

Keith S. Burron, WSB #5-2884  
Associated Legal Group, LLC  
1807 Capitol Ave., Suite 203  
Cheyenne, WY 82001  
307-632-2888  
Counsel for New Fashion Pork, LLP

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Jim Ruby, Executive Secretary  
Environmental Quality Council

**BEFORE THE ENVIRONMENTAL QUALITY  
STATE OF WYOMING**

IN THE MATTER OF THE PROTEST )  
TO THE ISSUANCE OF THE PERMIT TO ) Docket 11-3801  
CONSTRUCT NO. 11-008 )

**NFP'S RESPONSE TO NOTICE OF PROTEST**

New Fashion Pork, LLP ("NFP") by and through its counsel and pursuant to the Environmental Quality Council's July 5, 2011 Amended Response Order in this matter, hereby submits its Response to the Notice of Protest ("Protest") filed by Michael and Heidi Romsa on July 5, 2011.

NFP requests a scheduling conference be set at the earliest possible date to set a schedule for proceedings in the event that its pending Motion to Dismiss is not granted.

**Background:**

NFP operates a swine farrow to wean operation near Albin, Wyoming, which employs 26 full time employees. The facility, which was originally permitted on November 29, 1994, consists of two sets of barns, with each set capable of housing 4050 sows. In total, the operation is permitted to confine up to 8100 sows. NFP purchased the facility in 2000 and has operated it since that time.

Animal waste at the facility is managed using a flushing system whereby barns are flushed on a regular basis and flush water is discharged into a storage lagoon. Effluent from the lagoon, which contains nutrients beneficial to crops, is then land applied at agronomic rates on crop lands.

Water for flushing the barns and watering the swine has historically been obtained from the Romsa #7 well, an irrigation well located on the Protestant Romsa's property. Pursuant to an agreement existing between NFP and certain Romsa parties (including Protestants), water from the irrigation well on the Romsa property is used at the NFP facilities, discharged into the lagoon, and then pumped onto irrigated lands at agronomic rates. However, the agreement between NFP and the Romsa parties providing for water from the irrigation well and application of effluent on Romsa lands will terminate in January, 2012.

The pending expiration of the agreement necessitated that NFP obtain a new source of water and modify the method of managing animal waste from the facilities. As a result, NFP has permitted water supplies through the State Engineer's Office (which are not at issue here) and has worked with the Wyoming Department of Environmental Quality, Water Quality Division ("DEQ/WQD") for approximately four years, to design modifications to its waste management facilities. The modifications that were permitted by the DEQ in the Permit include implementation of a flush-water recycle system to conserve water and minimize the amount of effluent generated, inclusion of an additional earth-lined storage lagoon and use of a constructed wetland system to uptake and manage nutrient concentrations.

NFP utilized the expertise of professional engineers with experience in designing wastewater facilities, professional ground water hydrologists, environmental scientists, and experts in concentrated animal feeding operations ("CAFO") nutrient management to design the

modifications to the waste management system. Extensive engineering and design work was accomplished, and modifications were planned and designed utilizing methods that are successfully employed in different locations throughout the United States for similar facilities. Numerous meetings were held with the DEQ/WQD staff and the application to authorize the modifications underwent thorough review prior to approval. The resulting Permit allowing the modifications reflects the culmination of these efforts.

Operational controls under the modifications authorized by the Permit are more stringent than those previously required at the facilities. In addition, as noted in the Permit, NFP is also obtaining from the DEQ/WQD a CAFO Permit, which imposes additional limits on the management of animal waste, and which requires an approved nutrient management plan. NFP has applied for the CAFO permit and the application is currently under review with the DEQ. The requirements of the Permit under protest in this proceeding and the CAFO permit requirements represent a level of environmental oversight and stringency in excess of that previously required for the facilities.

**Responses to Specific Allegations in Protest:**

Chapter 1 Section 3(c)(iii) of the Rules of Practice and Procedure provides that a Petition for Hearing shall include: "A statement in ordinary, but concise language of the facts on which the request or protest is based, including whenever possible particular references to the statutes, rules or orders that the Applicant or Protestant alleges have been violated." NFP objects to the Protest on the basis that this important aspect of the rules has not been complied with in the Protest. Instead, the Protest contains only general subjective assertions without stating facts, scientific data, or any citations to applicable regulations to support the allegations. In many cases, there are no applicable regulations or statutes that would provide a mechanism by which

Protestants could obtain relief. As a result, it is difficult for NFP to fully respond to all of the averments in the Protest. However, to the extent that initial responses to the averments can be made, NFP states as follows:

1. With respect to Paragraphs A. and B. of the Protest, NFP admits that the Protest was filed by Michael and Heidi Romsa, protesting Permit No. 11-008.
2. With respect to Paragraph "C. Statement of Facts," NFP responds to the numbered subparagraphs as follows:

Paragraph C. 1. Upon the extent of NFP's belief, NFP admits that Protestants are residents of Laramie County and have irrigated lands adjacent to the NFP site. NFP admits that the Protestants residence is the closest residence to the NFP facilities. The Romsa residence is over ½ mile from the facility.

Paragraph C. 2. Upon the extent of NFP's belief, NFP admits that Protestants (particularly Michael Romsa) are generally familiar with farming and irrigation practices occurring on the Protestants' lands. NFP is without information sufficient to form a belief as to the Protestants' knowledge of farming practices on other landowners' properties in the vicinity of the NFP facilities, and therefore denies the same. NFP affirmatively states that NFP is well informed about the farming practices on the lands on which effluent from the NFP facilities is applied, and that NFP is knowledgeable about the nutrient management, soil nutrient levels, irrigation application information and other data that is routinely collected through NFP's monitoring program and reported to the DEQ annually by NFP to document conditions on the lands which receive effluent from NFP's facilities.

Paragraph C. 3. NFP denies that Protestants are “intimately familiar with the management style engaged in by NFP having been the supplier of water for the facility for the past twelve years.” Protestants’ assertion in this regard is vague and unclear. Pursuant to an agreement and authorization from the State Engineer’s Office, water from the Romsa #7 irrigation well on Protestants’ land has supplied the NFP facility and effluent stored in the NFP lagoon has been utilized as a source of irrigation water and nutrients on Protestants’ lands, as described above. NFP performs the DEQ reported monitoring and reporting for the DEQ permit. Protestants are not involved in the management of the NFP business operations and are not privy to or involved in the management of the company.

Paragraph C. 4. NFP denies that there are potential or immediate discrepancies in the permit conditions.

Paragraph C.5. NFP denies that there is insufficient specificity for the location or number of monitoring wells. There are two wells located down gradient of the site that were installed by NFP at specific selected locations for the purpose of groundwater monitoring and testing and for providing water to the facility. Protestant references these wells in Paragraph C. 6. These wells were fully monitored and evaluated upon installation as part of the groundwater evaluation conducted by Thomas G. Michel, a Ph.D hydrologist. These same wells will remain in place and will be pumped to supply water to the NFP facilities and to create a drawdown cone to intercept any exfiltration. Water quality samples can be taken from these wells if such becomes necessary, as they will be supplying water to the facilities. In addition, the existing lagoon, wetland area and much of the new lagoon are within the capture zone of these wells.

Paragraph C. 6. NFP admits the Hydro-Engineering LLC Report notes that there are indications of a hydraulic connection between the two NFP wells and between the two NFP wells and the Romsa #7 Well. This is an unremarkable observation and does not provide any basis upon which to conclude water quality in the Romsa #7 Well could be negatively affected by the NFP wells. All three wells draw from the same aquifer, and operation of the NFP wells would not, as a technical, hydrologic or scientific matter, materially change the water quality in the Romsa # 7 Well. The references in the Protest to water quantity or water supply for the Romsa #7 Well are not matters that are within the purview of an EQC proceeding, as matters pertaining to water appropriation and quantity are vested exclusively in the State Engineer and Board of Control. NFP's wells are lawfully permitted through the State Engineer's Office. Although not stated directly in the Protest, if the objection expressed in Paragraph 6. C. is that there is the potential that the NFP wells could be a conduit for pollution, such contention is answered by the fact that the wells were completed using DEQ and State Engineer approved methods for sealing the well annulus to prevent pollution from entering from the top of the well bore.

Paragraph C. 7. NFP denies Paragraph C. 7 for the reasons stated in the response to Paragraph C. 6, above.

Paragraph C. 8. NFP denies Paragraph C. 8. The allegation that the permit sampling requirements are "inadequate" provides no citation to regulation or any factual statement as to why the requirements are purportedly inadequate, or what is not addressed in the sampling requirements. To the contrary, the Permit contains extensive, detailed and rigorous sampling and reporting protocols for wastewater and includes measures to respond to any exceedences of allowable loading rates. (See permit conditions)

Paragraph C. 9. This paragraph asserts that there is no requirement for regular taking and/or reporting scentometry measurements. NFP responds by admitting there are no such requirements in the Permit and by affirmatively stating that there is no applicable regulation or permitting requirement for taking and reporting of scentometry measurements as a condition of a WQD construction permit. The Wyoming standard for odor is expressed in the Air Quality Regulations and enforced by the Air Quality Division. Protestants are seeking to have a requirement imposed upon NFP that has not historically been required, is unsupported by the regulations, and is not necessary to enable the agency to address odor issues in Wyoming.

Paragraph C. 10. This paragraph asserts that there is no requirement for regular taking and/or reporting olfactometry samples. NFP responds by admitting there are no such requirements in the permit and by affirmatively stating that the State of Wyoming does not employ olfactometry samples in the regulation of odor or air quality. There is no regulatory standard in Wyoming for olfactometry readings, no provision in regulations to take such readings, and no enforcement program for olfactometry. In short, olfactometry is not a methodology recognized or used by the State of Wyoming under the Environmental Quality Act or regulations and it has no application to the Permit.

Paragraph C. 11. NFP denies the allegations in Paragraph C. 11. that allege the allowable volatile solid loading rate (VSLR) of 4.25 lbs/ 1000 cubic feet of primary lagoon water provides an insufficient margin of error for safe operations and that the VSLR should be lower. NFP further denies the allegation that there is no requirement for regular testing to determine the actual, rather than calculated, capacity of the primary lagoon. The 4.25 loading rate is a rate derived from and supported by anaerobic lagoon

design standards published in the *USDA NRCS Agricultural Waste Management Field Handbook*. As to the allegation that there is no requirement for regular testing to accurately determine actual, rather than calculated capacity of the primary lagoon, the Permit requires that the level of the lagoon be measured from a manhole, which will allow for measurement of actual lagoon volume. This is a feasible and accurate way of taking volume measurements.

Paragraph C. 12. NFP admits that there is no condition requiring a bond and affirmatively states that as a matter of law no reclamation bond or bond of any kind is required under the Permit or applicable regulations. Further, the facility has operated without a bond since its construction and by operation of law is not required to have a bond to continue operations.

Paragraph C. 13. NFP restates its response to Paragraph C. 12., with respect to the assertions in Paragraph C. 13. that there is no provision for a bond for remediation.

Paragraph C. 14. NFP denies all allegations in Paragraph C. 14 and states that the general assertions fail to state any claim with any specificity sufficient for the EQC to take any action with respect to the Permit. The NFP facilities have existed in their present location for over 15 years and in the same proximity to the Romsa residence. The design standards and permit requirements for the facility modifications described in the Permit were derived after extensive engineering work, design and planning for the modifications, with input from the DEQ at several stages along the way. The provisions in the permit imposed for the modifications are more stringent than the permit requirements under which the facility has operated since the 1990s. In sum, the Protest provides no basis upon which the Permit should be modified in any respect, and fails to



demonstrate that the Protestants stand to be adversely affected by the issuance of the Permit.

General Denial: NFP specifically denies each and every allegation in the Protest that is not specifically admitted in the paragraphs above.

**Affirmative Defenses:**

1. The EQC lacks subject matter jurisdiction to hear the Protest. (See NFP's Motion to Dismiss).
2. The allegations in the Protest fail to comply with the requirements for Protests under the Rules of Practice and Procedure, (Chapter 1 § 3 (c) (iii)), in that they fail to provide specific facts or cite statutory or regulatory provisions to support their claims, and instead provide only conclusory statements of opinion that are not supported by any statement of facts or citation to legal authority.
3. The Protests fail to state any claim upon which relief may be granted.
4. Petitioners lack standing to bring this Petition.

WHEREFORE, NFP respectfully requests the EQC dismiss the Protest and/or affirm the issuance of the Permit.

Respectfully submitted this 2<sup>ND</sup> day of August, 2011.

  
Keith S. Burron, WSB #5-2884  
Associated Legal Group, LLC  
1807 Capitol Ave., Suite 203  
Cheyenne, WY 82001  
(307)-632-2888 (Phone)  
(307)-632-2828 (Fax)  
[kburron@associatedlegal.com](mailto:kburron@associatedlegal.com)  
Attorneys for NFP

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of August, 2011 I served a true, full and correct copy of the foregoing NFP's Response to Notice of Protest upon the following by depositing the same in the US Mail, postage prepaid and addressed as follows:

Alexander K. Davison  
Patton & Davison  
1920 Thomes Ave., Suite 600  
P.O. Box 945  
Cheyenne, WY 82003-0945

Luke Esch  
Wyoming Attorney General's Office  
123 Capitol Building  
Cheyenne, WY 82002

And Hand Delivered to:

Tim Flitner, Chairman  
Environmental Quality Council  
122 W. 25<sup>th</sup> Street, Room 1714  
Herschler Building  
Cheyenne, WY 82002

  
Keith S. Burron