

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JUL 30 2007

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. WY0052361)

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. WY0052361 ("the Permit") issued by the Department of Environmental Quality ("DEQ") to Pennaco on May 30, 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. David T. Hill at Pennaco Energy, Inc. at the Gillette address above.

II. Action Being Appealed

Pennaco appeals the inclusion in the permit of redundant and inconsistent end-of-pipe compliance limits for sodium adsorption ratio ("SAR") for impounded discharges from Outfalls

001-012 and 020 with a numerical compliance limit for SAR in water from these discharges at the Irrigation Monitoring Points (“IMPs”), both of which would become effective under the renewed permit as of July 31, 2007. The permit as published for public comment on July 15, 2006, and as finally issued on June 1, 2007, requires Pennaco to impound all discharges in on-channel reservoirs, from which water may be discharged only in the event stormwater runoff causes the reservoirs to fill and overtop. The permit also sets an SAR limit of 24 at the end-of-pipe on all discharges into these impoundments from Outfalls 001-012 and 020.

The public-noticed permit also established four IMPs and required daily monitoring for, inter alia, SAR. When the permit was issued in final form on June 1, 2007, it included a new requirement that water quality at the IMPs also meet a specific, numeric SAR level based on a stated formula.¹ The public had no opportunity to comment on this provision.

Pennaco appeals the final permit and objects to the unwarranted retention of the end-of-pipe limits on SAR in water discharged to impoundments where the IMPs are now effectively compliance points. Pennaco also appeals and objects to the use of the formula to set SAR limits at downstream irrigation locations, rather than utilizing a limit of 24. Pennaco appeals on the following grounds:

1. The end of pipe limits on impounded discharges are irrational because they presume that the effluent from these outfalls will impact the downstream irrigated lands, even though the discharges are impounded and cannot be released except during precipitation events with attendant dilution. As the revised permit correctly notes, SAR (and EC) levels should be determined at the locations where such discharged water actually is diverted for irrigation, i.e., at the IMPs.

¹ Under this formula, the limit on SAR at the IMP depends on the electrical conductivity (EC) level of the water and cannot exceed $7.10 \times EC - 2.48$. See Permit part I.A.1.c.

2. The SAR limit at the IMPs should be 24, and should not be based on the indicated formula. As the Statement of Basis notes, based on the Section 20 Compliance Analysis prepared by Kevin Harvey for the Middle Prong of Wild Horse Creek, water with SAR of 24 will protect agriculture use of water in that stream, such that “continued irrigation with water containing and SAR level of 24 would theoretically increase the E[xchangeable] S[odium] P[ercentage] of the downstream irrigated soils from 9% to around 12%, which is well below the accepted 15% maximum ESP threshold which is necessary for maintaining soil permeability.” Statement of Basis (rev. May 25, 2007) at 4. This analysis is independent of EC levels in the water. Thus, DEQ has found that water with an SAR level of 24 at the point of application to the irrigated land at issue here will not cause harm to soils, regardless of EC.

3. The indicated formula could result in SAR limits below 24, in contradiction of Mr. Harvey’s analysis and conclusion, which DEQ endorsed in the Statement of Basis. According to Pennaco’s application for this modification, representative water quality for these new discharges is expected not to have EC levels in excess of 2260 $\mu\text{S}/\text{cm}$, or 2.26 dS/Cm . Under the formula, this EC level would result in a SAR limit of 13.6 at the IMP, i.e., $[(7.1 \times 2.26) - 2.48]$. This SAR limit is far below the level that, according to the Statement of Basis, will protect irrigated soils, i.e., 24.

4. The final permit provides no rationale for placing this formula-based SAR limit in the permit, without public comment.

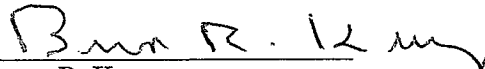
5. To the extent that DEQ included the indicated formula in the permit as a result of the Agricultural Use Policy, this formula does not appear in the Policy and, even if it did, DEQ could not lawfully apply the requirements of the Agricultural Use Policy to this permit modification because DEQ must first adopt the “policy” as a rule in accordance with the procedural requirements of the Water Quality Act and the Administrative Procedure Act.

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. WY0052361 pursuant to the EQA, the WAPA, and the EQC's Rules of Practice and Procedure.
2. Finally determine Pennaco's application for modification of WYPDES Permit No. WY0052361; reject the permit provisions referenced herein; and order that the modified permit shall be finally issued with no end of pipe limits on EC or SAR for Outfalls 001-012 and 020, and that those limits shall be set at the most upstream IMP and shall be, respectively, 6100 $\mu\text{S}/\text{cm}$ and 24.
3. Provide such other relief as the EQC determines just and reasonable under the circumstances.

Respectfully submitted,



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: July 30, 2007

CERTIFICATE OF SERVICE

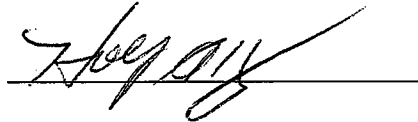
The undersigned certifies that on July 30, 2007, the foregoing Notice of Appeal and Petition for Hearing was served by hand as follows:

Original and 10 copies to:

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

Two copies to:

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

A handwritten signature in cursive script, appearing to read "Terri Lorenzon", is written over a horizontal line.