BEFORE THE
WYOMING ENVIRONMENTAL QUALITY COUNCIL

IN RE Willow Creek Watershed General Permit,	)	
Pumpkin Creek Watershed General Permit,	)	
and Four Mile Creek Plan	)	Docket No. 06-3815
	)	Docket No. 06-3816
	)	Docket No. 06-3817

PETITIONER'S REPLY BRIEF TO RESPONDENT DEQ AND INTERVENORS MARATHON, YATES AND CITATION OIL & GAS ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Comes now the Wyoming Outdoor Council and for its Reply to Respondent Department of Environmental Quality's (hereinafter "DEQ") and Intervenors' Marathon Oil Company, Yates Petroleum Corporation and Citation Oil and Gas Corp. (hereinafter "the Intervenors") Response to the Petitioner's Motion for Summary Judgment hereby presents the following:

There are No Genuine Issues of Material Fact

First of all, it is important to point out that the Motion for Summary Judgment of the Petitioner in this matter presents three legal issues for resolution by the Environmental Quality Council (hereinafter "EQC"). Neither the DEQ nor the Intervenors argue that this matter is not susceptible of resolution by summary judgment on the ground that there are material issues of fact in dispute. With respect to the legal issues presented by the Petitioner, all parties apparently agree that there are not genuine issues of material fact in dispute, and the EQC is therefore empowered to decide these issues on the merits of the legal issues to be adjudicated.

It is therefore appropriate that the EQC decide this matter before proceeding to a contested case hearing in this matter, since resolution of any one of the three issues raised by the Petitioner, in favor of the Petitioner, is fatal to the legality of both the Pumpkin Creek Watershed General Permit and Willow Creek Watershed General Permit. The matter could therefore be

resolved without the necessity of having a contested case hearing on these permits. It is in the interests of judicial economy that the EQC rule on these issues without further ado.

General Permits Must be Promulgated as Rules

Nothing that either the DEQ or the Intervenors have stated can justify the issuance of the general permits in this case without following the proscriptions of the Wyoming Administrative Procedure Act. A "rule" is defined as an agency statement of general applicability, W.S. 16-3-101, and since the general permits are exactly that—agency statements of general applicability—the general permits clearly must be promulgated as rules, but yet were not. Even DEQ's Ex. D, the June 1, 1990 opinion of the undersigned attorney cited by DEQ, notes that, referring to the concept of a general permit, "This is, in effect, a permit by rule." Ex. D, p. 2.

The argument of the Intervenors can be easily refuted. They claim that the general permits meet the definition of "license" under the WAPA. License is defined as "the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, but it does not include a license required solely for revenue purposes." W.S. 16-3-101(b)(iii). The Intervenors cite no case law for their argument that general permits constitute licenses. It is not surprising that there would not be any.

While this can get confusing, since the DEQ is issuing a "permit by rule" (a.k.a. the general permits) in this case, it need not be. Imagine, if you will, any Wyoming agency that issues licenses. Let's say, for instance, a license to operate in the State of Wyoming as a cosmetologist. Now imagine that the Wyoming Board of Cosmetology decides it wants to issue a "general license" for all cosmetologists of a certain type to operate and practice under state law, without the need for applying for and obtaining an individual license. For instance, it may conclude that all cosmetologists who graduate from an accredited beauty school in the State of

Wyoming are automatically cosmetologists. No further individual license required. Could the Cosmetology Board do this? Perhaps. But not if it did not issue such a purported "general license" that applied to a whole group of people, unknown and unidentified at the time of issuance, as a rule of the Cosmetology Board. To make such a ruling and issue it just as if it was any other individual license would clearly violate the WAPA.

There is a bright conceptual line between the notion of a "license," which is issued to one individual, and a rule, which applies to a whole group of people or organizations or companies. Calling it a "general permit" does not change its essential character—that of a rule that applies generally to a whole category of individuals or entities that are not identified at the time of the issuance of the general permit. "A rose by any other name would smell as sweet," as Shakespeare says. And this general permit is still a rule—it's just being referred to as a "general permit." But that name should not be allowed to hide its essential character.

Perhaps to put it more grotesquely, "You can put lipstick on a pig, but it is still a pig." It is important that the EQC recognize this porcine entity, the general permit, for what it really is, and look past the linguistic frills that the DEQ has used to hide its essential character. Once it is recognized to be a rule, regardless of its misleading name, it is easy to then order the DEQ to comply with the Wyoming Administrative Procedure Act and promulgate it as a rule. There is no escape from this conclusion. Once it is recognized that these general permits are rules (by other names), then it is axiomatic: they must be promulgated as rules, as required by the WAPA. Nothing that the DEQ or the Intervenors have put forth refutes this basic truth.

The Pathfinder Mines Case is Inapposite

The DEQ cites the case of Pathfinder Mines Corp. v. State Board of Equalization, 766 P.2d 531, 535-536. In that case, the Wyoming Supreme Court ruled that the promulgation of its

valuation system for the taxation of uranium minerals was not required "as long as statutory and constitutional rights to protest and contest are afforded to the taxpayer." While the Supreme Court did carve out a small exception to the WAPA requirement of rule promulgation, it does not apply to this case. First, it must be remembered that taxation cases are generally regarded as *sui generis* and should not be applied to other situations that do not involved taxation matters. Secondly, in the Pathfinder Mines case, the promulgating body, the State Board of Equalization (and not the Department of Revenue) is the decision-making body for the valuation system. Here in this case, the promulgating body (the EQC) has made no decision on the issuance of these general permits. Those general permits are in effect right now, without any decision having been rendered by the EQC to adopt the general permit approach that DEQ seems to love so much, but for which the EQC has not even had the opportunity to rule on—and may not have, had Wyoming Outdoor Council not brought this contested case before the EQC. (The Intervenors have appealed the general permits on different factual issues, and do not contest the legality of the general permits.)

Thirdly, and most importantly, persons who may become affected by the issuance of these general permits at a later time, due to some as-yet unidentified permittee deciding that it wants to begin discharging pollution in such a manner that it may affect him or her, will have no opportunity to challenge the legality of these general permits. Thus, the statutory and constitutional rights to protest and contest will not be afforded such affected persons, such as landowners who may discover that an upstream discharge of pollution will adversely affect his or her interests. While the DEQ cites Chapter 2, Sec. 4(i)(ii), WQR&R, as allowing individuals to petition the Water Quality Division Administrator to require any person seeking coverage under a general permit to instead apply for and obtain an individual permit, this is not the same as

affording such interested person the right to challenge the general permit itself. In fact, the general permits at issue herein cannot be challenged once the 60-day time limit has elapsed for appealing it to the EQC (this is the same rule that applies for all individual discharge permits). Similarly, if an operator, who does not (at the time of general permit issuance) have any interest in any leasehold within the general permit geographic area, but later acquires such an interest, then wants to challenge that general permit, such an operator would be foreclosed from challenging the general permit until the permit comes up for renewal after five years in existence. Again, "rights to protest and contest" are foreclosed in such cases.

By contrast, any taxpayer who becomes affected by the valuation system of the State Board of Equalization, as in the Pathfinder Mines case, can contest its legality and applicability to him afresh, at any time that the State Board of Equalization makes a valuation determination. Such is simply not the case for the general permits at issue in this matter.

There is No Statutory Authority For Issuance of General Permits Under the Environmental Quality Act

The DEQ essentially argues, with respect to the statutory authority of the DEQ to issue general permits, that, in effect, "they didn't tell us we couldn't do it." Unfortunately that argument does not count for much, given the history of general permitting authority that the Wyoming Legislature has extended to the DEQ. First and foremost is the fact, which DEQ does not address, that the legislature does understand what a general permit is, and how to authorize DEQ to issue general permits. See W.S. 35-11-206(d). The legislature extended the authority to issue general permits to the DEQ for air quality permits. No such similar authority was extended for water quality permits under Article 3 of the Environmental Quality Act, W.S. 35-11-301, et seq.

While DEQ is correct to assert that the failure to pass legislation can occur for various reasons, one reasonable interpretation of the failure of the legislature to pass HB 0212 is that perhaps it was not regarded by the legislature as a mere clarification. But rather the legislature saw the bill for what it was: the extension of new authority to issue general permits for the Water Quality Division of DEQ. HB 0212 states that it was an act "clarifying general watershed permits relating to coal bed methane production." But this was a subterfuge, since there was nothing to "clarify." There is no provision in the Environmental Quality Act addressing "general watershed permits relating to coal bed methane production" to be clarified. It may very well be that the legislature rejected such dissembling by the authors of the bill and decided they wanted to think long and hard about extending additional authority to the DEQ/WQD that it did not now have.

The idea that the 16-year history of regulations that authorize some kind of general permit to be issued by the Water Quality Division somehow implies legislative consent or authorization must be rejected in the instant case. The breadth and scope of the authority asserted by DEQ in this case, to promulgate watershed general permits, so far outstrips the form and substance of previous general permits issued by the DEQ that no comparison can or should be made. The most likely probability is that the Wyoming legislature was not alerted to the general permit issue for water quality permits until this last legislative session. And when given the opportunity to extend the authority of the DEQ/WQD to issue watershed general permits, via HB 0212, the Wyoming legislature said "no thanks."

The DEQ has Created Different Effluent Limitations for the Same Category of Discharge, Thus Violating Their Own Regulations

The DEQ argues that it did not issue the general watershed permits in this case in violation of its own regulations. But let's be clear. Chapter 2, Section 4(a)(iii), allows DEQ to

issue general permits to "regulate certain effluent discharges if the sources all ... (B) Discharge the same types of pollution or wastes; [and] (C) Require the same effluent limitations or operating conditions...."

For DEQ to rationalize away these provisions by arguing that they can set up innumerable categories of discharges for the exact same effluent (in this case, coal bed methane produced water) within one general permit is to have the effect of eliminating any meaningful interpretation of these regulatory requirements. The fact is this: DEQ has taken one type of effluent in this case (coal bed methane produced water) and established more than one set of effluent limitations for that one type of effluent. But that it cannot do. It violates Chapter 2, Section 4(a)(iii)(C).

Perhaps DEQ could have more than one category of effluent within one general permit. This is a reasonable interpretation of the federal regulations DEQ cites in its brief. See DEQ Ex. F. But note that the Commonwealth of Puerto Rico is given as an example of a possible water quality general permit that could comply with the EPA's general permit regulations. See DEQ Ex. F, at p. 3. The EPA states that Puerto Rico's effluent limitations could be applied in a general permit because Puerto Rico does not allow mixing zones, and therefore all of Puerto Rico's water quality based effluent limitations (WQBELs) would have to "apply to all discharges without variation." But this is exactly the problem created by DEQ in this case. The DEQ has, in these general permits, created <u>different</u> effluent limitations for the <u>same</u> effluent, depending on the distance from the Powder River (a Class 2 River). It cannot create different effluent standards for the same effluent as part of a general permit. It is creating the exact problem that the EPA warned about in the Puerto Rico example. <u>The EPA said that the same water quality</u>

standards would have to apply at the point of discharge, to all discharges. DEQ Ex. F, at p. 3. Under the Willow Creek and Pumpkin Creek Watershed General Permits, this was not done.

The Intervenors have attempted to argue that some of the DEQ categories of discharge are WQBELs and some are Technology Based Effluent Limitations (TBELs). The Intervenors argue that a discharge to an on-channel reservoir is a TBEL because the reservoir serves as a treatment of the coal bed methane produced water. This is nonsense. These are waters of the State that the coal bed methane produced water is being discharged to -- whether to an on-channel reservoir (located within a stream) or directly to a stream with no reservoir present. A polluter cannot use waters of the State as a treatment works. That is not using "technology" to achieve treatment of the effluent. That is using waters of the State to achieve dilution. It is the same notion as a mixing zone. This is the exact type of variation of discharges that EPA indicated would be prohibited under a general permit scenario.

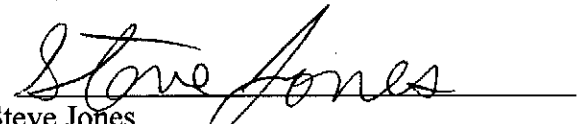
The effluent discharges in this case are all WQBELs. Even if the EQC were to conclude otherwise, it does not matter. There are different categories of discharges for the same effluent. The DEQ is chiefly concerned about the distance of these discharges from the Powder River. It is a legitimate concern, to be sure. But it is not the kind of concern that can be addressed in a general permit. It is the kind of concern that requires a case-by-case judgment on the part of DEQ as to the appropriateness of given effluent limits, given the site under consideration (factoring in such features as potential for dilution (mixing with natural water flows), geology, topography, stream ecology, etc.). It is exactly why only an individual permit should be allowed for such discharges.

Summary

In sum, both general permits are agency statements of general applicability and should have been promulgated as rules as required by the Wyoming Administrative Procedure Act, W.S. 16-3-101, et seq., but instead were improperly issued without such promulgation. Both general permits were issued by DEQ, even though there is no statutory authority to issue watershed general permits, and therefore are violative of the Environmental Quality Act, W.S. 35-11-302, and the Administrative Procedure Act, W.S. 16-3-103(d)(i). Both general permits do not comply with the requirements of Chapter 2, Section 4(a), Wyoming Water Quality Rules and Regulations, in that they do not meet the requirements for general permits. Specifically, they both have different effluent limitations for the same type of effluent, and provide for different monitoring requirements, all within the same permit.

Dated this 22nd day of August 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioner's Reply Brief by placing a copy of the same in the U.S. mail, postage prepaid, on the 22nd day of August, 2007, addressed to the following:

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