

**FILED**

**MAY 29 2007**

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

**Terri A. Lorenzon, Director  
Environmental Quality Council**

**IN THE MATTER OF THE APPEAL OF)  
PENNACO ENERGY, INC. OF )  
CONDITIONS IN RENEWAL OF )  
WYPDES PERMIT NO. WY0039616 )**

**DOCKET NO. \_\_\_\_\_**

**NOTICE OF APPEAL AND PETITION FOR HEARING**

Pennaco Energy, Inc. ("Pennaco"), through its undersigned counsel, hereby appeals certain conditions contained in WYPDES Permit No. WY0039616 ("the Permit") issued by the Department of Environmental Quality ("DEQ") to Pennaco on March 29, 2007 and requests a hearing pursuant to the Environmental Quality Act, the Wyoming Administrative Procedure Act ("WAPA"), and the Rules of Practice and Procedure of the Environmental Quality Council ("EQC"). In support of this appeal, Petitioner advises the EQC as follows:

**I. Information About the Petitioner**

The petitioner filing this appeal is:

Pennaco Energy, Inc.  
3601 Southern Drive  
Gillette, Wyoming 82718

Petitioner is represented in this matter by Brent Kunz of Hathaway & Kunz, P.C., 2515 Warren Avenue, Suite 500, Cheyenne, Wyoming 82003 and by Duane Siler and John Martin of Patton Boggs LLP, 2550 M Street, Washington, D.C. 20037. Correspondence and information related to this appeal should be served on the undersigned counsel and on Mr. Gregory Smith at Pennaco Energy, Inc. at the Gillette address above.

## II. Action Being Appealed

1. Pennaco appeals, on the following grounds, the requirement for impoundment of CBNG produced water discharges from Outfalls 29, 30, and 31 in off-channel impoundments, from which water may be discharged only as a result of a 50-year/ 24-storm event.<sup>1</sup>

(A) In developing its WYPDES Application, Pennaco concluded that compliance with the SAR limits in the Section 20 Policy for the volume of water projected for Outfalls 029-031 would be even more technically and economically infeasible than for the other outfalls. These limits were excessively conservative, but Pennaco was compelled to accept option 1A in order to continue discharging produced water.

(B) This 'option' requires, of course, construction and maintenance of an extremely large impoundment with an extremely large freeboard capable of receiving and containing precipitation and runoff from a 50-year/24-hour storm event, in return for which WQD's permit imposes limits on discharges to the impoundment for EC (7500 uS/cm) but no limits for SAR.

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<sup>1</sup> DEQ's Statement of Basis for Pennaco's permit renewal for Railroad POD says Pennaco "has chosen ... option[] 1A of the coal bed methane permitting options" for the three outfalls covered by the expiring permit, 029-031. Pennaco's 'choice' was of course constrained by the categories dictated by DEQ in CBM permitting guidance and in the DEQ-prescribed permit application form – Pennaco had no real choice but to select one of WQD's permitting 'options.' This 'choice' should not be misconstrued as consent by Pennaco or as a waiver of any objections to these new requirements in the renewal permit.

Similarly, the Statement of Basis says Pennaco "has chosen ... option[] 2 ... of the coal bed methane permitting options" for all other outfalls covered by the expiring permit. To the extent that Pennaco has been required to add new on-channel reservoirs instead of being allowed to continue direct discharge, Pennaco's 'choice' should likewise not be misconstrued as consent by Pennaco or as a waiver of any objections to these new requirements in the renewal permit.

(C) Contrary to Wyo. Stat. § 35-11-302(a)(vi)'s mandate for consideration of, *inter alia*, environmental effects of a WYPDES permit, WQD has not adequately considered the environmental costs associated with actual construction of reservoirs of this size.<sup>2</sup> Instead of these unlawful requirements, the permit should adopt the impoundment requirements that WQD has applied to Outfalls 001-028 and 032-043, which allow for all precipitation-driven discharges.

(D) To require an applicant to construct and maintain an impoundment capable of retaining precipitation and runoff from a 50-year/24-hour precipitation event, as a condition of relief from the default end-of-pipe limits under the Section 20 Policy, is arbitrary, unreasonable and unlawful.

2. Pennaco appeals the final end-of-pipe compliance limits on Outfalls 001-028 and 032-043 for electrical conductivity ("EC") and sodium adsorption ratio ("SAR") on the following grounds:

(A) The Agricultural Use Policy, by means of which DEQ is implementing Section 20 of the Water Quality Regulations, and upon which these limits are based, and as in effect when this permit was issued, is not applicable to permit renewals for existing produced water discharges, absent a showing that existing discharges are harmful to humans or animals. No evidence suggests that the existing discharges under this permit are causing such harm.

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<sup>2</sup> Environmental Quality Council Hearings Transcript, February 15, 2007, Docket No. 06-3819, Chapter 1, Surface Water Standards for Rulemaking, Volume 1, p. 135 ("[MS. TWEEDY:] I don't support building reservoirs that will contain all the produced water plus the 50-year, 24-hour rain event as I believe the additional disturbance to grazing land could be very substantial.")

(B) DEQ could not lawfully apply the requirements of the Agricultural Use Policy to this permit because DEQ was required to first adopt the 'policy' as a rule in accordance with the procedural requirements of the Water Quality Act and the Administrative Procedure Act.

(C) It is arbitrary and capricious for DEQ to impose effluent limitations at the point of discharge of CBNG produced water into impoundments when those limits are premised on protection of downstream water quality at the former Irrigation Compliance Point. End-of-pipe limits are irrational and unsupported by substantial evidence because they erroneously presume that the effluent from these outfalls would impact downstream irrigated lands or aquatic life when, in fact, the produced water discharges will be impounded and water in the impoundment cannot be discharged to flow downstream except during precipitation events with attendant dilution.

### **III. Relief Requested**

Petitioner respectfully requests that the EQC grant the following relief:

1. Grant Petitioner a contested case hearing on the challenged provisions of WYPDES Permit No. WY0039616 pursuant to the EQA, the WAPA, and the EQC's Rules of Practice and Procedure.

2. Finally determine Pennaco's application for renewal of WYPDES Permit No. WY0039616; reject the permit provisions referenced herein; and order that the renewed permit shall be finally issued without those provisions.

3. Provide such other relief as the EQC determines just and reasonable under the circumstances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brent R. Kunz", written over a horizontal line.

Brent R. Kunz  
HATHAWAY & KUNZ, P.C.  
2515 Warren Avenue, Suite 500  
P.O. Box 1208  
Cheyenne, Wyoming 82003  
(307) 634-7723  
(307) 634-0985 (fax)

Duane A. Siler  
John C. Martin  
PATTON BOGGS LLP  
2550 M Street, N.W.  
Washington, D.C. 20037  
(202) 457-6000  
(202) 457-6315 (fax)

Dated: May 29, 2007

**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 29, 2007, the foregoing Notice of Appeal and Petition for Hearing was served by hand as follows:

*Original and 10 copies to:*

Terri Lorenzon, Director  
Environmental Quality Council  
Herschler Building, Room 114  
122 West 25<sup>th</sup> Street  
Cheyenne, Wyoming 82002

*Two copies to:*

John Corra, Director  
Department of Environmental Quality  
Herschler Building, 4<sup>th</sup> Floor West  
122 West 25<sup>th</sup> Street  
Cheyenne, Wyoming 82002

*Diana M. Gorman*