

# Office of the Attorney General

**Governor**  
Dave Freudenthal

**Attorney General**  
Patrick J. Crank

Civil Division  
123 Capitol Building  
Cheyenne, Wyoming 82002  
307-777-7876/777-7886 Telephone  
307-777-3687 Fax

**Chief Deputy Attorney General**  
Elizabeth C. Gagen

**Deputy Attorney General**  
Michael L. Hubbard

July 12, 2006

## PRIVILEGED AND CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

Mark Gordon, Chairman  
Wyoming Environmental Quality Council  
122 West 25<sup>th</sup> Street, Room 1714  
Cheyenne, WY 82002

Dear Chairman Gordon:

The Council asked this office to address several legal questions regarding the PETITION TO AMEND DEPARTMENT OF ENVIRONMENTAL QUALITY WATER QUALITY DIVISION RULES, CHAPTER 2, APPENDIX H (Petition) and the Attorney General's Formal Opinion No. 2006-001. Our office sent the Council a list of the questions as we understood them, and the Council has confirmed that these were the questions posed. We will address each question in turn.

**Question 1: The Clean Water Act states that "use in agricultural or wildlife propagation" means "that the produced water is of good enough quality to be used for wildlife or livestock watering or other agricultural uses and that the produced water is actually put to such use during periods of discharge." Is the Council complying with the Act, if it does not assure that the produced water is "actually put to such use?"**

The Clean Water Act (CWA) generally prohibits the discharge of water produced in oil and gas operations into the waters of the nation. 40 C.F.R. 435.32. There is however an exception for water used in agriculture and wildlife propagation. 40 C.F.R. §§ 435.51; 435.52. The CWA defines "use in agriculture or wildlife propagation" as

meaning that “the produced water is of good enough quality to be used for wildlife or livestock watering or other agricultural uses and that the produced water is actually put to such use during periods of discharge” 40 C.F.R. § 435.51(c). In ascertaining the meaning of this provision and Wyoming’s compliance with it, we are directed to determine the intent from the words of the statute. Indeed, when issues of statutory construction arise we look to the plain language of the statute itself. *Watt v. Alaska*, 451 U.S. 259, 265, 101 S.Ct. 1673, 1677 (1981). Additionally, a guiding principle of statutory construction is that a statute ought to be construed as a whole. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441 (2001). We must also consider the provisions in light of the purposes Congress sought to serve. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911 (1979).

We begin with the purposes of the CWA. One of those purposes is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C. § 1251. The language of the CWA should be considered in light of these purposes. It is worth noting that this purpose is similar to one of the declared purposes of Wyoming’s Environmental Quality Act (EQA), which is to “enable the state to prevent, reduce and eliminate pollution...” WYO. STAT. ANN. § 35-11-102. With this purpose in mind we move to the language of the CWA.

When considering the meaning of the provision, it must be read in toto. Therefore, the language “actually put to such use,” must be considered with the rest of the provision. Specifically, the Council must consider “and actually put to such use” as that phrase relates to “the produced water is of **good enough quality to be used for wildlife or livestock watering or other agricultural uses.**” 40 C.F.R. § 435.51(c). “Actually put to such use” modifies both “wildlife or livestock watering” and “other agricultural uses.” What the phrase “actually put to such use” for wildlife or livestock watering or other agricultural uses is not completely clear and unfortunately, there has not been judicial or agency interpretation of these provisions. However, it is clear that “actually put to such use” is not the same as “beneficial use.” *See*, Formal Opinion 2006-001; 44 Fed. Reg. 22069, 22075 (April 13, 1979). In fact, the EPA specifically noted that the meaning of “beneficial use” was not connected with the meaning of these regulations. *Id.* Thus, the meaning of “actually put to such use” does not connote the strict requirements of “beneficial use” as that term is used in water law. This distinction may indicate flexibility in the requirement of “actually put to such use” such that assuring that the water is accessible for wildlife or livestock watering, may meet the purposes of this provision.

The likelihood of this flexibility is greater when we consider other provisions of the CWA. In particular, the CWA includes numerous provisions that set specific effluent limitations. Such provisions indicate that the legislature knew how to set specific limitations when it desired to do so. However, nothing in 40 CFR 435.51 indicates a

specific effluent limitation. Additionally, “actually put to such use” does not appear to equate to “consumed” as that language could have easily be used if that was the intent.

Furthermore, the CWA expressly states, “[i]t is the policy of Congress that the authority of each state to allocate **quantities** of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired.... 33 U.S.C. § 1251(g) (emphasis added). It is therefore unlikely that “actually put to such use” as used by the CWA indicates that the flow is limited to the amount water actually to be consumed as such a reading would be contrary to this stated policy. Indeed, the flexibility of “actually put to such use” seems even more likely when considering the purposes of the CWA. As noted above, those purposes focus on the quality of the nation’s waters. Thus, the emphasis of 40 CFR 435 is undoubtedly on the portion that declares that the “produced water is of good enough quality to be used for wildlife or livestock watering or other agricultural uses,” and if the water is of this quality, it can be presumed to be “actually put to such use.”

As discussed in Formal Opinion 2006-001, it is our opinion that the Council does not have jurisdiction to address the quantity of water actually used, but does have authority to address issues involving the quality of discharged water. Currently, the existing Water Quality Division (WQD) rules reflect the language of 40 C.F.R. 435.51(c) to provide that the produced water must meet the same basic quality standard in order to be discharged into the surface waters of the state. *See*, Water Quality Division Rules, ch. 2, App. H (a)(i). The rules additionally provide that as long as the discharge water is accessible to livestock and/or wildlife and meets certain quality requirements, the discharge will be considered in compliance with Appendix H. *See*, Water Quality Division Rules, ch. 2, App. H (d)(i). As such, the Council has incorporated the CWA’s requirements. As long as the Council assures that the discharges are consistent with these regulations, the Council should be in compliance with the CWA.

**Question 2: If the quantity of produced water is impacting land quality, does the Council have the authority to regulate the quantity of water produced?**

The Council is given the power to promulgate rules and regulations necessary for the administration of the (EQA). WYO. STAT. ANN. § 35-11-112(a)(i). Indeed, the legal obligation imposed on the Council by the legislature is “to promulgate rules and regulations necessary to prevent, reduce and eliminate pollution.” *Tri-State Generation & Transmission Ass’n v. Environmental Quality Council*, 590 P.2d 1324, 1332 (Wyo. 1979). The EQA grants the Council the authority to regulate, among other things, both land quality and water quality. A search of the land quality provisions reveals that those provisions generally relate to mining activities and do not include provisions granting the Council authority to regulate the quantity of discharged water for the sake of land quality. *See*, WYO. STAT. ANN. §§ 35-11-401 through -437.

The provisions of the EQA related to water quality similarly do not relate to the effect of discharged water on land quality. Instead, those provisions provide the Council with the authority to regulate water quality as it relates to several activities. WYO. STAT. ANN. § 35-11-301 states:

(a) No person, except when authorized by a permit issued pursuant to the provisions of this act, shall:

(i) Cause, threaten or allow the discharge of any **pollution or wastes into the waters of the state;**

(ii) Alter the physical, chemical, radiological, biological or bacteriological properties **of any waters of the state;**

(iii) Construct, install, modify or operate any sewerage system, treatment works, disposal system or other facility, excluding uranium mill tailing facilities, capable of causing or contributing to pollution, except that no permit to operate shall be required for any publicly owned or controlled sewerage system, treatment works or disposal system;

(iv) Increase the quantity or strength of any discharge;<sup>1</sup>

(v) Construct, install, modify or operate any public water supply or construct any subdivision water supply, except that no permit to operate shall be required for any publicly owned or controlled public water supply and a permit under this section shall not be required for subdivision water supplies consisting of individual wells serving individual lots of a subdivision. (Emphasis added.)

A reading of the plain language of this statute shows that the Council does not have authority to regulate the quantity of water discharged for the sake of land quality.

---

<sup>1</sup> WYO. STAT. ANN. § 35-11-103(c)(vii) defines “discharge” as “any addition of any pollution or wastes to any waters of the state.” Thus, this provision is not intended to convey authority to regulate water quantity without regard to quality.

**Question 3: If the Council does not have the authority to regulate the quantity of water produced from coal bed natural gas (CBNG) development, who does?**

As noted in the Formal Opinion No. 2006-001, the EQA does provide the Council with authority to regulate water quantity if the quantity of the water is causing unacceptable water quality or has the potential to cause unacceptable water quality. Thus, the Council does have the limited authority to regulate quantity of produced water in those instances. The State Engineer's Office and the Oil and Gas Conservation Commission are other agencies with authority over produced water.

Specifically, the Wyoming Constitution grants the State Engineer and the Board of Control "supervision of the waters of the state" WYO. CONST. art. 8 §§ 2, 5. This authority includes matters related to appropriation and distribution. *Id.* The waters of the state include groundwater. *See*, WYO. STAT. ANN. §§ 41-3-903, 41-3-904 (defining by-product water and allowing for its appropriation). Groundwater diversions require a permit from the State Engineer's Office. *See*, WYO. STAT. ANN. § 41-3-905. Permits of this sort "shall be granted as a matter of course, if the proposed use is beneficial and, if the state engineer finds that the proposed means of diversion and construction are adequate." WYO. STAT. ANN. § 41-3-931.

Additionally, the statutes related to the State Engineer's Office provide:

A water right is a right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the **basis, the measure and limit of the right to use water at all times ...**

WYO. STAT. ANN. § 41-3-101 (emphasis added). The EQA provides that nothing in the act "limits or interferes with the jurisdiction, duties or authority of the state engineer, [or] board of control..." WYO. STAT. ANN. § 35-11-1104(a)(iii).

The Oil and Gas Conservation Commission (OGCC) has similarly been granted some authority for produced water. Specifically the OGCC has been granted the authority to regulate, for conservation purposes "disposal of salt water, nonpotable water, drilling fluids and other oil-field wastes which are uniquely associated with exploration and production operations." WYO. STAT. ANN. § 30-5-104(d)(ii)(D). Accordingly, through this authority the OGCC may regulate the disposal of the quantity of produced water falling into these categories.

**Question 4: Does the Council have the authority to regulate the quantity of water produced from CBNG if the Council determines that the produced water is a “nuisance” under the definition of pollution as found in WYO. STAT. ANN. § 35-11-103(c)(i)?**

As noted above, the Council has the authority to regulate the discharge of “pollution” into the waters of the state. The definition of pollution as it relates to water quality is quite broad. Specifically, WYO. STAT. ANN. § 35-11-103(c)(i) provides:

‘Pollution’ means contamination or other alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity or odor of the waters or **any discharge of any acid or toxic material, chemical or chemical compound, whether it be liquid, gaseous, solid, radioactive or other substance, including wastes, into any water of the state which creates a nuisance** or renders any water harmful, detrimental or injurious to public health, safety or welfare, to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife or aquatic life, or which degrades the water for its intended use, or adversely affects the environment. (Emphasis added).

The language of this definition includes the discharge of a substance which creates a “nuisance.” “Nuisance” is not a defined term under the provisions of the EQA and therefore should be given its plain and ordinary meaning. Dictionaries define “nuisance” as “harm, injury” or “one that is annoying, unpleasant or obnoxious” Merriam Webster’s *Collegiate Dictionary*, 850 (11<sup>th</sup> Ed. 2004). “Nuisance” as used in this statute should be given a similar meaning. Additionally, the meaning of “nuisance” must be contemplated as that word is arranged and connected within the statute itself. *BP America Prod. Co. v. Dep’t of Revenue*, 2005 WY 60, ¶15, 112 P.3d 596, 604 (Wyo. 2005). Specifically, “nuisance” must not be read in isolation but in context of the statute as a whole. *Id.* When considering “nuisance” in context, it is clear that it must be a discharge of any “acid or toxic material, chemical or chemical compound, whether it be liquid, gaseous, solid, radioactive or other substance, including waste into any water of the state” that creates the nuisance. The Council is granted the authority to regulate the discharge of substances into the waters of the state that create a “nuisance” in that sense.

**Question 5: Does the Council have the authority to regulate the quantity of water produced from CBNG if the Council determines that the quantity of produced water causes erosion?**

This question also requires the consideration of the definition of "pollution." The plain language of the definition of pollution includes no mention of erosion. The definition does, however, include the addition of a "substance" to water which renders the water detrimental to commercial, industrial, agricultural, recreational, or other legitimate beneficial uses. WYO. STAT. ANN. § 35-11-103(c)(i). Again however, the meaning of the word "substance" must be contemplated as that word is arranged and connected within the statute itself. *BP America Prod. Co. v. Dep't of Revenue*, 2005 WY 60, ¶15, 112 P.3d 596, 604 (Wyo. 2005). Specifically, like "nuisance," "substance" must not be read in isolation but in context of the statute as a whole. *Id.* Indeed, a rule of statutory construction is that a word is known by the company it keeps. *Gustafson v. Alloyd Co., Inc.* 513 U.S. 561, 575, 115 S.Ct. 1061, 1069 (U.S. 1995). This rule is applied to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words and thus giving unintended breadth to legislation. *Id.*

In this instance, the word "substance" is used in a list including "acid or toxic material, chemical or chemical compound, whether it be liquid, gaseous, solid, radioactive or other substance, including wastes." WYO. STAT. ANN. § 35-11-103(c)(i). It therefore appears that "substance" as it is used in this statute, is intended to mean something similar to the other listed materials. Thus, if the produced water is of sufficient quality, the addition of that water to water would likely not be considered the addition of a "substance." Accordingly, the Council does not have the authority to regulate the quantity of water simply because it causes erosion.

**Question 6: Does the Council have the authority to regulate the quantity of water produced from CBNG if the Council determines that the quantity of produced water effects wildlife?**

This question again requires the consideration of the definition of "pollution." This definition specifically includes the addition of substances to water which renders the water detrimental to wildlife uses. If the quantity of the discharged water is such that it renders the quality of the water into which it is discharged injurious to wildlife, then the Council has the authority to regulate the quantity of produced water discharged.

**Question 7: Is CBNG discharged water considered "return flow" as that phrase is used in Wyoming Law?**

It appears the phrase "return flow" has never been specifically defined by Wyoming statute, rule, or case law. However, in water law, the generally accepted meaning of the term "return flow" is "water drawn from a stream and impounded or used in irrigation which subsequently arrives again at the stream from which it was initially extracted. *U.S. v. Warm Springs Irr. Dist.*, 38 F. Supp 239, 241 (D. Or. 1940). This definition is consistent with the context in which the term "return flow" is used within

Wyoming statutes. *See*, WYO. STAT. ANN. §§ 41-3-104; 41-3-110; 41-3-115; 41-3-701. At the point of its production, the water produced during CBNG operations does not fit within that generally accepted meaning because it has not been “impounded or used in irrigation” and then subsequently returned to the stream from which it was extracted. Instead, at the point of its production CBNG discharged water is more appropriately classified as “by-product water” as that term is defined by WYO. STAT. ANN. § 41-3-903. That statute defines by-product water as:

[W]ater which has not been put to prior beneficial use, and which is a by-product of some nonwater-related economic activity and has been developed only as a result of such activity. By product water includes, but is not limited to, water resulting from the operation of oil well separator systems or mining activities such as dewatering of mines.

*Id.* The appropriation of “by-product water” is supervised by the State Engineer and the Wyoming Board of Control. *See*, WYO. STAT. ANN. § 41-3-904.

**Question 8: Is the Council obligated to use Appendix H, which addresses requirements applicable to produced water discharges from oil and gas production facilities, to regulate water produced in CBNG development, or may the Council enact separate and distinct regulations for CBNG development?**

The Council has been given the authority to promulgate rules and regulations in accordance with the EQA. WYO. STAT. ANN. § 35-11-112(a)(i). As long as an agency does not exceed its authority and follows the appropriate procedure when promulgating such rules, generally, the agency has the flexibility to formulate the rules as it sees fit. The Council has been given the authority to “promulgate rules and regulations necessary for the administration of [the EQA], **after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards.**” WYO. STAT. ANN. § 35-11-112(a)(i) (emphasis added).<sup>2</sup> Wyoming statute also provides that the administrator has the power to recommend “that any rule, regulation or standard or any amendment adopted [] may differ in its terms and provisions as between particular types, characteristics, quantities, conditions and circumstances ...” WYO. STAT. ANN. § 35-11-110(a)(ix). Accordingly, if the Council desires to promulgate a separate and distinct section related to CBNG, it may do so. There could be a question, however, of whether the EQC may force the Wyoming Department of Environmental Quality (DEQ) to bear the expense of promulgating rules not recommended by the Director of the DEQ.

---

<sup>2</sup> As discussed in Question 9, the Wyoming Administrative Procedure Act (WAPA) provides the additional authority for agencies to consider citizen petitions for rulemaking.



**Question 9: Is the rulemaking process for a citizen petition different than the normal rulemaking process?**

The Council is an “agency” as defined by WYO. STAT. ANN. § 16-3-101(b)(i). The Council has the authority to adopt, amend, and repeal all the rules regarding the implementation and administration of the EQA. WYO. STAT. ANN. § 35-11-112. As discussed above, the rulemaking process is normally initiated by the DEQ or an Advisory Board. See, WYO. STAT. ANN. §§ 35-11-112(a)(i); 35-11-114(b). However, pursuant to the WAPA, “any interested person” may petition an agency for the promulgation, amendment or repeal of any rule. WYO. STAT. ANN. § 16-3-106. After such a petition is submitted, “the agency as soon as practicable either shall deny the petition in writing (stating its reasons for denials) or initiate rulemaking proceedings in accordance with W.S. 16-3-103.” *Id.* If the Council denies the petition and decides not to proceed to rulemaking, that decision is final and not subject to review. *Id.* However, as the language of §16-3-106 indicates, if the Council decides to accept the petition and initiate rulemaking, the normal rulemaking process provided by § 16-3-103 applies. Thus, the actual rulemaking process for a citizen petition is the same once the Council decides to accept the petition and initiate rulemaking.

**Question 10: What options are available to the Council regarding this particular petition? Specifically, what decisions may be made regarding the motion to dismiss related to this petition?**

We cannot provide specific answers to this question at this time because the EQC staff has not forwarded the relevant documents pertaining to this petition to this Office. However, in a general sense, the options available to the Council regarding this petition are the usual options available to an agency when adopting rules. That is, the Council may adopt, not adopt, amend, or withdraw the notice of intent to adopt the rules. However, as discussed in the Formal Opinion 2006-001, the EQA does not grant the Council or DEQ the authority to regulate water quantity to ensure that all produced water from CBNG production is at all times actually used for wildlife or livestock watering or other agricultural uses. Therefore, the Council does not have the statutory authority to adopt these rules in their current form. If the Council decides it would like to withdraw the notice of intent to adopt, there are no specific statutory requirements that must be complied with in order to do so. However, it is advisable to provide the interested parties and the Secretary of State’s Office with a revised decision to deny the petition for rulemaking. Such a decision is likely not subject to appeal. If the Council decides to amend the rule so that it complies with law and those amendments change the original rule so that the original notice of rulemaking was not sufficient, then a second public comment period will be necessary.

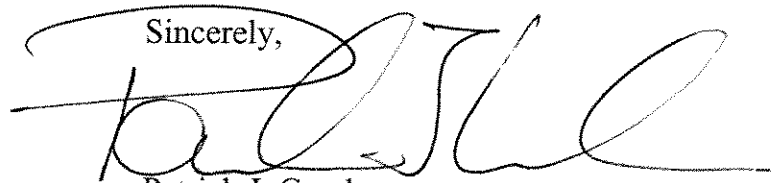
As for the motion to dismiss filed in response to the petition for rulemaking, it is important to remember that the Council is conducting a rulemaking process, not a contested case. *See*, Environmental Quality Council, Rules and Regulations, Ch. III, § 4. Accordingly, the motion to dismiss is simply information to be considered as a part of that rulemaking process, and the Council's alternatives remain the same as those mentioned above.

**Question 11: Can the Council formulate rules for how a citizen can initiate a rulemaking process? Essentially, may the Council direct what must be included in a citizen petition?**

The WAPA provides for citizen petitions and states that "each agency may prescribe by rule the form of the petition and the procedure for its submission, consideration and disposition." WYO. STAT. ANN. § 16-3-106. Accordingly, the Council may adopt, by rule, any procedure that it deems appropriate for the submission, consideration, and disposition of any petitions filed by interested persons. When doing so, the Council may detail the type and quantity of information the Council will require before considering such a petition. Currently, Chapter III of the Council's Rules of Practice and Procedure provide for rulemaking hearings and brief requirements for citizen petitions. If the Council would like to change these requirements, it could amend these rules.

If there are any other questions or concerns that we may address, please don't hesitate to contact this office.

Sincerely,



Patrick J. Crank  
Attorney General

*Michael L. Hubbard*

Michael L. Hubbard  
Deputy Attorney General



Bridget Hill  
Assistant Attorney General