

Mark R. Ruppert, P.C. (Wyo. Bar No. 6-3593)
Jere C. (Trey) Overdyke, III (Wyo. Bar No. 6-4248)
HOLLAND & HART LLP
2515 Warren Ave., Suite 450
P. O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
Facsimile: (307) 778-8175

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Jim Ruby, Executive Secretary
Environmental Quality Council

ATTORNEYS FOR PENNACO ENERGY, INC.

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

In the Matter of the Appeal of JOHN D.)
KOLTISKA, AC RANCH, INC., a)
Wyoming Corporation, PRAIRIE DOG)
RANCH, INC., a Wyoming Statutory) Docket No. 09-3805
Close Corporation, and PRAIRIE DOG)
WATER SUPPLY COMPANY from)
WYPDES Permit No. WY0054364)

PENNACO'S ANNEX OF UNDISPUTED FACTS

Pennaco Energy, Inc. (Pennaco) submits the following as undisputed facts in this matter.

1. On April 29, 2009, the Director of the DEQ issued WYPDES Permit No. WY0054364 (the Permit) to Pennaco that authorizes the discharge of treated water into Prairie Dog Creek via Outfall 003 and Wildcat Creek via Outfall 002. Permit, Statement of Basis, at 1-
2. The Permit authorizes Pennaco to discharge treated CBM water into an on-channel storage reservoir. (Permit, Statement of Basis at 2, Thomas Dep. Ex. 3, excerpt attached as Exhibit E).
2. On May 15, 2009, Petitioners filed an Amended Petition (Petition) that challenged the protectiveness of the permit limits for EC, SAR, and sodium, and challenged the scientific method DEQ used to derive the limits. Petition, paragraphs 3n, 3p.
3. Petitioners admit that Chapter 1, Section 20 of the Wyoming Water Quality Rules and Regulations (WWQRR) and the November 11, 2008 Agricultural Use Protection Policy do

not require effluent limitations by a WYPDES permit to preserve the ambient water quality. Petitioners' Resp. to Pennaco's First Discovery Reqs, Resp. to Req. for Admis. No. 7 at 2.

4. Petitioners designated Dr. George F. Vance and Mr. James A. O'Neill, II, as expert witnesses in this case. Dr. Vance was designated to provide expert testimony on whether the effluent limits established in the Permit are protective of the irrigation in Prairie Dog Creek and Wildcat Creek. Vance Report at 1. Mr. O'Neill was designated to provide expert testimony on whether DEQ used appropriate scientific methods to derive the Permit limits. O'Neill Report at 1.

5. Dr. Vance is not an expert in irrigation. (Vance Dep. at 77). Dr. Vance did not visit the Prairie Dog Creek area until after he filed his expert report. (Vance Dep. at 70-71). During his visit to the Prairie Dog Creek area, he did not interview any landowners or irrigators along Prairie Dog Creek (Vance Dep. at 66) and did not take any water quality samples. (Vance Dep. at 70-71). Dr. Vance also knew virtually nothing about the irrigation occurring in and from Prairie Dog Creek. He did not know the flow required in Prairie Dog Creek for any irrigator to irrigate. (Vance Dep. at 134). He did not know how the irrigators were using the water, but admitted that it is important to know that he needed to know if adding sodium to irrigation water would actually affect an irrigator. (Vance Dep. at 25-26). He further admitted that he did not know the leaching fraction the irrigators in Prairie Dog and Wildcat Creeks were attaining in their irrigation operations (Vance Dep. at 60, 178), but recognized that information determines discharge impacts on an irrigator. (Vance Dep. at 178).

6. Dr. Vance did not know the actual flow data for Prairie Dog Creek, and was not familiar with the amount of discharge authorized by the Permit. (Vance Dep. at 48-49). Dr. Vance did not perform any mixing analyses or calculations to determine the quality of mixed

discharge and various natural flows before it is applied for irrigation. (Vance Dep. at 30-31).

Dr. Vance did not use the USGS data for Prairie Dog and Wildcat Creeks and was not familiar with any actual flows in Prairie Dog Creek during either irrigation or non-irrigation season.

(Vance Dep. at 50, 99-100).

7. To understand the actual conditions of Prairie Dog Creek irrigation, Dr. Vance reviewed water sampling data provided by Pennaco and a report mapping general soil types in the Prairie Dog Creek and Wildcat Creek drainages. (Exhibit A, Vance Report, 2-3). Dr. Vance also recognized that his chosen methodology should be supplemented by on-site soil investigation. (Vance Dep. at 136-138).

8. Dr. Vance testified that discharges would have to mimic background water quality to avoid unspecified burdens on downstream irrigators. (Vance Dep. at 19-20).

9. Dr. Vance previously testified before the Council that Tier 1 limits are protective. (Vance Dep. at 113; Oct. 24, 2008 Vance Testimony, Vance Dep. Ex. 32).

10. Mr. O'Neill offered no opinion, expert or otherwise, regarding the protectiveness of the Permit limits for EC and SAR. (O'Neill Dep. at 124).

11. Mr. O'Neill's expertise on methodology is based on his reading WWQRR Ch. 1, Section 20, Chapter 2, Section 5, and the Agricultural Use Protection Policy (AUPP) for the first time for this case. (O'Neill Dep. at 20, 21, 95, 122, 153).

12. Mr. O'Neill is not an expert in irrigation (O'Neill Dep. at 116-17) and did not know or consider the protective EC limit for alfalfa when he drafted his report. (O'Neill Dep. at 35). Mr. O'Neill has no experience with CBM projects or CBM-produced water. (O'Neill Dep. at 17). He has only limited experience in water chemistry, but none involving EC or SAR.

(O'Neill Dep. at 19). He has no experience or background in soil or agronomy. (O'Neill Dep. at 20).

13. Before he was retained by the Petitioners in this case, Mr. O'Neill had never read the WWQRR or the AUPP. (O'Neill Dep. at 20-21). Mr. O'Neill equates the term "appropriate scientific methods" in Chapter 2, Section 5, with the term "best scientific practice" used in his Report. (O'Neill Dep. at 28-29, 144). He did not have a scientific basis for his opinions on what the AUPP did or did not require. (O'Neill Dep. at 59-60).

14. Any CBM water in Wildcat Creek may not be coming from the Paul3 reservoir (an on-channel storage reservoir), CBM water is not reaching irrigated lands of Mr. Koltiska (the only Petitioner who irrigates on Wildcat Creek downstream of the Paul3 reservoir). (O'Neill Dep. at 113; Vance Dep. at 170; Deposition of John Koltiska at 85).

15. DEQ responded to complaints that the Paul3 reservoir was "leaking" and instructed Pennaco to install a pumpback station at the toe of the reservoir. DEQ has made a final decision on handling any leaking from the Paul3. (Deposition of Bill DiRienzo at 10-14). Petitioners never requested Council review of DEQ's decision pursuant to DEQ WQR Ch. 1 § 16(a).

16. Pennaco had water samples taken throughout Wildcat Creek in June 2009, and part of the testing of those samples included Carbon 13 isotopic testing. Pennaco conducted this and other isotopic sampling to trace potential CBM water in Wildcat Creek. Dr. Schafer, Pennaco's designated expert, conducted the sampling and determined that CBM water was not contributing to upper Wildcat Creek. (Exhibit B, Schafer Report, 32-40).

17. Mr. O'Neill and Dr. Vance are not experts in Carbon 13 isotope chemistry (O'Neill Dep. at 106); (Vance Dep. at 165-66). Mr. O'Neill's opinion is based on his carbon isotope analysis – an analysis he has never performed before. (ONEill Dep. At 100).

Respectfully submitted October 16, 2009.



Mark R. Ruppert, P.C. (Wyo. Bar No. 6-3593)
Jere C. (Trey) Overdyke, III (Wyo. Bar No. 6-4248)
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ATTORNEYS FOR PENNACO ENERGY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, I served the foregoing document to the following by:

Mike Barrash
Luke Esch
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
mbarra@state.wy.us

Kate M. Fox
J. Mark Stewart
Davis & Cannon, LLP
422 W. 26th Street
P. O. Box 43
Cheyenne, WY 82003
kate@davisandcannonchey.com
mark@davisandcannonchey.com

- U.S. Mail, postage prepaid
- UPS – overnight delivery
- Hand Delivery
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- E-mail

- U.S. Mail, postage prepaid
- UPS – overnight delivery
- Hand Delivery
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- E-mail

