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MEMORANDUM

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT COMMUNICATION**

To: Kip Crofts, Governor's Office, Counsel to the Governor

From: Pat Crank, Attorney General *PJC*

Re: Environmental Quality Council – Citizen petition, Appendix I, regarding additional requirements applicable to produced water discharges from coal bed natural gas (coalbed methane “CBM”) facilities.

I have reviewed the above referenced proposed rule. The proposed rule largely parrots the existing standards for produced water discharges found in Water Quality Rules Ch. 2, Appendix H and existing statutes. The major changes found in the proposed rules are the reduction in the effluent limits for sulfates and total dissolved solids and the addition of an effluent limit for barium. *Proposed Water Quality Rules Ch. 2, Appendix I (b)(vii)(B), (C), and (E)*. At this point, the Environmental Quality Council (EQC) has provided no information to show that the proposed limits are based on scientific data or other relevant information.

Rules adopted by an agency must be supported by relevant information in the record, or they will be struck down as arbitrary and capricious. Specifically, WYO. STAT. ANN. § 16-3-114(c) provides, in relevant part, that a reviewing court shall:

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law[.]

The Wyoming Supreme Court has stated, “[w]e have often said administrative officers and boards will not be permitted to act in an arbitrary, capricious or fraudulent manner, and courts will restrain such administrative agencies from becoming despotic.” *Board of Trustees of School Dist. No. 3, Natrona County v. District Boundary Bd. of Natrona County*, 489 P.2d 413, 417 (Wyo. 1971). Therefore, no administrative agency has the authority to act arbitrarily. “The term ‘arbitrary’ has been generally defined as willful and unreasoning action, without consideration and regard for the facts and circumstances presented, and without adequate determining principle.” *Tri-State Generation and Transmission Ass’n, Inc. v. Environmental Quality Council*, 590 P.2d 1324, 1330 (Wyo. 1979). “An agency action is arbitrary or capricious if it is not based on a consideration of the relevant factors.” *Id.* at 1330-1331. In this instance, the proposed rules significantly reduce the effluent limits found in the existing DEQ standards, which have been through the rulemaking process and have been utilized by DEQ for a number of years. Such a change requires some explanation or scientific data supporting the change.

In addition, the Environmental Quality Act (EQA) evidences an intent that rules and regulations promulgated pursuant to the act be subject to thorough examination and review and based on the consideration of relevant factors. Specifically, the EQA sets out a process whereby the administrators of the divisions are to consult with the appropriate advisory board before recommending rules to the director. WYO. STAT. ANN. § 35-11-110. After consultation, these advisory boards are to recommend, through the administrators and the director, rules and regulations to implement and carry out the provisions and purposes of the EQA. WYO. STAT. ANN. § 35-11-114. The director then recommends rules to the EQC. The EQA thus provided several layers of review and examination. WYO. STAT. ANN. § 35-11-112. In addition, the statutes individually set out different detailed regulations for the various department divisions. The statutes related to those individual divisions generally provide factors that the administrators are to consider when promulgating regulations. See WYO. STAT. ANN. §§ 35-11-202; 35-11-302; 35-11-401. The Wyoming Supreme Court has indicated that the EQC may find it advantageous to refer to the factors listed in the statute and that those factors may be of assistance to courts when determining whether the EQC has considered the relevant information when reaching a decision on a particular pollution standard. *Tri-State Generation and Transmission*, 590 P.2d at 1332.

The other change evidenced by the rules is the policy decision to treat water produced from conventional oil and gas drilling operations differently than the water

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produced by CBM development. I believe that such a policy shift should also be justified by some scientific data or other relevant information or the rules could be challenged as being arbitrary and capricious. I am unaware whether such information exists and would ask the EQC for the basis supporting this policy change.

The statutory scheme indicates that the legislature intended the rules and regulations adopted pursuant to the EQA to be the result of measured consideration and thorough consultation. As such, I would advise that you ask the EQC to provide any and all documentation to support the limits included within proposed Appendix I and documents justifying treatment of CBM discharges differently than discharges associated with conventional oil and gas operations. The rules cannot proceed until we are sure that the rules will not be struck down as arbitrary and capricious.