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**FILED**

**JAN 22 2008**

Terri A. Lorenzon, Director  
Environmental Quality Council

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

IN THE MATTER OF THE APPEAL OF )  
PENNACO ENERGY, INC. OF )  
CONDITIONS IN REVEWAL OF ) Docket Nos. 07-3616  
WYPDES PERMIT NOS. WY0039721, ) 07-3617, 07-3618  
0039616, 0048461, 0052361 AND ) 07-3819, and 07-3620  
0048283 )

**POWDER RIVER BASIN RESOURCE COUNCIL'S REPLY TO PENNACO'S  
OPPOSITION TO PETITION FOR LEAVE TO INTERVENE IN  
CONSOLIDATED APPEALS OF PENNACO ENERGY, INC.**

Powder River Basin Resource Council [PRBRC] herewith submits is reply to  
Petitioner's Response to PRBRC's Motion to Intervene in Consolidated Appeals  
captioned above.

Contrary to Petitioner [Pennaco] assertions, PRBRC has associational standing to  
intervene, PRBRC has protectable interests in the subject of the appeal and PRBRC has  
legal rights under both the Environmental Quality Act [EQA] and the Wyoming  
Administrative Procedure Act [WAPA].

## I. ARGUMENT

Intervention in an Environmental Quality Council [EQC] appeal is governed by the Wyoming Department of Environmental Quality [WDEQ] Rules of Practice and Procedure, Chapter II, § 7, which provides that leave to intervene shall not be granted unless the requesting party is adversely affected by the action or has a legal right under the EQA or WAPA. PRBRC meets both requirements.

### A. PRBRC Has Associational Standing to Intervene

An organization has standing to intervene if “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 670 (10th Cir. 2006) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). PRBRC meets all three.

“A litigant is said to have standing when he has a ‘personal stake in the outcome of the controversy.’ This personal stake requirement has been described in Wyoming as a ‘tangible interest’ at stake.” *Riedel v. Anderson*, 70 P.3d 223, 229 (Wyo. 2003). The phrase “tangible interest” has been equated with the phrase “personal stake in the outcome.” *Halliburton Energy Services, Inc. v. Gunter*, 167 P.3d 645, 649 (Wyo. 2007). The individuals identified in PRBRC’s Petition for Leave to Intervene - Ken Clabaugh, Bob Spellman, and Bill and Marge West - are PRBRC members (See Exhibit A, Affidavit of Jill Morrison) and have personal stakes in the outcome of the appeals of these Pennaco permits.

Pennaco's own permit applications identify the PRBRC members whose interests are at stake. Question 4 of the Wyoming Pollution Discharge Elimination System Application for Permit to Surface Discharge Produced Water from Coal Bed Methane [Application] requires the applicant to list the name and mailing address of the owner "of the surface rights on whose land the discharge occurs." (Exhibit B at 3). Question 19 of the Application requires a listing of the names and address "of all downstream irrigators between the outfalls and mainstem." *Id.* at 9. Pennaco's applications for permits WY0039721, WY0039616 and WY0052361 list Bill and Marge West, Ken Clabaugh and Bob Spellman as landowners and/or downstream irrigators. (Exhibit B at 11, Pennaco Application WY0039721, June 19, 2006; Exhibit C at 7, Pennaco Application WY0039616, March 22, 2006; Exhibit D at 7, 8, Pennaco Application WY0052361, May 9, 2006).<sup>1</sup>

As persons upon whose lands Pennaco is permitted to discharge its CBM produced water or as downstream irrigators who may receive those discharged waters, the identified PRBRC members have a personal stake in the quality of that water and the manner in which its quality is protected. If Pennaco is successful in its appeal and forces the EQC to adopt the higher Electrical Conductivity [EC] and Sodium Adsorption Ratio [SAR] values, these members' lands will be adversely affected. Their standing to intervene in their own right satisfies the first prong of associational standing for PRBRC.

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<sup>1</sup> Exhibit B is available at [http://deq.state.wy.us/wqd/WYPDES\\_Permitting/WYPDES\\_PNs\\_and\\_appr\\_permits/WYPDES\\_PNs/WYPDES\\_PNs\\_2007/Jan\\_2007/PN-07-001.rtf](http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_PNs_and_appr_permits/WYPDES_PNs/WYPDES_PNs_2007/Jan_2007/PN-07-001.rtf)

Exhibit C is available at [http://deq.state.wy.us/wqd/WYPDES\\_Permitting/WYPDES\\_PNs\\_and\\_appr\\_permits/WYPDES\\_PNs/WYPDES\\_PNs\\_2006/July\\_2006\\_PN/PN-06-007.rev.rtf](http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_PNs_and_appr_permits/WYPDES_PNs/WYPDES_PNs_2006/July_2006_PN/PN-06-007.rev.rtf)

Exhibit D is available at [http://deq.state.wy.us/wqd/WYPDES\\_Permitting/WYPDES\\_PNs\\_and\\_appr\\_permits/WYPDES\\_PNs/WYPDES\\_PNs\\_2006/August\\_2006\\_PN/PN-06-008.rtf](http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_PNs_and_appr_permits/WYPDES_PNs/WYPDES_PNs_2006/August_2006_PN/PN-06-008.rtf)

PRBRC also satisfies the second prong. PRBRC has for over 20 years represented its rancher and citizen members in advocating for responsible development of Wyoming's minerals. (Exhibit A, Affidavit of Jill Morrison). PRBRC has been actively involved in CBM issues before the WDEQ and EQC, including in December 2005, petitioning to Amend Wyoming Water Quality Rule, Chapter 2, Appendix H, December 7, 2005.<sup>2</sup> Protecting PRBRC's members' interests in their environmental health of their land is central to PRBRC's purpose.

Lastly, the prospective relief PRBRC seeks in this case – that appropriate methodologies are used to determine SAR and EC limits that are protective of crop and livestock production, that water quality compliance points be reasonable and effective, and seeking application of § 20 of the Water Quality Rules without a showing that existing discharges under current permits cause harm – is the type of relief that does not require the participation of the individual members because it will inure to the benefit of all PRBRC members. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (stating “If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be assumed that the remedy, if granted, will inure to the benefit of those members of the organization actually injured.”).

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<sup>2</sup> The Environmental Quality Council (Council) held a public prehearing conference on the Petition pursuant to the Environmental Quality Rules of Practice and Procedure Applicable To Rule-Making Hearings, Chapter III, Section 2(c) February 16, 2006, and, at the conclusion of that prehearing conference, voted unanimously to set the Petition for a rulemaking hearing. After public notice and hearing, the EQC adopted amended versions of Appendices H & I on February 16, 2007. The EQC submitted the rules to Governor Freudenthal who, on April 23, 2007 declined to approve them.

**B. PRBRC's Members Have Protectable Interests that Could be Adversely Affected by Pennaco's Appeal**

PRBRC's members are landowners upon whose property Pennaco's CBM water is discharged or flows across. Avoiding adverse impacts to their property and its productivity by those discharges are protectable interests traditionally protected at law. *See Cross v. State*, 370 P.2d 371, 377 (Wyo. 1962) (holding that the constitutional right not to be deprived of property necessarily implies the right to protect property).

If Pennaco's appeal is successful, they will be permitted to discharge CBM water with higher EC and SAR values, and do so more frequently, onto and across the lands of PRBRC's members. The members' ownership of the lands directly affected by these (and others) CBM water discharges gives them interests that are not contingent and that are different than that of the public at large. *See Masinter v. Markstein* 45 P.3d 237, 241 (Wyo. 2002) (holding nonexclusive easement in lands subject of action is significantly protectable interest and is not a contingent interest).

**C. PRBRC has Legal Rights Under the EQA and WAPA.**

The EQA affords any "aggrieved party" the right to seek judicial review pursuant to the WAPA of a final order or other final action. WYO. STAT. § 35-11-1001.

"Aggrieved party" is defined as

any person named or admitted as a party **or properly seeking or entitled as of right to be admitted as a party to any proceeding under this act** because of damages that the person may sustain or be claiming because of his unique position in any proceeding held under this act.

WYO. STAT. § 35-11-103(a)(vii).<sup>3</sup> PRBRC is properly seeking to be admitted as a party to this proceeding because of the damages its members may sustain by their unique

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<sup>3</sup> PRBRC meets the definition of a "person" because it is an association. WYO. STAT. § 35-11-103(a)(vi).

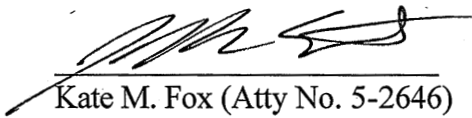
position of being the owners of the property upon which Pennaco's discharges under these permits will be made. PRBRC's right to seek judicial review under WYO. STAT. § 35-11-1001 is also provided by its having participated in the public comment process for each of the permits Pennaco is appealing. WYO. STAT. § 35-11-208(b). PRBRC's legal rights under the EQA warrant granting it leave to intervene pursuant to Chapter II, § 7 of the WDEQ's Rules of Practice and Procedure.

The WAPA also affords PRBRC legal rights. Under the WAPA, parties are afforded, in contested cases, the right to cross-examine opposing witnesses (WYO. STAT. § 16-3-108) and to submit briefs (WYO. STAT. § 16-3-109). The WAPA defines "party" to mean "each person . . . admitted as a party or properly seeking and entitled as of right to be admitted as a party." Having established above that PRBRC is entitled to intervene as of right, the PRBRC meets the WAPA definition of a party. Because of PRBRC has legal rights under both the EQA and WAPA, leave to intervene should be granted.

## **II. CONCLUSION**

PRBRC's purpose, the relief sought, and the personal stakes Ken Clabaugh, Bob Spellman and Bill and Marge West have in the outcome of Pennaco's appeal gives PRBRC standing to intervene as an association. Their interests are protectable interests which could be adversely affected by Pennaco's appeal. For these reasons, and because PRBRC has legal rights under both the EQA and WAPA, PRBRC's Petition for Leave Intervene should be granted.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January, 2008.



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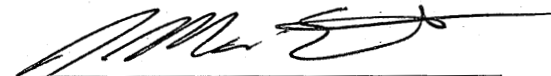
**Certificate of Service**

I, J. Mark Stewart, hereby certify that on this 22<sup>nd</sup> day of January, 2008, an accurate copy of the foregoing Reply to Pennaco's Opposition to Petition for Leave to Intervene in Consolidated Appeals of Pennaco Energy, Inc. was served via e-mail and US Mail to the following:

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