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Office of the Governor

April 23, 2007

FILED

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Terri A. Lorenzon, Director
Environmental Quality Council

Mr. Richard C. Moore, P.E., Chairman
And Members,
Environmental Quality Council
Herschler Building, Room 1714
122 West 25th
Cheyenne, WY 82002

RE: Final Rules for Water Quality Division, Department of Environmental Quality (DEQ), Chapter 2, Appendices H and I, Docket No. 05-3102

Dear Chairman Moore, and Members, Environmental Quality Council (EQC):

I have carefully considered the rules submitted to me by your Memorandum dated February 23, 2007. They have also been reviewed by the Attorney General and my counsel.

The Wyoming Statutes place an affirmative responsibility on the Governor in the rule review process. W.S. 16-3-103(d) provides that, "The Governor shall not approve any rule or any amendment, repeal, modification or revision of the rule unless it:

(i) Is within the scope of the statutory authority delegated to the adopting agency;
(ii) Appears to be within the scope of the legislative purpose of the statutory authority; and
(iii) Has been adopted in compliance with the procedural requirements of this act (The Administrative Procedure Act)."

Applying these standards to the proposed rules, I have concluded that I cannot add my signature to these proposals. I believe these proposed rules reach beyond the statutory authority of the Environmental Quality Act (EQA) and invite the Department of Environmental Quality to regulate water quantity discharge, not as a coincidence of achieving a water quality result, but as a simple matter of reducing the amount of discharge for its own sake. I also question whether the procedural requirements of the Wyoming Administrative Procedure Act (WAPA) and the EQA were followed.

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The regulation of quantity by the DEQ was one of two primary requests made from the beginning by the Petitioners. The second request was for re-determination of numeric water quality standards. When you wisely decided to postpone consideration of the numeric standards for water quality until completion of the University of Wyoming study, it appears there was nothing left from the Petition for your consideration but the issue of water quantity. I note that, on page 6 of the "Statement of Principal Reasons" for the rules, you say that you have changed the rules in response to ". . . the concerns of landowners who testified to problems with the produced water discharges from coal bed natural gas operations, **in particular with high volumes of discharged water** . . ." (emphasis added) Later in the same paragraph — "A better process is to have a permit applicant present **information on agricultural and wildlife use** in the application process." (emphasis added) These sentences reflect intent to regulate water quantity. I have received mail from constituents, on both sides of this issue, who believe that is what you have done.

The Attorney General opined on April 12, 2006, correctly in my view, that DEQ could only concern itself with water quantity when it had an effect on quality. Water quality standards, as expressed in the current rules, are usually expressed in terms of some unwanted substance dissolved in the water, and clearly the quantity of that substance relative to the quantity of water affects the degree of concentration of the unwanted polluting substance, and thus affects the quality of the water. DEQ has always concerned itself with those issues of concentration and dilution. But that is clearly not the same as saying they have broad authority to regulate quantities and usage of discharged water. The conclusion that the statutes giving power to the EQC and the DEQ were not intended to authorize broad regulation of water quantity is further supported by the provisions of W.S. 35-11-1104(a)(iii) which provides that nothing in the act "limits or interferes with the jurisdiction, duties or authority of the state engineer, [or] board of control . . ."

An argument has been offered that federal law requires DEQ to regulate quantity for quantity's sake. This is not correct. When that federal rule was first adopted it was in response to conventional oil and gas operations. This was before Coal Bed Methane (CBM) technology was developed and when no one anticipated that CBM produced water might be used for anything other than animal watering or rural irrigation, and before anyone anticipated the large quantities of water that might be produced. The first draft of the federal rule simply provided that no water could be discharged. In response to requests from people in the arid west, including many in Wyoming, for authority to make use of the water the feds changed that rule, allowing it to be discharged so long as some "beneficial" use was made of it. Later they amended the word "beneficial" out of the rule, recognizing that it was being confused with the term "beneficial use" that had different and specific meaning in western water law. So, in effect, the environmental value being protected is the quality of the water. Once the quality is deemed acceptable for a particular use — the actual quantity of the water utilized becomes a secondary consideration under the federal rules. The federal Clean Water Act, under which the

federal rule was adopted, contains a provision that states, "It 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 by this chapter." (emphasis added) This federal language closely parallels the earlier cited provisions of the Wyoming Environmental Quality Act. Thus, it is clear that the federal rule, as copied in the current Wyoming rules, in Appendix H, was never intended to grant broad authority to either the federal EPA or the Wyoming DEQ to regulate quantity per se.

The new rules the EQC has proposed would make two significant and problematic substantive changes to the existing rule as currently written in Appendix H. And, the EQC has created a significant procedural problem in the way it has made one of those changes.

First, in the new Appendix I, the EQC has inserted a requirement that the DEQ shall require "representative and valid data establishing" that the produced water is actually used for wildlife or livestock watering or other agricultural uses, and, second, it has eliminated the presumption formerly contained in Appendix H that stated that if the quality is sufficient and the discharge water is accessible to livestock and/or wildlife…"the discharge will be considered in compliance with the requirements of Appendix H (a)(i) of these regulations." Unfortunately these two changes, taken together, open a "back door" way for DEQ to simply regulate quantity and usage of the produced water.

The usage of the new terms "representative and valid data" is also problematic, for substantive and procedural reasons. On their face, those terms appear to be very ambiguous and unclear. Neither DEQ nor affected parties will be able to discern precisely what kind of data might be required. Is the applicant required to identify a certain number of livestock and/or wildlife, calculate their consumption and this becomes the limit of the discharge quantity? If the intent is not to regulate discharge based on actual use, it is difficult to understand the superior utility of the new information compared to the existing requirement of accessibility for wildlife and/or livestock.

While not determinative of my decision, there is also a procedural concern about the adequacy of the public notice originally referencing "credible data," which has a statutorily defined meaning and context, as contrasted to the subsequent 11th hour insertion of "representative and valid data." The public notice may not have sufficiently informed the public that such a change was possible.

There is another provision in the new Appendix I that I believe may also be problematic. Appendix I in the proposed new rules requires the DEQ to require establishment that the "quantity of produced water shall not cause, or have the potential to cause, unacceptable water quality." Upon its face this seems only to require establishment of the self-evident dilution versus concentration factor that I mentioned

above, and thus may be only unnecessary surplusage. However, I believe its insertion in this new appendix is further evidence that EQC has intended in these changes to regulate quantity of CBM water, since no similar provision appears in Appendix H. And thus it further heightens my concern that these rules are contrary to law.

I have one final concern with the rules the Council has proposed, and the process by which those rules have arrived here. W.S. 35-11-112(a)(i) gives EQC the authority to "promulgate rules and regulations necessary for the administration of this act . . ." But that section continues with this: ". . . after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards." This ban on unilateral rule-making by the EQC is further confirmed in W.S. 35-11-112(a)(ii) in which EQC is empowered to "[c]onduct hearings as required by the Wyoming Administrative Procedure Act for the adoption, amendment or repeal of rules, regulations, standards or orders recommended by the advisory boards through the administrators and the director." I see nothing that makes an exception to this requirement when the Council is acting upon rules proposed from a citizen outside the Department. The EQA and WAPA read together suggest that a citizen petition may trigger rule making but the proposal must still be considered by the relevant advisory board and the Department.

This discussion could continue for many pages. I appreciate the hard work of the Council on these rules but I am unable to sign them. I believe they step outside the powers delegated to the Council and the Department of Environmental Quality by the Legislature.

Pursuant to the statute, your proposed rules are returned with this letter, without my signature.

Best regards,

Dave Freudenthal

Dave Freudenthal
Governor

DF:KC:pjb
c: Honorable Max Maxfield, Secretary of State
Honorable John Schiffer, President of the Senate
Honorable Roy Cohee, Speaker of the House
Patrick J. Crank, Attorney General
Legislative Service Office