

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

IN THE MATTER OF THE APPEAL OF)
THE COPPERLEAF SUBDIVISION WATER)
SUPPLY, TREATMENT, STORAGE, AND) Docket No. 06-3814
BOOSTER PUMPING SYSTEMS,)
Permit No. 06-274RR/Reference No. 06-236RR)

**WORTHINGTON GROUP OF WYOMING, LLC'S REPLY BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS**

COMES NOW the Worthington Group of Wyoming, LLC, by and through counsel, and replies to Petitioner/Appellant's *Response to Motion to Dismiss*.

I. RESPONSE TO PETITIONER'S ALLEGATIONS

In an effort to craft an argument that they have standing to appeal the issuance of Permit No. 06-274RR, Petitioners have alleged irrelevant facts and misstated certain particulars pertaining to the development of the Copperleaf Subdivision. Specifically, Petitioners claim that Worthington Group (hereinafter "Copperleaf") has made inconsistent factual statements to the State Engineer's Office ("SEO"), the Park County Commissioners and the Department of Environmental Quality ("DEQ"). However, review of the petitions to the SEO, the permit application to the DEQ and the attached affidavits reveal that Copperleaf has remained forthright about its proposed development and its sources for a consistent water supply. A timeline of events reveals that there is nothing duplicitous about Copperleaf's representations to the various state agencies.

TIMELINE

April 18, 2005	Application for Permit to Appropriate Surface Water
April 20, 2005	Petition for Water Exchange filed with SEO

July 28, 2005	SEO Surface Water Permit No. 33288; SEO Order Granting Water Exchange
August 26, 2005	Petition for Review of Order Granting Water Exchange filed in state district court by Keiths
March 7, 2006	Park County Commission meeting, final plat approval
March 13, 2006- May 1, 2006	Groundwater testing and analysis conducted
May 26, 2006	Application for Permit to Construct No. 06-274RR filed with DEQ
October 5, 2006	Issuance of DEQ Permit to Construct No. 274RR
October 26, 2006	Northfork Citizen's Group Petition for Review of DEQ Permit to Construct No. 274RR
November 22, 2006	Hearing before the District Court in which Worthington Group advised Northfork Citizen's Group of relinquishment of interest in water exchange order.
April 13, 2007	District Court letter dismissing Copperleaf from appeal and finding water exchange order to be void.

As far back as July 28, 2005, Copperleaf had a water right which would provide an adequate source of water for the residential development. However, it was only after further testing (conducted *after* July 2005), that the State Engineer's Office and Copperleaf were confident the surface water permit would provide sufficient year-round water supply to the subdivision. While the Northfork Citizens Group was assiduously working to abolish the SEO's Water Exchange Order, Copperleaf had made the decision to abandon its interest in Order because it had learned the surface water permit would suffice. (*See, Easum Affidavit; Pilch Affidavit*).

On March 7, 2006 Copperleaf presented its final plan to the Park County Commissioners with the expectation that it would rely solely on the surface water permit for the water supply. Having obtained approval of its final plat, Copperleaf

submitted an application to the DEQ for a permit to construct a water supply and treatment system.

Shortly after the County Commission meeting, Copperleaf conducted substantial testing of the groundwater supply and learned that there is sufficient groundwater for the subdivision development. On May 26, 2006 Copperleaf submitted its DEQ application for a permit to construct. After extensive analysis and consideration, the DEQ issued Permit No. 274RR permitting Copperleaf to construct a water infiltration gallery, raw water pumps and pipeline, pumps and transmission lines, raw water treatment including micro-filtration, disinfection, three 35,000 gallon finished water storage tanks, a booster pump system, *and* three groundwater wells. The DEQ Permit to Construct was issued on October 5, 2006, almost seven months after the application was submitted. (Easum Affidavit; Pilch Affidavit).

The extensive analysis and testing conducted by Copperleaf, all done in accordance with DEQ's regulations and procedures, revealed an ample groundwater supply. In issuing Permit No. 06-274RR, the DEQ followed all of its procedures and regulations. The testing shows that nobody's groundwater supply will be adversely affected by the issuance of Permit No. 274RR. For that reason alone, the Council must find in favor of Copperleaf in this appeal. However, the unnecessary expense of a three-day hearing can be avoided altogether by dismissing the contested case hearing because Petitioners lack standing to bring this appeal.

II. PETITIONERS LACK STANDING TO BRING THIS APPEAL

Wyoming Rule of Civil Procedure 12(b) states: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is

required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.” Subject matter jurisdiction cannot be waived. *Hirschfield v. Board of County Comm’rs*, 944 P.2d 1139, 1141 (Wyo. 1997). Therefore, the “first and fundamental question on every appeal is that of jurisdiction; this question cannot be waived; it is open for consideration by the reviewing court whenever it is raised by any party, or it may be raised by the court of its own motion.” *Id.* (quoting *Pawlowski v. Pawlowski*, 925 P.2d 240, 243 (Wyo. 1996)). This same rule applies to this petition for review.

Standing is a concept used to determine if a party is sufficiently affected to insure that a justiciable controversy exists. *Id.* (citing to *Memorial Hospital of Laramie County v. Department of Revenue and Taxation of State of Wyoming*, 770 P.2d 223, 226 (Wyo. 1989)). More explicitly,

The doctrine of standing is a jurisprudential rule of jurisdictional magnitude. At its most elementary level, the standing doctrine holds that a decision-making body should refrain from considering issues in which the litigants have little or no interest in vigorously advocating. Accordingly, the doctrine of standing focuses upon whether a litigant is properly situated to assert an issue for judicial or quasi-judicial determination. [emphasis added].

State ex rel. Bayou Liquors, Inc. v. City of Casper, 906 P.2d 1046, 1048 (Wyo. 1995). A litigant is deemed to have standing when he has a “personal stake in the outcome of the controversy.” *Id.* Put another way, a litigant must have a “tangible interest” at stake. This interest requirement ensures that a litigant is sufficiently interested in a case to present a justiciable controversy. *Id.*

The right of appeal is entirely statutory. *Walker v. Board of County Comm’rs*, 644 P.2d 772, 774 (Wyo. 1982). Wyo. Stat. § 35-11-103 (a) (vii) defines “aggrieved party” as

any person named or admitted as a party or properly seeking or entitled as of right to be admitted as a party to any proceeding under this act **because of damages that person may sustain or be claiming because of his unique position** in any proceeding held under this act.

As emphasized by the bolded print, a key provision of this statute is that administrative review is available to any person who sustains damages because of his unique position. An aggrieved or adversely affected person is one who has a legally recognizable interest in that which will be affected by the agency action. *Hoke v. Moyer*, 865 P.2d 624, 628 (Wyo. 1993). Petitioners must show injury or potential injury by alleging a perceptible—*not just speculative*—harm resulting from the issuance of Permit No. 274RR. *Fosters, Inc. v. City of Laramie*, 718 P.2d 868, 872 (Wyo. 1986). Furthermore, Petitioner's interests must be substantial, immediate and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient. *L Slash X Cattle Co, Inc. v. Texaco, Inc.*, 623 P.2d 764, 769 (Wyo. 1981). Finally,

[P]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action....

Sinclair Oil Corp. v. Wyoming Public Service Comm'n., 63 P.3d 887, 895 (Wyo. 2003), *citing*, *Foster's Inc. v. City of Laramie*, 718 P.2d 868, 872-73 (Wyo. 1986).

In 2000, the Wyoming Supreme Court decided *Roe v. Board of County Comm'rs of Campbell County*, 997 P.2d 1021-1023 (Wyo. 2000). The Roes appealed the Campbell County Board of Commissioner's grant of final approval for the creation of Echo Subdivision. *Id.* at 1022. Specifically, developer RAG Wyoming Land Company sought to re-subdivide a portion of the subdivision into large tracts for livestock grazing. The BOCC granted approval and the Roes appealed to the

District Court, which affirmed the BOCC's decision. The Roes then appealed to the Wyoming Supreme Court. *Id.* The Supreme Court held that Appellants Roe did not have standing to pursue the appeal because they failed to articulate specifically how they had been injured:

The Roes have not presented specific facts to demonstrate how they have been injured by the Board's decision to approve the Echo Subdivision. **Their brief includes a general discussion about whether the administrative process was correctly followed but fails to specifically assert how they have been aggrieved by any alleged deviation from this process or by the final approval.**

* * *

Given the Roes' **failure to present specific, articulable facts to demonstrate how they were harmed** by the Board's decision, we hold that the **district court was without jurisdiction** to decide their case. [emphasis added].

997 P.2d at 1023. As in *Roe*, Petitioners here have failed to specifically assert how they have been aggrieved by the issuance of Permit No. 274RR.

Petitioners have artfully expressed outrage at what they (incorrectly) *perceive* to be inconsistent representations made by Copperleaf to the SEO and the County Commission. However, this Council's scope of review is strictly limited to:

...cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department (DEQ) or its air quality, land quality, solid and hazardous waste management or water quality divisions.

Wyo. Stat. § 35-11-112(a) (Lexis 2005). Petitioner's ability to bring this matter to the Council must be based solely on actual harms resulting from the issuance of Permit No. 274RR. While Jamison and Hoszwa may have groundwater wells on adjacent property, they have failed to explain how the issuance of the Permit to Construct will adversely affect their interests.

III. SEO APPLICATION FOR WATER EXCHANGE IS IRRELEVANT TO THIS PROCEEDING.

Petitioners rely upon Copperleaf's application to the Wyoming State Engineer's Office in support of their position. Petitioners misrepresent both the substance and the purpose of Copperleaf's application. While considering the water supply for the subdivision, Copperleaf initially was concerned that there *may* not be sufficient groundwater supply to serve the residential community. Accordingly, Copperleaf applied for the water exchange with the State Engineer's Office. In the meantime, further analysis of the groundwater supply revealed that there *is* sufficient groundwater for this development. (Affidavit of Tom Pilch). This information was submitted in the application for this permit and reflected by the SEO's issuance of three groundwater permits dating back to September and December, 2005.

Petitioners also refer to the following statement contained in Copperleaf's application to the SEO for the water exchange:

Due to the need for a reliable, year-round domestic supply of water for the residents of Copperleaf Subdivision, the presence of *many* existing wells in the area around Copperleaf Subdivision, and the proven insufficient supply of ground water in the area...

This statement was made before further analysis revealed there is sufficient ground water available for this residential development. (Affidavits of Jeremy Easum and Tom Pilch). Geographic proximity without real, ascertainable harm, will not withstand a challenge to Petitioner's standing. *See, Hoke v. Moyer*, 865 P.2d 624, 628 (Wyo. 1993); *Fosters, Inc. v. City of Laramie*, 718 P.2d 868, 872 (Wyo. 1986); *L Slash X Cattle Co, Inc. v. Texaco, Inc.*, 623 P.2d 764, 769 (Wyo. 1981).

IV. JUDICIAL ESTOPPEL IS INAPPLICABLE

The doctrine of judicial estoppel may be invoked to foreclose a party from maintaining inconsistent positions in judicial proceedings. *Beaulieu v. Florquist*, 2004 WY 31, ¶ 16, 86 P.3d 863, 869 (Wyo. 2004), *citing*, *Amoco Production Co. v. Board of County Com'rs. Of County of Sweetwater*, 2002 WY 154, ¶ 17, 55 P.3d 1246, 1252 (Wyo. 2002). When the position taken by a party in the first proceeding is successful, that position “rises to the dignity of conclusiveness.” *Id.*, *quoting*, *Cross v. Berg Lumber Co.*, 7 P.3d 922, 930 (Wyo. 2000). The Wyoming Supreme Court applies the doctrine only sparingly. *Id.*, *citing*, *Polo Ranch Co. v. City of Cheyenne*, 2003 WY 15, ¶ 22, 61 P.3d 1255, 1262 (Wyo. 2003).

The appeal from the SEO water exchange order before the district court pertained strictly to the water exchange order. In support of its application for the water exchange, Copperleaf stated that there *may* be insufficient groundwater. The representation was speculative in that regard. Further testing revealed an adequate water supply, justifying the issuance of Permit No. 274RR. The issue as to whether or not there is sufficient groundwater in the area was never addressed or resolved by the SEO or by the district court on appeal. Accordingly, judicial estoppel does not bar the Copperleaf from establishing that there is sufficient groundwater availability to justify the issuance of Permit No. 274RR.

Throughout the four administrative appeals Petitioners have brought seeking to shut down the Copperleaf subdivision, Copperleaf's legal positions and legal arguments have remained consistent. Copperleaf has consistently maintained that the Petitioners lack standing to appeal agency decisions made regarding this development. (*See, e.g.* Petitioner's Exhibit F, in which Copperleaf challenges

Petitioner's standing). Accordingly, judicial estoppel does not prevent Copperleaf from continuing to argue that Petitioners lack standing to bring this appeal.

V. THIS MATTER DOES NOT JUSTIFY THE RELAXED STANDING ANALYSIS.

Petitioners suggest that the relaxed standing requirement in matters of great public interest or importance should be applied in this case. In May of this year, the Wyoming Supreme Court declined to extend this analysis in *Hicks, et. al. v. Dowd, et. al.*, 2007 WY 74, ¶22, where a Johnson County resident filed a declaratory judgment action seeking to enforce the terms of a charitable trust held by the Johnson County Scenic Preserve with the Johnson County Commissioners serving as trustees.

In *Hicks*, the plaintiff/appellant argued that he had standing to enforce the terms of a conservation easement restricting development of 1,000 acres held in trust by the County. The Supreme Court disagreed, finding that the Uniform Charitable Trust Act limited standing to enforce a charitable trust to the Attorney General, the trustee or a qualified beneficiary. Furthermore, the Court declined to invoke the doctrine of great public interest, stating that this doctrine should be applied with caution and its exercise “must be a matter where strict standards are applied to avoid the temptation to apply the judge’s own beliefs and philosophies to a determination of what questions are of great public importance.” 2007 WY at ¶ 34. The Court specifically stated:

We decline to expand the doctrine to encompass alleged violations of an agency’s rules and regulations that do not directly implicate the constitutionality of legislation or an agency’s actions or inactions.

Id. Here, Petitioners challenge the issuance of Permit No. 274RR. However, the grounds for their challenge are not articulated in their Petition for Review or

developed in their Response to Motion to Dismiss. Notably, Petitioners do not allege violations of the DEQ rules, nor do they claim the DEQ's action is unconstitutional or illegal. Rather, Petitioners allege that Copperleaf has, with duplicitous and nefarious methods, managed to dupe the DEQ into issuing Permit No. 274RR.

The right to appeal the DEQ's decision is strictly statutory and limited to "aggrieved parties" who are actually harmed because of their "unique position." Wyo. Stat. § 35-11-103. The statute expressly restricts standing to those in a "unique position." The *Hicks* holding precludes standing to the general public unless the claim challenges the constitutionality of an agency's rule or regulation. As in *Hicks*, the "doctrine of great public importance" cannot be invoked to grant Petitioners standing.

VI. CONCLUSION

The issues raised in this case do not justify the invocation of the 'great public importance doctrine' permitting a more relaxed threshold for standing. Furthermore, Copperleaf has not made any inconsistent representations in other court proceedings which would implicate the doctrine of judicial estoppel.

The statutory right to bring a petition for review before the Council is limited to "aggrieved parties" as defined in Wyo. Stat. § 35-11-103 (a) (vii). Petitioners do not have standing to bring this appeal because they are not in a "unique position," and because they cannot articulate any ascertainable harm to them resulting from the issuance of Permit No. 274RR. Accordingly, this case must be dismissed for lack of subject matter jurisdiction because the Petitioners lack standing.

DATED this 24th day of May, 2007.



LAURENCE W. STINSON
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Powell, Wyoming 82435
Attorney for The Worthington Group
of Wyoming, LLC

CERTIFICATE OF SERVICE

I, Laurence W. Stinson, attorney for the Worthington Group of Wyoming, LLC, hereby certify that on the 24th day of May, 2007, I served a true and correct copy of the foregoing correctly addressed to the following:

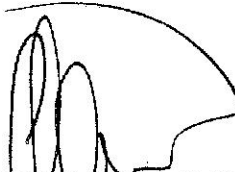
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Laurence W. Stinson

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
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IN THE MATTER OF THE APPEAL OF)
THE COPPERLEAF SUBDIVISION WATER)
SUPPLY, TREATMENT, STORAGE, AND) Docket No. 06-3814
BOOSTER PUMPING SYSTEMS,)
Permit No. 06-274RR/Reference No. 06-236RR)

**AFFIDAVIT OF JEREMY EASUM IN
SUPPORT OF MOTION TO DISMISS**

STATE OF WYOMING)
)
) :ss
COUNTY OF PARK)

I, Jeremy Easum, being first duly sworn upon his oath, depose and state as follows:

1. I am a professional engineer, licensed in the State of Wyoming, and project manager at Sage Civil Engineering. The Worthington Group of Wyoming, LLC retained Sage Civil Engineering to conduct various engineering projects for the Copperleaf Subdivision development. The projects included analysis of the water supply and design of the water supply and treatment systems.

2. A surface water permit was applied for and obtained from the State Engineer's Office. The surface water permit no. 33288 approved on July 28, 2005 provides adequate year-round water for this residential subdivision.

3. In addition to applying for the surface water permit, the Worthington Group applied for a water exchange order from the State Engineer's Office. This petition for the water exchange was filed on April 20, 2005 and it was intended to provide a supplemental source of water, should regulation ever occur. The SEO issued an order for the water exchange on July 28, 2005.

4. A citizen's group challenged the water exchange order in state district court. Prior to the hearing on the matter the Worthington Group decided to withdraw its petition for the water exchange as it was unnecessary after further consideration. However, the petition for the water exchange could not be withdrawn because an order for the water exchange had already been issued. In any event, the citizen's group was advised at the district court hearing that the Worthington Group had relinquished any claim or interest in the water exchange order.

5. I attended a Park County Commissioner's meeting on March 7, 2006 on behalf of the Worthington Group. At this meeting, the Commission reviewed and approved the final plat for the Copperleaf Subdivision. Part of the discussion at the meeting concerned the water supply system for the subdivision. I advised the commission that the subdivision was using a surface water permit which provides 200 gallons of water per minute, which was more than adequate for the proposed development. I also advised that there are two existing on-site groundwater wells which would not be used as part of the water system. Mr. Stinson, the Worthington Group's attorney, advised the Commission that "the developer may be pursuing backups," meaning a supplemental water supply.

6. The Park County Commission approved the final plat of the Copperleaf Subdivision and construction of the subdivision is underway. The approval and construction of the subdivision is based upon the surface water permit no. 33288, which provides ample water to the subdivision with no adverse effect to any senior water right holders, nor to the neighboring properties.

7. Shortly after the March 7, 2006 County Commission meeting, the Worthington Group began investigating groundwater as a supplemental water source. Between March 13th and May 1st, 2006 (approximately) analysis was done on the groundwater supply and it was determined that there is adequate groundwater for the subdivision without creating any adverse effects on adjacent properties. This determination was made after the March 7, 2006 County Commission meeting.

8. The reason the Worthington Group pursued the groundwater supplemental water supply was to have an alternative source of water during maintenance periods for the infiltration system for the surface water supply. An alternative water source would allow the infiltration system to be turned off for maintenance work.

9. On May 26, 2006 the Worthington Group submitted an application to the DEQ for a surface water infiltration gallery, raw water pumps and pipeline, three groundwater wells, pumps and transmission lines, raw water treatment including micro-filtration, disinfection, three 35,000 gallon finished water storage tanks, a booster pump system, and all specified controls and alarms.

10. The DEQ issued a permit to construct the above system in Permit No. 274RR. The Northfork Citizen's Group is challenging this Permit to Construct No. 274RR in the above-captioned proceeding before the Environmental Quality Council.

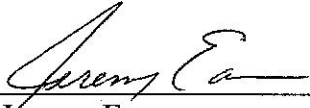
11. The additional water supply from the three water wells is supplemental and the County's restriction on the use of the three water wells is inconsequential to the development. However, the Permit to Construct the water supply, storage, treatment and booster pumping systems is essential for this residential development.

12. The testing and analysis shows that the use of the three water wells approved in Permit No. 274RR will not have any deleterious effect on the water supply on adjacent

properties. Additionally, the surface water permit for the Copperleaf Subdivision provides an ample water source for this residential development.

Further affiant sayeth naught.

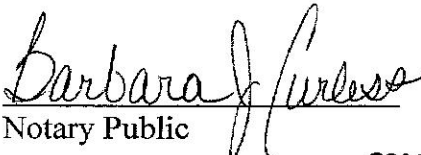
DATED this 24th day of May, 2007.



Jeremy Easum

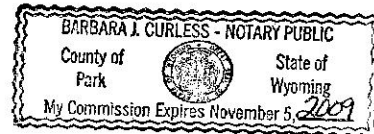
STATE OF WYOMING)
) ss.
COUNTY OF PARK)

Subscribed and sworn by Jeremy Easum before me this 24th day of May, 2007.



Notary Public

My commission expires: 11-05-09



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

IN THE MATTER OF THE APPEAL OF)
THE COPPERLEAF SUBDIVISION WATER)
SUPPLY, TREATMENT, STORAGE, AND) Docket No. 06-3814
BOOSTER PUMPING SYSTEMS,)
Permit No. 06-274RR/Reference No. 06-236RR)

**AFFIDAVIT OF TOM PILCH IN SUPPORT OF
WORTHINGTON GROUP'S MOTION TO DISMISS**

STATE OF WYOMING)
) :ss
COUNTY OF SHERIDAN)

I, Thomas J. Pilch, P.E., P.G. being first duly sworn upon his oath, depose and state as follows:

1. I am a professional engineer and a professional geologist and principal of Pilch Engineering located at 41 E. Burkitt in Sheridan, Wyoming. I have worked as a professional engineer and professional geologist since 1990 and I have owned and operate Pilch Engineering since 1992.

2. I was retained by the Worthington Group of Wyoming, LLC to conduct testing on the water well supply for the proposed Copperleaf Subdivision in Park County, Wyoming.

3. I did not prepare the application for the Permit No. 06-274RR at issue in the above-referenced matter, but some of my analysis and testing of the groundwater wells was included in it.

4. All of the wells at the Copperleaf Subdivision and the wells located on adjacent properties are using the same water aquifer.

5. Over the past 3 years, I conducted groundwater pumping tests on the wells already existing on-site at the Copperleaf Subdivision, I conducted a hydrogeologic review of the area, and drilled 6 additional wells at the site. The results from the testing and analysis I conducted are expressed to a reasonable degree of probability in my field as an engineer and geologist. The kind of testing and analysis I conducted are of the type ordinarily and reasonably relied upon by engineers and geologists.

6. The pump testing involved pumping existing on-site water wells for twenty four hours at rates that exceed what the Copperleaf Subdivision's (once fully developed) usage will

be for one day. We then measured how much the water drops in the well, which indicates the aquifer's characteristics. With the pump test results, the hydrogeologic evaluation and the drilling of 6 additional wells on-site, the aquifer recharges more water than what the subdivision will be using.

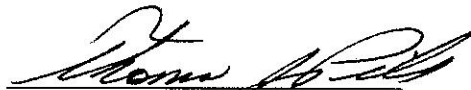
7. The tests and analysis show that the proposed use of the wells for the Copperleaf Subdivision will have no effect on the adjacent properties and their water wells.

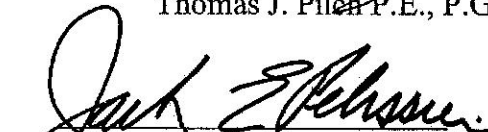
Further affiant sayeth naught.

DATED this 21 day of May, 2007.

STATE OF WYOMING)
) ss.
COUNTY OF SHERIDAN)

Subscribed and sworn by Thomas J. Pilch before me this 21 day of May, 2007.


Thomas J. Pilch P.E., P.G.


Notary Public

My commission expires:

