...” W.S. 16-3-101(b)(ii) (italics added). Hence, by definition, this proceeding involves a “legal right, duty or privilege.” Because Yates’ permit is the focus of the proceeding, its rights may be adversely affected by the outcome.

Representatives of Yates and Petitioner have verbally discussed reservoir siting on Petitioner's fee surface and Yates received permission to site the reservoir locations proposed in the application. Yates also made a written offer to Petitioner on June 29, 2005 to obtain written approval. At this time, Petitioner has not responded to that offer. Also, Yates representatives have been in communication with Petitioner's representatives concerning reservoir site locations and will make reasonable efforts to continue to do so prior to locating any reservoirs pursuant to the Agreement.

There is no requirement under either the Wyoming Environmental Quality Act or the Wyoming Water Quality Rules & Regulations that operators must enter into agreements with land owners regarding reservoir location. Indeed, the purpose of the NPDES program is to protect water quality and uses of the waters of the state. This Permit does just that: it imposes effluent limits which are protective of water quality and requires additional effluent limitations at the ICP which are protective of irrigation uses. Whether the proposed limits satisfy the agreement between the parties is a matter for the parties to decide.

B. The Permit Provides Protection From Accelerated Channel Erosion

Petitioner has objected to issuance of the draft permit on the grounds that the amount of produced water that will be produced will accelerate erosion "consisting of mass wasting, incision and widening." This objection is inconsistent with the terms of the permit, with which Yates must comply.

The permit requires that all waters must "be discharged in a manner to prevent erosion, scouring, or damage to stream banks." WYPDES Permit No. WY0052761, Part I.A.1.c. If water is discharged in a manner inconsistent with the permit, Yates will be in

violation. Hence, the permit already provides adequate protection from “accelerated erosion.”

C. Yates Has Provided Documentation of Beneficial Use of Produced Water and the Presence of Produced Water Will Not Cause a Measurable Decrease in Livestock Production

First, Petitioner alleges that Yates must submit “...a formal statement, with supporting documentation from a natural resources or environmental professional accompanied by the credentials of the natural resources or environmental personnel” with its permit application. There is no such requirement under either the federal or State regulations, but WDEQ has imposed this requirement on permit applicants in guidance. The regulations only require that the “produced water has a use in agriculture or wildlife propagation when discharged into navigable waters.” 40 C.F.R. § 435.50 (attached as Exhibit “A”). The term “use in agriculture or wildlife propagation” is defined as “the produced water is of good enough quality to be used for wildlife or livestock watering or other agricultural uses...” 40 C.F.R. § 435.51(c). WQD, in fact, only requires that a permittee “document that the water will be used for a specific agricultural or wildlife purpose” and includes “discharges to streams to enhance wildlife habitat.” DEQ Memorandum re: Wildlife and Agricultural Use Demonstration, p. 2 (January 27, 2004) (attached as Exhibit “B”). Also, Petitioner fails to recognize that the federal and state programs provide that beneficial use includes use of produced water for *wildlife* propagation and, instead, focuses only on livestock watering. In any event, Yates has provided a beneficial use statement with its permit application which concludes that “the weight of evidence regarding the accrual of positive benefits of CBM produced waters to

WY wildlife is substantial.” Permit Application, p. 20 of 21 (attached as Exhibit “C”). Hence, Yates has met its obligation to document a beneficial use of the produced water.

Second, Petitioner asserts that Yates has the burden of demonstrating that produced water will not measurably decrease livestock production. Essentially, Petitioner is claiming that the use of reservoirs will decrease the amount of bottomland forage in contravention of Chapter 1, Section 20 of the Wyoming Water Quality Rules & Regulations (WWQRR). This claim is disingenuous.

If produced/storm water is discharged to Dry Creek, and assuming a total loss of palatable bottomland forage, the effect on agricultural production would not be *measurable*.² Calculations provided to WQD in the past on similar water bodies demonstrate that, even if water is continually discharged and bottomland forage is completely lost, only one to one-and-a-half animal units might be lost along the entire Dry Creek ephemeral stream system (conservatively estimated at 11 stream miles), assuming a 20-foot wide wetland corridor. Any such potential (and extremely unlikely) loss must be balanced against the likely increase in livestock production resulting from the increase in available water for potential livestock consumption. Kevin Harvey, Yates’ soils consultant, has indicated in similar drainages that the net result would likely be an increase in livestock production rather than a decrease. *See* Letter from Kevin Harvey to Matt Joy, dated March 16, 2006 (attached as Exhibit “D”). This information has been provided to WDEQ in the past. The only evidence in the record to date is the analysis by Mr. Harvey.

² Section 20 provides that degradation of waters of the state “shall not be of such an extent to cause a measurable decrease in crop or livestock production.” 1 WWQRR § 20.

Also, apparently the objector is more concerned with the loss of bottomland grazing at the location of the proposed reservoirs. As stated above, Yates is working with Petitioner in siting any reservoirs with land owner input. This should alleviate any concerns the Petitioner may have. Finally, to the extent the objection is that the presence of reservoirs displaces an equivalent amount of grazing land, that objection is without merit. Chapter 1, Section 20 protects water quality; it does not prohibit the development of infrastructure. Interpreting Section 20 in the manner argued by Petitioner would prohibit stock ponds and irrigation diversions, both of which use land area and hence arguably reduce forage but which are clearly acceptable.

D. The Permit Requirements and WDEQ Policy Are Protective of Groundwater Quality

Petitioner asserts that the permit application does not “contain an analysis as to the long term effects of infiltrated water from the containment ponds in downgrading aquifers.” This objection is baseless for several reasons. First, there is no requirement that the *permit application* contain documentation concerning the presence or absence of groundwater. In fact, guidance issued by the WDEQ states that such documentation be submitted and approved “prior to discharge into the impoundment.” WDEQ, Water Quality Division, *Compliance Monitoring for Ground Water Protection Beneath Unlined Coalbed Methane Produced Water Impoundments*, 1 (June 14, 2004) (excerpt attached as Exhibit “E”). Hence, Yates need not have submitted this documentation with its permit application. Second, the permit sets forth groundwater monitoring for discharges into impoundments according to the above guidance document. No discharge can take place until the groundwater monitoring is completed and documentation is supplied. Permit, Part I.C.1.; *see also*, WDEQ, Water Quality Division, *Integration of Groundwater*

Monitoring Requirements for CBM Ponds into WYPDES Permits, 1 (April 14, 2005) (attached as Exhibit “F”). Attorneys for Petitioner have simply misinterpreted the guidance. The guidance fully protects groundwater quality.

E. The Permit Minimizes Cumulative Impacts through Storage and Discharge Limits

Petitioner asserts that “the entire Dry Creek drainage needs to be studied for the cumulative effect of all CBM projects planned for development.” First, there is no requirement that imposes a duty on the permittee to submit a cumulative impact analysis for a drainage under either the EQA or the WWQRR. Second, Petitioner’s claim that cumulative effects will occur is unfounded. As stated in the permit, Yates’ discharges will be to on-channel reservoirs on un-named ephemeral tributaries of the Dry Creek drainage. *See* Statement of Basis, p. 2 (attached as Exhibit “G”). Because Yates will be discharging into on-channel reservoirs (once reservoir locations are agreed upon with the land owner) and the majority of the reservoirs will *only* discharge in the event of a precipitation event (as required by the permit), any impacts downstream of the reservoirs will be greatly minimized. Third, produced water from Yates’ operations will not contribute to downstream impacts in Dry Creek. Under typical conditions there will be no discharge at all from the reservoirs and hence no impact upon Petitioner. In the event of a large storm that might cause discharge from the reservoirs, the amount of produced water will be insignificant when compared to the amount of runoff from a storm of that magnitude.

F. Petitioner’s Objection Regarding Lack of Access is Groundless


Petitioner essentially objects on the grounds that produced water flowing across its property would constitute a trespass. This objection is baseless on several grounds.

First, trespass is a matter for civil courts in Wyoming and would not be properly before Environmental Quality Council. Second, the permit only allows the reservoirs to discharge in the event of a storm event. Given the size of the drainage area and the relatively small amount of produced water in comparison to the amount of precipitation runoff, any impact on the presence of water would not be significant, especially given the fact that runoff would be present in downstream water bodies as a result of the precipitation event. Hence, and claim that discharged produced water would constitute a trespass ignores the fact that runoff would account for the vast majority of water downstream.

IV. CONCLUSION

The permit application submitted by Yates met all statutory and regulatory requirements governing information which must be included in the application. In addition, the permit issued by WDEQ provides many protections against the allegations complained of by Petitioner. For the foregoing reasons, Respondents respectfully request the EQC to dismiss the Petition and decline to proceed to a contested case hearing on the matters raised by Petitioner.

RESPECTFULLY SUBMITTED this 28TH day of March, 2006.

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ATTORNEYS FOR YATES PETROLEUM CORPORATION

CERTIFICATE OF SERVICE

I, Sharon E. Baker, certify that on the 28th day of March, 2006, I served the original and eight (8) copies of the foregoing Motion for Leave to Intervene and Response in Opposition to Petition for Review, Notice of Appeal and Request for Contested Case Hearing by depositing copies of the same via Federal Express and addressed to:

Environmental Quality Council
Attn: Jon Brady, P.E., Hearing Examiner
Herschler Building, Room 1714
122 West 25th Street
Cheyenne, WY 82002

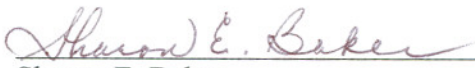
also one (1) copy to the following persons via Federal Express.

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