

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

IN THE MATTER OF THE APPEAL )  
AND REVIEW OF THE ISSUANCE )  
OF WYOMING POLLUTANT DISCHARGE )  
ELIMINATION SYSTEM (WYPDES) ) Dockets No. 06-3816, 06-3817  
GENERAL PERMITS )  
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**RESPONSE IN OPPOSITION TO WYOMING OUTDOOR COUNCIL  
APPEALS OF PUMPKIN CREEK GENERAL PERMIT, PERMIT  
NUMBER WYG280000, AND WILLOW CREEK GENERAL PERMIT,  
PERMIT NUMBER WYG290000**

Pursuant to the Wyoming Department of Environmental Quality (“DEQ”) Rules of Practice and Procedure, Chapter 2, Section 7, Yates Petroleum Corporation, Marathon Oil Company and Citation Oil & Gas Corp. (“Intervenors”) hereby file this Response to Wyoming Outdoor Council’s (“WOC”) Petition for Review of the Pumpkin Creek and Willow Creek General Permits. Intervenors respectfully request that, the Environmental Quality Council (“EQC”) not grant the sought-after relief in the WOC petitions or, in the alternative, the EQC remand the General Permits with instruction to develop effluent limits and conditions supported by available background water quality data and technologically feasible methods. Intervenors filed a separate Petition for Leave to Intervene on July 3, 2007.

**ISSUES UNDER APPEAL**

1. WOC has appealed DEQ’s issuance of the Pumpkin Creek General Permit, Docket Number 06-3816, and the Willow Creek General Permit, Docket Number 06-3817. WOC’s allegations are nearly identical in each appeal. As a result, EQC has consolidated these petitions.
2. WOC presents seven issues for review in its appeal of each of the General Permits: (1) the General Permit is a rule; (2) issuance of the General Permit violates Wyoming Water Quality Rules and Regulations (“WWQRR”); (3) the Wyoming Environmental Quality Act (“EQA”) does not authorize the issuance of General Permits; (4) on-channel reservoirs authorized by General Permits are treatment works; (5) different categories of discharge for the same class of waters is arbitrary and capricious; (6) agricultural uses are not protected by the General Permits; and (7) erosion protection controls in the General Permits are inadequate.

3. Intervenor disagree with the above allegations and respectfully request the opportunity to respond. Intervenor are also appealing the issuance of the Pumpkin Creek and Willow Creek General Permits (as well as the Fourmile Creek Watershed Permit Plan) in EQC proceeding 06-3815. While Intervenor take issue with certain conditions in the General Permits, Intervenor do not take issue with DEQ's *authority* to issue General Permits.
4. For purposes of this Response, Intervenor are not restating or incorporating the concerns raised in its Notice of Appeal and Request for Hearing (Docket No. 06-3815), but rather, are responding to WOC's allegations.
5. Intervenor acknowledge the EQC's set schedule regarding WOC's Motion for Summary Judgment and do not intend to change the scheduled Summary Judgment filing deadlines or Summary Judgment hearing date.

## **RESPONSES TO WOC's APPEAL**

### **I. The General Permits are Licenses, Not Rules.**

6. WOC alleges that a General Permit is a rule and that DEQ did not promulgate the General Permits as rules. The General Permits are not rules; they are *licenses* issued by Wyoming DEQ.
7. A "license" is defined as including "the whole or part of any agency *permit*, certificate, approval, registration, charter or similar form of permission required by law." W.S. 16-3-101(b)(iii) (*italics added*). The General Permits are agency permits authorizing Permittees to discharge as required by law (*see WWQRR, Chapter 2, Section 4*).
8. The procedures for licensing are distinctly different than those for rulemaking and only require public notice, a comment period and the opportunity for public meeting and/or hearing. *See 2 WWQRR Sections 15-17, W.S. 16-2-113(a)*.
9. Because the General Permits are licenses, licensing procedures apply and DEQ has followed these requirements.
10. Finally, the General Permits were issued under 2 WWQRR § 4 which specifically allows DEQ to issue General Permits. This regulation *was* promulgated pursuant to Wyoming Administrative Procedure Act rulemaking requirements.

### **II. Issuance of the General Permits Complies with the Requirements of Chapter 2, WWQRR.**

11. WOC alleges that issuance of the General Permits violates DEQ General Permit regulations at 2 WWQRR § 4.

12. General Permits may be written to regulate effluent discharges, if the sources all:

- (A.) Involve the same or substantially similar types of operations;
- (B.) Discharge the same types of pollution or wastes;
- (C.) Require the same effluent limitations or operating conditions;
- (D.) Require the same or similar monitoring;
- (E.) In the opinion of the administrator, are more appropriately controlled under a general permit than under individual permits.

2 WWQRR § 4(a)(iii).

13. The Pumpkin and Willow Creek General Permits involve the same type of operations (coal bed natural gas mining) and types of discharges (coal bed produced water) and require Permittees to comply with the same effluent limitations, operating conditions and monitoring. The General Permits were issued based on the Section 4(a)(iii) criteria.

14. The regulations do *not* restrict DEQ from establishing categories of discharges within a General Permit. Instead of issuing numerous General Permits to cover the same pollutant discharges from the same type of operations, DEQ established different categories of discharges within a single General Permit based on the location of the outfall in proximity to the headwater or whether the discharge is contained prior to discharge. Within each category of discharge in the Pumpkin Creek and Willow Creek General Permits, each Permittee must comply with the *same* effluent limitations, operating conditions, monitoring and management practices.

15. To the extent that WOC alleges that a General Permit cannot contain different effluent limitations *within the permit itself* for different discharges, the regulations provide no such limitation.

### **III. The Wyoming EQA Authorizes DEQ to Create and Issue General Permits.**

16. WOC alleges that DEQ does not have the authority to create and issue General Permits.

17. The EQA provides the DEQ Director the power to perform “any and all acts necessary to promulgate, administer and enforce the provisions of [the] Act and any rules, regulations, orders, limitations, standards, requirements *or permits* adopted, established or issued thereunder.” EQA 35-11-109.

18. Under the EQA, the Administrator of the Water Quality Division is authorized to recommend to the Director “rules, regulations, standards and *permit systems* to promote the purpose of [the EQA].” EQA 35-11-302(a).

19. The EQA gives the Director authority to promulgate permit systems, including a system of General Permits. DEQ promulgated the General Permit program (i.e., a

*system of permits*) in 2 WWQRR § 4 following the rulemaking process and culminating in the Governor signing the rule into law on November 11, 2004.

20. Finally, WOC's argument that DEQ does not have the authority to issue General Permits should have been made in an appeal during the WWQRR Section 4 rulemaking promulgating the General Permit program. WOC's unreasonable delay in bringing its challenge has prejudiced all other parties who did participate in the General Permit rulemaking proceedings.

#### **IV. On-Channel Reservoirs are Not Treatment Works.**

21. WOC alleges that on-channel reservoirs authorized by the General Permits cannot be authorized by the General Permit but must be authorized as treatment works. This is not supported by WWQRR.
22. Treatment Works is defined as "either a publicly or privately owned device or system used to treat either domestic sewage or a combination of domestic sewage and commercial or industrial waste of a liquid nature." 3 WWQRR § 3(a)(xviii).
23. The produced water has no domestic sewage component. Therefore, the on-channel reservoirs are not treatment works and are not subject to wastewater facility permitting in WWQRR Chapter 3.

#### **V. Different Effluent Limits for Discharges to On-Channel Reservoirs and Direct Discharges to Pumpkin Creek are Permissible under General Permits.**

24. WOC alleges that establishing different categories of discharge within a single General Permit is impermissible.
25. As stated in paragraphs 12 through 14 above, neither the Statute nor the regulations restrict DEQ from establishing categories of discharges within a General Permit. DEQ has the authority to create different effluent limits within the Permit so long as they are based on scientific data, technical practicability and economic reasonableness. *See* 2 WWQRR § 5(c)(iii).

#### **VI. Agricultural Uses Will be Protected by the General Permits.**

26. WOC alleges that effluent limitations contained in the General Permits violate WWQRR as they are not protective of agricultural uses.
27. Intervenors agree that the established effluent limits are not appropriate as they do not reflect natural water quality in violation of WWQRR Chapter 1, Section 20.

#### **VII. Erosion Control Protections in the General Permits are Adequate.**

28. WOC alleges that the General Permits do not adequately protect the watershed against erosion. These allegations are unfounded.
29. The General Permits specifically and fully address stream channel protections. Pumpkin Creek General Permit paragraph 8.1, and Willow Creek General Permit paragraph 6.1, require headcut identification, annual monitoring and implementation of a headcut mitigation plan should erosion contribute to a water quality violation or impairment.

### **RESERVATION OF RIGHTS**

30. Intervenors reserve the right to file a legal memorandum of point and authorities in support of their Response to WOCs Appeal of the Pumpkin Creek and Willow Creek General Permits.

### **REQUEST FOR RELIEF**

For all the foregoing reasons, Intervenors request that the EQC:

- A. Not grant the sought-after relief in the WOC petitions.
- B. Remand the General Permits with instruction to DEQ's Water Quality Division to develop effluent limits and conditions supported by available background water quality data and technologically feasible methods.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of July, 2007.



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ATTORNEYS FOR INTERVENORS

## Certificate of Service

I certify that on this 3<sup>rd</sup> day of July, 2007, service of a true and complete copy of Intervenor's Response in Opposition to Wyoming Outdoor Council's Appeals of Pumpkin Creek General Permit, Permit Number WYG280000, and Willow Creek General Permit, Permit Number WYG290000 in File Nos. 06-3816 and 06-3817 was made upon each party or attorney of record herein as indicated below.

The ORIGINAL and ten (10) copies were filed by registered U.S. Mail on July 3, 2007 with:

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