

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

APR 23 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF)
PENNACO ENERGY, INC. OF)
CONDITIONS IN RENEWAL OF)
WYPDES PERMIT NO. WY0040797)

DOCKET NO. 09-3601

PENNACO'S RESPONSE TO DEQ'S MOTION
TO DISMISS PETITION FOR REVIEW

On April 3, 2009, Respondent Wyoming Department of Environmental Quality (DEQ) moved to dismiss Pennaco Energy, Inc.'s (Pennaco) Petition for Review of WYPDES renewal permit WY0040797 for "lack of subject matter jurisdiction." Pennaco opposes the motion to dismiss for the following reasons.¹

DEQ erroneously contends that the "action being appealed" in Pennaco's February 27, 2009 petition was DEQ's prospective modification of the December 31, 2008 renewal permit to include end-of-pipe SAR limits that DEQ erroneously omitted from the renewal permit (but described in the Statement of Basis for the renewal permit). *See* DEQ Motion at 1-2. DEQ apparently argues that the Petition addresses only these prospective SAR limits and, therefore, that there was no "final agency action" reviewable by the Council.

But DEQ quotes only part of the "action being appealed" section of the Petition, which clearly addresses the December 31, 2008 EC limits as well as the prospective SAR limits:

Pennaco appeals the proposed permit limitation for [indicated outfalls] because DEQ has erroneously placed limits on effluent from these outfalls, including both direct discharges and discharges to on-channel reservoirs, for purposes of "irrigation use protection." These effluent limits

¹ On April 10, 2009, DEQ and Pennaco filed a Joint Stipulation to Stay Proceedings in this matter pending the Council's determination of the proposed rulemaking in Docket No. 08-3108, but as of April 23, 2009 – the deadline for Pennaco's response to the instant motion -- the proposed order approving this stipulation had not been entered.

include end-of-pipe limits on specific conductance (EC) for all of these outfalls. In addition, the Statement of Basis – though not the permit – says that end-of-pipe limits are imposed on SAR for those outfalls that are direct discharges. DEQ has notified Pennaco of its intent to administratively modify the permit to conform the permit to the Statement of Basis and imposed end-of-pipe SAR limits on outfalls that direct-discharge to Middle Prong and Wild Horse Creek.

Pennaco Petition at 2 (italics indicate text omitted from DEQ's Motion). Indeed, DEQ agrees that Pennaco's requested relief includes that the Council reject the renewal permit's end-of-pipe effluent limitations not only on SAR, but also on EC. *See* DEQ Motion at 2 (quoting Pennaco Petition at 6).

There is no doubt that the December 31, 2008 renewal permit constituted what DEQ views as final action with respect to the imposition of new EC limits based on the Agricultural Use Protection Policy (AUPP). Nor can it be disputed that Pennaco placed this DEQ action in issue in its Petition, which challenges, *inter alia*, the scientific validity of applying the AUPP to "naturally irrigated bottomlands," which DEQ plainly did in the December 31, 2008 renewal permit with respect to EC and, prospectively, SAR. *See* Petition at 2-3. Contrary to DEQ's assertion, "the gist" of Pennaco's Petition includes a challenge to DEQ's final decision on the EC limits in the renewal permit and, more fundamentally, on the applicability of the AUPP to Pennaco's existing discharges in the absence of any downstream artificial irrigation uses.

Under Ch.1, section 16 of the Council's Rules of Practice and Procedure, Pennaco was required to petition for review of the December 31, 2008, permit renewal, at least insofar as it imposed new EC limits based on the AUPP, within 60 days, *i.e.*, not later than March 2, 2009.² Pennaco could not have waited for DEQ to issue the planned administrative modification, which was not even proposed for 30-day public notice until February 27, 2009. In an abundance of

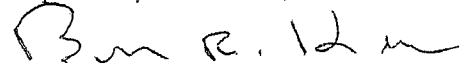
² *Antelope Valley Improvement and Service District of Gillette v. Wyoming State Board of Equalization*, 992 P.2d 563 (Wyo. 1969) (filing of administrative appeal *after* date prescribed by reviewing agency's rules deprived reviewing body of subject-matter jurisdiction).

caution, Pennaco also sought review of the SAR limits – also based on the AUPP – that DEQ had already summarized as a part of the permit in the Statement of Basis.³

The Council clearly has subject matter jurisdiction over Pennaco's Petition, at least as to the EC limits and the AUPP on which they are based. If DEQ ultimately issues the administrative modification (on which comment closed on April 13, 2009), Pennaco will either seek leave to amend its Petition to include the SAR limits, which implicate the same issue, i.e., imposition of effluent limitations to protect "naturally irrigated bottomlands," or file a new Petition and move for consolidation.⁴

For the foregoing reasons, Respondent DEQ's motion to dismiss Pennaco's Petition should be dismissed and Respondent should be directed to file and serve its response to the Petition without further delay.

Respectfully submitted,



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³ On April 13, 2009, Pennaco timely submitted comments to DEQ on the proposed administrative modification of the instant permit renewal, opposing the imposition of end-of-pipe SAR limits on direct discharges under the renewal permit.

⁴ Pennaco anticipates that, upon expiration of the joint stipulated stay, and assuming DEQ issues the proposed modification, the procedure for placing the SAR limits in issue would be addressed in an order governing further proceedings following a Pre-Hearing Conference, as provided in the Joint Stipulation.

CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing of PENNACO'S RESPONSE TO DEQ'S MOTION TO DISMISS PETITION FOR REVIEW was served this 23rd day of April, 2009 by United States mail, postage prepaid, and also by e-mail or facsimile transmission, addressed as follows:

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