

FILED

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Terri A. Lorenzon, Director
Environmental Quality Council

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
GENERAL PERMITS AND THE)	(06-3815, 06-3817
FOURMILE CREEK WATERSHED PLAN)	Consolidated)
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**PETITIONERS YATES, MARATHON AND CITIATION'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Petitioners Yates Petroleum Corporation, Marathon Oil Company and Citation Oil and Gas Corp., collectively "Petitioners," pursuant to the Environmental Quality Council's (the Council's) request at the Hearing on May 1, 2008, hereby submit the following Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In order to establish no measurable decrease as provided for in Chapter 1, Section 20 of the Wyoming Water Quality Rules and Regulations, the background water quality must be known. Hearing Transcript, testimony of B. DiRienzo, p. 58, l. 14 – p. 59. l. 10.
2. DEQ believed it was establishing water quality based effluent limits for EC and SAR for Category IC discharges located upstream of points of irrigation. Hearing Transcript, testimony of B. DiRienzo, p. 50, l. 16 – p. 51, l. 17.

3. Ideally DEQ would have actual water quality information but there has been no categorization of background water quality in either Pumpkin Creek or Willow Creek. Hearing Transcript, testimony of B. DiRienzo, p. 70, l. 11 – p. 71, l. 1.
4. DEQ did not evaluate background water quality or soil chemistry data. Hearing Transcript, testimony of B. DiRienzo, p. 95, ll. 21 – 25; Hearing Transcript, testimony of K. Shreve, p. 172, ll. 5 – 22 (referring to Pumpkin Creek); Hearing Transcript, testimony of J. Thomas, p. 218, ll. 15 – 22 (referring to Willow Creek).
5. DEQ does not know what the background water quality of Willow Creek is. Hearing Transcript, testimony of J. Thomas, p. 238, ll. 1 – 11.
6. DEQ relied on the presence of plant growth, and not actual water quality or soil chemistry data, in establishing the effluent limits applicable to Category IC discharges for EC and SAR. Hearing Transcript, testimony of B. DiRienzo, p. 98, ll. 16 – 20; p. 116, l. 19 – p. 120, l. 2.
7. DEQ has not determined the actual background water quality in Pumpkin Creek or Willow Creek. (See, paragraphs 3 – 6, above.)
8. Water quality varies from drainage to drainage. Hearing Transcript, testimony of B. DiRienzo, p. 97, ll. 6 – 9; Hearing Transcript, testimony of J. Thomas, p. 242, ll. 5 – 7.
9. In seventy to ninety percent of the cases where a Tier 2-type approach is taken by an operator in the context of an individual permit, the water quality is

determined to be higher in EC and SAR than the default limits. Hearing Transcript, testimony of J. Thomas, p. 240, l. 19 – p. 241, l. 6.

10. Water quality on the east side of the Powder River is expected to be higher in EC and SAR, and of worse water quality, than limits established by the general permits. Hearing Transcript, testimony of B. DiRienzo, p. 99, ll. 11 – 14; p. 99, ll. 19 – 21.
11. The Pumpkin Creek and Willow Creek drainages are on the east side of the Powder River. Yates/Marathon/Citation Exhibit 10 (General Permit, WYG280000, Sept. 11, 2006), p. 61 of 62.
12. DEQ's default approach to developing effluent limits for EC and SAR does not typically result in effluent limits on the east side of the Powder River that are representative of actual background water quality. (See, paragraphs 8 – 11, above.)
13. DEQ hired a consultant to undertake a channel capacity survey for the general permits. Hearing Transcript, testimony of J. Thomas, p. 237, l. 12 – p. 239, l. 1.
14. Despite the fact that DEQ is the proponent of these general permits, it requires the operators to obtain background water quality data or soil chemistry data. Hearing Transcript, testimony of J. Thomas, p. 237, ll. 5 – 11.
15. Two of the four storm events measured from 2002 to 2005 demonstrated point in time measurements for EC and SAR that exceeded the effluent limits set forth in the general permits. Hearing Transcript, testimony of E. Kern, p. 432, l. 18 – p. 433, l. 2.

16. The average EC of the May 27, 2003 storm event flow at the Iberlin Monitoring station exceeded the effluent limit applicable to EC set forth in the general permits. Hearing Transcript, testimony of E. Kern, p. 354, l. 12 – p. 355, l. 7; Yates/Marathon/Citation Exhibit 1 (Evaluation of Surface Water Quality in the Pumpkin Creek Drainage Associated with the Development of the Watershed-Based Permit for Coalbed Natural Gas (CBNG) Discharges, August, 2007), Table 1.
17. The percentage of CBNG produced water in the four storm events evaluated by Dr. Kern is very small. Hearing Transcript, testimony of E. Kern, p. 432, l. 18 – p. 439, ll. 10 – 13.
18. Due to the small amount of CBNG contribution to the storm events, the signature of CBNG produced water in the flows is overwhelmed. Hearing Transcript, testimony of E. Kern, p. 432, l. 18 – p. 439, ll. 10 – 13.
19. Because the signature of CBNG produced water is overwhelmed by the amount of runoff contained in the storm flows at the Iberlin station, the high EC is due to the accumulation of sulfate. Hearing Transcript, testimony of E. Kern, p. 426, ll. 10 – 17.
20. There is minimal influence, if any, from CBNG produced water on the storm event water quality. Hearing Transcript, testimony of E. Kern, p. 358, l. 6 – p. 359, l. 8.
21. Evidence presented by Dr. Kern indicates that natural water quality is of higher EC and SAR than that set forth in the General Permits. (See, paragraphs 15 – 20, above.)

22. Mr. Innes is a landowner on the North and Middle prongs of Pumpkin Creek. Hearing Transcript, testimony of R. Innes, p. 298, l. 22 – p. 299, l. 5.
23. There has been no change in vegetation type on Mr. Innes' property as the result of CBNG produced water flow. Hearing Transcript, testimony of R. Innes, p. 313, l. 5 – p. 314, l. 4.
24. CBNG water has resulted in much more forage and additional vegetation growth on creek banks along Mr. Innes' operations. Hearing Transcript, testimony of R. Innes, p. 303, ll. 7 – 15.
25. DEQ performed no modeling to determine quantity of water that would be contained in a reservoir with capacity to hold a 50-year, 24-hour storm event. Hearing Transcript, testimony of B. DiRienzo, p. 103, ll. 6 – 12;
26. DEQ did no modeling to determine the size of reservoir necessary to contain a 50-year, 24-hour storm event. Hearing Transcript, testimony of K. Shreve, p. 178, l. 25 – p. 179, l. 9; testimony of J. Thomas, p. 253, ll. 15 – 19.
27. DEQ conducted no modeling to determine whether the requirement to contain a 50-year, 24-hour storm event would achieve the goals for which DEQ was attempting to regulate. Hearing Transcript, testimony of K. Shreve, p. 178, l. 25 – p. 179, l. 9; testimony of J. Thomas, p. 253, ll. 15 – 19.
28. The change from the 100-year, 24-hour storage requirement for category 2 discharges was not made until after the draft permits were issued. Hearing Transcript, testimony of K. Shreve, p. 176, ll. 18 – 23; Hearing Transcript, testimony of J. Thomas, p. 249, ll. 3 – 10.

29. Landowners commented that the 100-year, 24-hour storage requirement was too big. Hearing Transcript, testimony of K. Shreve, p. 177, ll. 7 – 10; Hearing Transcript, testimony of J. Thomas, p. 250, ll. 1 – 15.
30. There was no public comment allowed for the 50-year, 24-hour storage requirement for the Category II permitting option. Hearing Transcript, testimony of K. Shreve, p. 177, ll. 14 – 25; Hearing Transcript, testimony of J. Thomas, p. 249, l. 21 – 25.
31. Landowner testimony (provided by Mr. Innes) indicates that the increase in size of reservoirs required by the category 2 permitting option is problematic in terms of ranch management. Hearing Transcript, testimony of R. Innes, p. 318, ll. 20 – 24.
32. Landowner testimony provides that it is best, in terms of ranch management, to have full reservoirs. Hearing Transcript, testimony of R. Innes, p. 304, ll. 6 – 12.
33. Large reservoirs with unused capacity present management problems for landowners in Pumpkin Creek. Hearing Transcript, testimony of R. Innes, p. 306, ll. 5 – 24.
34. Overbuilt reservoirs present weed problems for landowners. Hearing Transcript, testimony of R. Innes, p. 306, l. 25 – p. 307, l. 20.
35. Overbuilt reservoirs present problems from a livestock watering perspective, such as cattle bogging in empty reservoirs. Hearing Transcript, testimony of R. Innes, p. 307, l. 21 – p. 308, l. 19.

36. Larger reservoirs present problems for landowners in that they cause increased land disturbance. Hearing Transcript, testimony of R. Innes, p. 305, ll. 13 – 16.
37. The increase in reservoir capacity will result in an increase in land disturbance of several hundred acres in existing reservoirs. Hearing Transcript, testimony of H. Lowham, p. 485, ll. 2 – 5; p. 502, ll. 5 – 13; Yates/Marathon/Citation Exhibit 2, (The Hydrology and Channels of Pumpkin, Willow and Fourmile Creeks, Campbell and Johnson Counties, Wyoming, and Appendices and Maps, August 31, 2007), p. E-1, F-1 & F-2.
38. Only one of the existing reservoirs in Pumpkin Creek has the capacity to hold a 50-year, 24-hour storm event. Hearing Transcript, testimony of H. Lowham, pp. 499, l. 4 – p. 500, l. 6; Yates/Marathon/Citation Exhibit 2, p. E-1.
39. Landowner testimony set forth concerns regarding the interruption of flow in the intermittent streams, due to the size of the reservoirs required by the 50-year, 24-hour containment provision. Hearing Transcript, testimony of R. Innes, p. 324, ll. 9 – 13.
40. Modeling in Pumpkin Creek demonstrates that large reservoirs will have a significant effect on runoff and stream flow within a stream channel, especially if they are empty. Hearing Transcript, testimony of H. Lowham, pp. 496, l. 9 – 497, l. 13; p. 506, ll. 6 – 20.
41. Expert testimony demonstrated that construction of reservoirs with unused capacity large enough to contain a 50-year, 24-hour storm event presents a

safety concern as the reservoirs cannot be observed while filling during the storm event. Hearing Transcript, testimony of H. Lowham, p. 504, ll. 9 – 22.

42. Landowner and expert testimony demonstrated that increasing the containment requirements in existing reservoirs to provide freeboard for a 50-year, 24-hour storm event will present ranch management problems (such as livestock watering and noxious weeds), increase land disturbance, interfere with natural flow regimes and present safety concerns. (See, paragraphs 31 through 41, above.)
43. The cap for SAR of 10 was not accepted by DEQ until after the general permits were issued. Hearing Transcript, testimony of B. DiRienzo, p. 69, l. 8 – p. 70, l. 7.
44. The Assimilative Capacity Allocation and Control Process is a policy. Hearing Transcript, testimony of B. DiRienzo, p. 107, ll. 9 – 12.
45. DEQ could revise the Assimilative Capacity Allocation and Control Process and impose additional requirements during the life of the permit. Hearing Transcript, testimony of K. Shreve, p. 210, l. 7 – p. 211, l. 21.
46. It is possible that the Assimilative Capacity Allocation and Control Process could change during the current life of the general permits. Hearing Transcript, testimony of B. DiRienzo, p. 107, ll. 18 – 22.
47. It is difficult to determine at this point how permittees may be affected in the event the Assimilative Capacity Allocation and Control Process changes during the life of the general permits. Hearing Transcript, testimony of B. DiRienzo, p. 107, l. 23 – p. 108, l. 7.

48. The “naturally irrigated lands” provision of the Agricultural Use Protection Policy was not adopted at the time the permits were issued. Hearing Transcript, testimony of K. Shreve, p. 207, ll. 11 – 17.
49. DEQ asked landowners in the Pumpkin Creek stakeholder meetings what agricultural crops were grown in the drainage and concluded that native hay was the only crop. Hearing Transcript, testimony of K. Shreve, p. 158, l. 19 – p. 159, l. 4.
50. DEQ reviewed BLM vegetation surveys to determine the type of native hay. Hearing Transcript, testimony of K. Shreve, p. 159, ll. 4 – 8.
51. DEQ asked landowners in Pumpkin Creek to identify irrigated lands during the permit process. Hearing Transcript, testimony of K. Shreve, p. 159, ll. 15 – p. 160, l. 9.
52. Landowners provided input on where irrigated lands were located in Willow Creek after being solicited for the information by DEQ. Hearing Transcript, testimony of J. Thomas, p. 270, ll. 17 – 23.
53. DEQ would evaluate additional data to determine whether the default effluent limits for EC and SAR are appropriate, given background water quality, if such water quality or soil chemistry data is provided to DEQ in the future. Hearing Transcript, testimony of J. Thomas, p. 282, l. 20 – 283, l. 23.
54. Neither Dr. Larry Munn nor Dr. Ginger Paige have reviewed background water quality data or soil chemistry data for the Pumpkin Creek or Willow Creek drainages. Hearing Transcript, testimony of L. Munn, p. 589, ll. 1 – 8; Hearing Transcript, testimony of G. Paige, p. 698, ll. 5 – 8.

55. Dr. Larry Munn has not personally observed the lands in Pumpkin Creek or Willow Creek. Hearing Transcript, testimony of L. Munn, p. 590, ll. 2 – 9.
56. Dr. Ginger Paige could not give an opinion specifically related to conditions in Pumpkin Creek or Willow Creek. Hearing Transcript, testimony of G. Paige, p. 698, ll. 9 – 14.

CONCLUSIONS OF LAW


1. The effluent limits applicable to Category IC discharges for EC and SAR are water quality based effluent limits.
2. Chapter 1, Wyoming Water Quality Rules & Regulations Section 20 requires that “surface waters which have the natural water quality for use as an agricultural water supply shall be maintained at a quality which allows for continued use of such waters for agricultural uses.”
3. Chapter 1, Section 20 requires that water quality based effluent limits be based on actual background water quality or soil chemistry data.
4. DEQ has failed to comply with the requirement of Section 20 in that it has not determined what the actual background water quality or soil chemistry is in either Pumpkin Creek or Willow Creek.
5. Based on testimony from DEQ, landowners and experts, the requirement for 50-year, 24-hour containment requirement applicable to Category II discharges is arbitrary and not supported by the record.
6. Permit conditions must provide “fair notice” to the permittee concerning what is required in order to comply with the permit.

7. Because the Assimilative Capacity Allocation and Control Process is a policy that is being incorporated by reference in the Permits, the underlying policy could be unilaterally altered by DEQ, changing the permittees obligations without compliance with either the permitting or rulemaking procedural requirements of the Environmental Quality Act.

WHEREFORE, Petitioners respectfully request the following relief that the General Permits be vacated and remanded to the DEQ with instructions as follows:

1. That the effluent limits applicable to Category IC discharges for EC and SAR be developed consistent with actual background water quality;
2. That the 50-year, 24-hour containment provision be removed from the permits;
and
3. That the incorporation of the Assimilative Capacity Allocation and Control Process in the permits be struck.

RESPECTFULLY SUBMITTED this 16TH day of June, 2008.


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ATTORNEYS FOR PETITIONERS

Certificate of Service

I certify that on this 16th day of June, 2008, service of a true and complete copy of Petitioners Yates, Marathon and Citation's Proposed Findings of Fact and Conclusions of Law in EQC File No. 06-3816 was made upon each party or attorney of record herein as indicated below.

The ORIGINAL and ten (10) copies were filed by Federal Express and also emailing a .pdf version of the same on June 16, 2008 with:

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