

Kate M. Fox (Wy. Bar No. 5-2646)
J. Mark Stewart (Wy. Bar No. 6-4121)
DAVIS & CANNON, LLP
Attorneys for Protestants
422 W. 26th St.
P.O. Box 43
Cheyenne, WY 82003

FILED

NOV 04 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE 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 Close) Docket No. 09-3805
Corporation, and PRAIRIE DOG WATER)
SUPPLY COMPANY FROM WYPDES)
PERMIT NO. WY0054364)

PROTESTANTS' PRE-HEARING MEMO

Petitioners John D. Koltiska, AC Ranch, Inc., Prairie Dog Ranch, Inc. and Prairie Dog Water Supply Company respectfully submit their Pre-Hearing Memo.

(a) Background

Petitioner John D. Koltiska is part owner of AC Ranch, Inc., Prairie Dog Ranch, Inc. and is a shareholder of Petitioner Prairie Dog Water Supply Company. Petitioner Prairie Dog Water Supply Company (PDWSC), is a Wyoming nonprofit mutual benefit corporation which supplies irrigation water to its shareholders through conveyances whose points of diversion are located on Prairie Dog Creek downstream of the discharges permitted by WY0054364. Petitioners John Koltiska, AC Ranch, Inc. and Prairie Dog Ranch, Inc. also irrigate in part with waters from flows originating in Wildcat Creek. Permit WY0054364 authorizes discharge of treated water into

both Prairie Dog Creek (via outfall 003) and into Wildcat Creek (via outfall 002 to Paul No. 3 Reservoir).

Prairie Dog Creek is somewhat unique in northeast Wyoming because its flows are primarily derived from a transbasin diversion from Piney Creek above Story, Wyoming. This means historic flows in Prairie Dog Creek have been perennial rather than ephemeral, and they have been of a generally high quality. Prairie Dog Creek is also unusual in that USGS gauges in the creek provide some historic water quality data. Therefore, the analytical methods provided in DEQ's Agricultural Use Protection Policy were not employed to establish effluent limits for discharges into Prairie Dog Creek. Rather, DEQ made use of some of the data available from the USGS, but it did so by using inappropriate methodologies on inadequate and insufficient information and by relying on unproven assumptions. One central flaw in DEQ's methodology for determining background water quality for discharges in Prairie Dog Creek is that it did not simply use the data from the USGS Wakeley station nearest the point of discharge (10 miles downstream from the point of discharge for Outfall 003) to determine background water quality. Instead, it achieved less protective limits (higher numbers for EC¹ and sodium) by averaging water quality data from the Wakeley station with the water quality data from the Acme station, which is located a further 23 stream miles downstream from Wakeley. Another flaw is the method employed by DEQ to establish an effluent limit for sodium for the Prairie Dog Creek outfall. The method employed relies on calcium and magnesium concentrations in Prairie Dog Creek to buffer the effects of the additional sodium that will be discharged under the permit. However, DEQ used inappropriate methods to estimate the amounts of magnesium and calcium that would be present in Prairie Dog Creek.

¹ The data relied upon by DEQ demonstrated the average EC at Wakeley was 885, at Acme 1217. Shreve Deposition, 15:3-4.

Wildcat Creek, on the other hand, is an ephemeral stream for which no adequate historic water quality data exists. DEQ therefore relied upon the “Ag Use Policy” Tier 1 methodology to determine effluent limits for discharges into Wildcat Creek. Water from the Permit from Outfall 002 will be discharged into the Wildcat Creek drainage, which is a source of irrigation water for AC Ranch, Inc. DEQ, relying on all effluent being contained in an on-channel reservoir called Paul No. 3 did not establish effluent limits for SAR nor for sodium for the Wildcat Creek outfall. However, DEQ’s own records showed that the reservoir to be used to contain the discharges is seeping at that it was leaking at the time the permit was drafted and granted. Results of subsequent carbon isotope sampling in the reservoir and Wildcat Creek conducted by Pennaco are consistent with a leaking Paul No. 3 reservoir.

Pennaco, the permittee, does not attempt to defend DEQ’s methodology, but instead takes the position that the Protestants bear the burden of proving that the effluent limits DEQ established will result in a measurable decrease in production of the Petitioners’ crops, and it argues that permit terms can be justified by a different analysis. The Council should not be misled by Pennaco’s attempt to turn the Wyoming Environmental Quality Act on its head. Pennaco’s motion is nothing short of a request that the Council impose the obligation of enforcing the EQA onto the very people that law is intended to protect. The burden is, as it must be, on the DEQ and Pennaco to prove that discharges authorized by the permit will not result in a measurable decrease in production.

(b) Uncontroverted facts

1. No expert in this case has opined that the DEQ’s scientific basis for the protested permit is valid.

2. No expert in this case has opined that the methods employed by DEQ to establish effluent limitations are appropriate scientific methods.
3. DEQ's WYPDES permit writers are not irrigation experts.
4. DEQ's WYPDES permit writers did not perform a site-specific analysis.
5. DEQ's WYPDES permit writers did not visit Prairie Dog Creek.
6. DEQ's WYPDES permit writers did not take samples on Prairie Dog Creek.
7. DEQ's WYPDES permit writers did not know the proportion of Prairie Dog Creek water to effluent discharge.
8. DEQ's WYPDES permit writers did not do a mixing analysis.
9. DEQ's WYPDES permit writers did not know the flow required for any Prairie Dog Creek irrigators to irrigate.
10. DEQ's WYPDES permit writers did not know how the Prairie Dog Creek irrigators were using their water.
11. DEQ's WYPDES permit writers did not know the leaching fractions of the impacted soils; or how the water moves through the system.
12. DEQ's WYPDES permit writers did not have access to specific soil mapping or soil quality assessment.

(c) Issues of Law

The EQA places the burden of proof on the agency in a contested case challenging the grant of a WYPDES discharge permit. The applicable substantive statute here is the Wyoming Environmental Quality Act (EQA), WYO. STAT. §§ 35-1-101 et seq., the policy and purpose of which is expressly described in WYO. STAT. § 35-1-102.

Whereas pollution of the air, water and land of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and

aquatic life, and impair domestic agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve and enhance the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives.

The purpose of the EQA is not only to prevent and minimize pollution but to allow pollution only if it does not impair beneficial use of the waters of the state. Thus the EQA prohibits anyone to “cause, threaten or allow the discharge of any pollution or wastes into the waters of the state” or to “alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state” except when authorized by a permit issued pursuant to the EQA. WYO. STAT. § 35-11-301(a)(i) – (ii). The EQA addresses permit issuance in WYO. STAT. § 35-11-801(a):

When the department has, by rule or regulation, required a permit to be obtained it is the duty of the director to issue such permits upon proof by the applicant that the procedures of this act and the rules and regulations promulgated thereunder have been complied with.²

The applicable statutes here indicate a legislative intent that the general rule apply and that DEQ and Pennaco, as proponents of the Permit, have the burden of proving compliance with the water quality rules and regulations. The applicable rule at issue here is found at Chapter I, Wyoming Surface Water Quality Standards:

Section 20. Agricultural Water Supply. All Wyoming surface waters which have the natural water quality potential for use as an agricultural water supply shall be maintained at a quality which allows continued use of such waters for agricultural purposes. Degradation of such waters shall not be of such an extent to cause a measurable decrease in crop or livestock production. Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.

² See also Water Quality Rules, Ch. 2, § 9(a)(vi).

As DEQ recognizes in its Agricultural Use Protection Policy where it states, at ¶ III, “The goal is to ensure that pre-existing irrigated crop production will not be diminished as a result of the lowering of water quality,” the applicable statutes, rules and regulations taken together impose the upon the agency and the applicant the burden of proving that the effluent limits will not result in a measurable decrease in crop or livestock production.

Although Section 20 is a narrative standard, DEQ is required to achieve the standard by applying appropriate scientific methods in compliance with Water Quality Rules and Regulations, Chapter 2, Section 5(c)(iii)(C)(IV).

See discussion in Petitioners’ Response to Pennaco’s Motion for Summary Judgment and to Strike Expert Testimony.

(d) Exhibits

Petitioners’ Exhibits are identified on the attached Exhibit List.

(e) Witnesses

Jason Thomas, DEQ will testify in accordance with his deposition testimony. ✓

Kathy Shreve, DEQ, will testify in accordance with her deposition testimony.

John D. Koliska will testify in accordance with his deposition testimony.

Dr. George Vance will testify in accordance with his deposition testimony and his expert report.

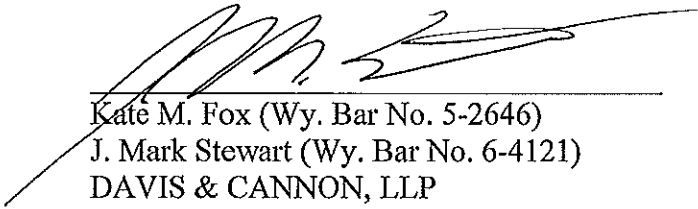
Jim O’Neil, P.E. will testify in accordance with his deposition testimony and his expert report.

In addition, these witnesses or additional witnesses may be called to present rebuttal testimony.

(f) Other matters

Petitioners will file a motion in limine to limit the evidence offered by Pennaco and to limit the testimony of Pennaco's expert, Bill Shafer, to the record upon which DEQ based its decision to issue the contested permit.

Dated this 4th day of November, 2009.



Kate M. Fox (Wy. Bar No. 5-2646)
J. Mark Stewart (Wy. Bar No. 6-4121)
DAVIS & CANNON, LLP
Attorneys for Protestants
422 W. 26th St.
P.O. Box 43
Cheyenne, WY 82003
Tel: 307-634-3210
Fax: 307-778-7118

CERTIFICATE OF SERVICE

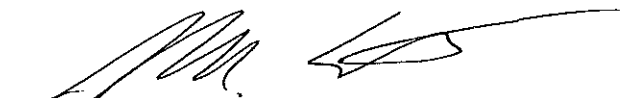
I certify that on the 4th day of November, 2009, I served a true and correct copy of the foregoing by hand delivery to:

Chairman Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, WY 82002

Mark Ruppert
Trey Overdyke
Holland & Hart, LLP
P.O. Box 1347
Cheyenne, WY 82003 – 1347
Attorneys for Pennaco Energy, Inc.

Mike Barrash
Luke Esch

Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
Attorneys for WDEQ



J. Mark Stewart

**CONTESTED-CASE HEARING EXHIBIT LIST
IN THE MATTER OF THE APPEAL OF JOHN D. KOLTISKA, ET AL.**

Before the Environmental Quality Council
Docket No. 09-3805
Party Submitting List: Protestant

Ex. No.	Description
1	Permit WYPDES0054364 Major Modification 4/28/09 – (Thomas Depo. #3)
2	Permit WYPDES0054364 Renewal 1/6/09 – (Thomas Depo. #2)
3	Permit WYPDES0054364 New 1/29/07 – (Thomas Depo. #15)
4	Pennaco Permit Application – (Thomas Depo. #4)
5	Map – (Koltiska Depo. #2)
6	Map – (Koltiska Depo. #3)
7	DEQ Responses to Petitioners' Interrogatories – (Thomas Depo. #5)
8	EnTech Report – (Thomas Depo. #6)
9	Pennaco Responses to Petitioners' Interrogatories – (Thomas Depo #7)
10	DEQ Response to Comments on Permit WY0054364 – (Thomas Depo. #8)
11	Letter from Bill Barrett to Brian Lovett – (Thomas Depo. #9)
12	Email from Bill Barrett to Melissa Velasquez – (Thomas Depo. #10)
13	Email from Bill Barrett to David Hill – (Thomas Depo. #11).
14	Hanson Diagram – (Thomas Depo. #12)
15	Water Quality for Agriculture, Ayers & Westcot, 1994 (online version)
16	USGS Data – (Shreve Depo. #16)

Ex. No.	Description
17	USGS Data – (Shreve Depo. #17)
18	USGS Data – (Shreve Depo. #18)
19	Prairie Dog Water Quality Sampling Results – (Shreve Depo. #19)
20	Map – (Shreve Depo. #20)
21	USGS Data – (Shreve Depo. #21)
22	Expert Report of Jim O'Neill
23	Expert Report of George Vance
24	Expert Report of William Schafer
25	Draft Prairie Dog Creek Agronomic Monitoring & Protection Program, PEI08561-8654
26	Prairie Dog Creek Agronomic Monitoring & Protection Program – (Schafer Depo. #15)
27	Tracing Coalbed Natural Gas – Coproduced Water Using Stable Isotopes of Carbon, Sharma & Frost, 2008 (O'Neill Depo. #10)
28	USGS Data – (Schafer Depo. #16)
29	Infiltration into Cropped Soils: Effect of Rain and Sodium Adsorption Ratio – Impacted Irrigation Water, Suarez et al. (Schafer Depo. #17)
30	Effect of SAR on Water Infiltration Under a Sequential Rain-Irrigation Management System, Suarez et al. – (Schafer Depo. #18)
31	Figure 21, Ayers & Westcott – (Schafer Depo. #19)
32	Expert Scientific Opinion on the Tier-2 Methodology, Hendryckz & Buchanan – (Schafer Depo. #23)
33	Map & Graph – (Vance Depo. #27)
34	Graph of Acme-Wakely Flow
35	Graph of Wakeley – WYPDES 54364 Flow

Ex. No.	Description
36	Photos of Wildcat Creek – (JK000281 – 288)
	Any exhibit identified in any deposition taken in this matter
	Any other demonstrative exhibits to be prepared during trial.
	Any exhibit offered by DEQ or Pennaco.
	Any exhibit necessary for rebuttal or impeachment.