BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE PETITION TO AMEND THE WYOMING WATER QUALITY RULES AND REGULATIONS, CHAPTER 2, APPENDIX H	))))	Docket No. 05-3102

INDUSTRY RESPONDENTS' COMMENTS ON PETITIONERS' PROPOSED STATEMENT OF PRINCIPAL REASONS

Introduction and Summary

On February 16, 2007, the Council voted to adopt the proposed new Appendix I to Chapter 2 establishing effluent limits for discharges of produced water from coalbed methane operations, with certain amendments. Petitioners have submitted a proposed Statement of Principal Reasons to be adopted by the Council in accordance with W.S. § 16-3-103(a)(ii)(D). *See* Attachment 1 hereto ("Proposed Statement"). Industry Respondents respectfully object to six mischaracterizations or ambiguities in the Proposed Statement, all of which should be corrected and clarified in any final statement adopted by the Council.[1]

First, nothing in the record of this rulemaking supports the statement that "The proposed Appendix I . . . will maintain Wyoming's primacy for delegated programs under the federal Clean Water Act." Proposed Statement at 2. This is a red herring, as there is not a shred of evidence in the record to suggest that Wyoming's primacy would be in jeopardy if CBM discharges continued to be regulated under existing Appendix H.

Second, contrary to Petitioners' assertion, the Environmental Quality Act, W.S. § 35-11-112(c)(i), expressly requires that the Council act on a petition for rulemaking only after the

[1] The following Respondents join in these comments: Marathon Oil Company; Devon Energy Production, L.P.; Merit Energy; Petro-Canada Resources (USA) Inc.; Yates Petroleum Corporation; Williams Production (RMT) Company; Fidelity Exploration and Production Company.

proposed rule has been recommended by DEQ following consultation with the Water and Waste Advisory Board. It is incorrect to state that the adopted rule went through several years of Advisory Board proceedings. On the contrary, the rule was never presented to the Advisory Board in any of its several versions.

Third, it is not true that a hearing was held on January 17-18, 2007, on Appendix I as adopted. Before adopting Petitioners' proposed rule, the Council made drastic changes to it on February 16, 2007, by deleting section (c)(i), under which wildlife and livestock uses were presumed to occur for discharges that meet livestock drinking water standards. In fact, the Council's amendment went far beyond the scope of permissible amendments to a proposed rule and, under the Wyoming Administrative Procedure Act ("WAPA") and the Environmental Quality Act, the public must be afforded an opportunity to comment on this fundamental change in the rule.

Fourth, the Proposed Statement erroneously asserts that the rule is authorized under the EQA. On the contrary, to the extent that section (a)(i) of the rule still purports to authorize DEQ to regulate the quantity of water discharged, without regard to the quality of the discharge, by requiring actual use thereof, the rule is contrary to the EQA.

Fifth, the Proposed Statement overreaches in asserting that DEQ can promulgate an effluent limitation guideline (ELG) for the CBM industry that requires consideration of the fate of every affected produced water discharge as it flows downstream. While ELGs may be supplemented by water quality-based limits in a given permit, ELGs promulgated under the federal Clean Water Act and the EQA are uniform standards that apply to all permits in a given industry category and, by definition, do not involve case-by-case analysis of the fate of discharged water.

Sixth, Petitioners assert that "evidence in the record demonstrates that too often permit applications are based on shoddy science and DEQ issues permits based on shoddy science." Proposed Statement at 12. The draft statement does not cite a single item of specific information to support this gratuitous statement, and no such evidence was ever presented to EQC.[2]

Discussion

1. Wyoming's Primacy Was Not At Risk Under Appendix H.

Respondents' Draft Statement says that "the WYPDES program must, at all times, be in accordance with § 401 of the [federal Clean Water] Act, all guidelines promulgated pursuant to § 304(h)(2) of the Act, and the Memorandum of Agreement between the EPA Regional Administrator and the Director of the Wyoming DEQ." Proposed Statement at 2. Respondents would have the Council assert, as justification for the new rule, that Appendix I "addresses shortcomings" and thereby "maintain[s] Wyoming's primacy" for issuing discharge permits under the Clean Water Act. *Id.*

Since 1975, Wyoming has been authorized under Section 402(b) of the federal Clean Water Act ("CWA") to administer the NPDES permit program in lieu of EPA. *See* 33 U.S.C. § 1342(b); 40 C.F.R. Part 123 (requirements for State programs). As an authorized State, Wyoming must satisfy certain federal statutory and regulatory requirements to maintain authorization of its Wyoming NPDES ("WYPDES") program. *See* 33 U.S.C. § 1342(b); 40 C.F.R. Part 123.

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[2] Additionally, the discussion at pages 9-11 of the proposed Statement, which apparently predates the February 16, 2007 proceedings, in which Petitioners seek to qualify the reach of section (a)(iii) as something less than a prohibition on discharges of CBM water, is irrelevant in light of the Council's deletion of section (a)(iii) from the adopted rule and should be removed from the Statement.

EPA can withdraw authorization of the State program, but *only* if EPA provides notice to the State and then holds a public hearing consistent with certain statutory and regulatory criteria and procedures. *See* 40 C.F.R. § 123.63(a) (specifying criteria for determining whether State program complies with applicable requirements); *id.* § 123.64 (procedures for notice and public hearing); *id.* §§ 123.64(b)(8)(iii), (vi) (allowing EPA to withdraw State authorization only after EPA gives the State up to 90 days to take corrective action and the State fails to do so); 33 U.S.C. § 1342(c)(3) (same). Congress intended that EPA would not exercise its withdrawal "except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise to comply with the law." 118 Cong. Reg. 33750 (1972); *see id.* at 33761 (Congress "expect[s] the Administrator to use this authority judiciously; it is their intent that the Act be administered in such a manner that the abilities of the States to control their own permit programs will be developed and strengthened"); *see also Save the Bay, Inc. v EPA*, 556 F.2d 1282, 1287 (5th Cir. 1977) (citing legislative history to support "the theme of restraint in the EPA's exercise of its supervisory role").

There has been no indication by either EPA or any other interested person that Wyoming is failing to meet the applicable requirements for administering its WYPDES program *at all*, let alone with respect to the State's enforcement of discharges from CBNG production. Even if there were, EPA would be expected to exercise its restraint in determining whether to withdraw Wyoming's WYPDES program and would be required to follow the detailed statutory and regulatory procedures. Thus, there is no basis for claiming that the new Appendix I to Chapter 2 is necessary to "maintain Wyoming's primacy for delegated programs of the federal Clean Water Act," Proposed Statement at 2, and the unsupported risk of losing State CWA

authorization should *not* provide *any* basis for adopting Appendix I. This assertion therefore should be deleted from the Statement of Principal Reasons.

At none of the hearings on the rule have Petitioners ever asserted that Wyoming's primacy was at risk if the State did not create a separate Appendix I with effluent limits specific to discharges of CBM produced water, let alone evidence to support that assertion. Indeed, EPA only recently published notice of its intent to consider whether it is appropriate to develop effluent limitation guidelines for CBM discharges. *See* 71 Fed. Reg. 76644 (Dec. 21, 2006). EPA's stated intent is to develop more information about CBM discharges "in order to determine whether it would be appropriate to conduct a rulemaking to potentially revise the effluent guidelines for the Oil and Gas Extraction category to include limits for [CBM]." *Id.* at 76656. Clearly, the Agency would not find fault with Wyoming's continued use of Appendix H, which reflects the technology-based effluent limitations for oil and gas producers in 40 C.F.R. Part 435, in WYPDES permitting for CBM discharges. That is the applicable effluent limitation guideline for all oil and gas produced water discharges under the Clean Water Act, and will remain so unless and until EPA determines, based on record evidence, that a separate ELG is needed for CBM discharges.

If the Council nevertheless believes that adoption of Appendix I was required by federal law, then, at a minimum the Statement of Principal Reasons must include those items required under section 103 (a)(i)(F) of the WAPA, which were not included in the public notice for the proposed rules. Furthermore, pursuant to W.S. § 16-3-103(a)(ii)(C), Industry Respondents hereby request that the Council provide them with "a written response explaining and substantiating the agency's position by reference to federal law or regulations." The Council

must also provide "to the governor and legislative service office a concise statement of [this] objection and the agency's response."

2. The Rule Was Never Presented to the Advisory Board And Could Not Be Lawfully Adopted Without A Recommendation From DEQ Following a Hearing Before the Advisory Board.

Petitioners would have the Council state that "this rule has gone through several years of the Advisory Board and Administrator process." Proposed Statement at 4. This is simply not true. Notwithstanding that Industry Respondents urged the Council to refer the PRBRC petition to the Advisory Board as long ago as June 2006[3], this rule has never been considered by the Advisory Board, the Board has never received public comment on the rule, and DEQ has never recommended that this rule be adopted.

Despite contending erroneously that Appendix I has gone through the Advisory Board and DEQ review process, Petitioners also would have the Council erroneously find that it is empowered to promulgate rules without regard to the EQA's requirements that rules be adopted only upon a recommendation from the Director following consultation with the Water and Waste Advisory Board. The language of W.S. § 35-11-112(a)(i) is unmistakably clear. The Council's enumerated powers include the power to "[p]romulgate rules and regulations necessary for the administration of this act, *after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards*." (Emphasis added.) This prohibition of unilateral rulemaking is confirmed in W.S. § 35-11-112(a)(ii), under which the Council is empowered to "[c]onduct hearings as required by the Wyoming Administrative Procedure Act [W.S. §§ 16-3-101 through 16-3-115] for the adoption, amendment or repeal of

[3] See Joint Response to Petitioners' First Status Report, filed June 16, 2006, at 16.

rules, regulations, standards or orders recommended by the advisory boards through the administrators and the director." (Emphasis added.)

Petitioners contend that this limitation on the Council's power to promulgate rules does not apply where a member of the public petitions EQC to adopt a rule, citing W.S. § 35-11-112(c)(1), which provides: "Subject to any applicable state or federal law, and subject to the right to appeal, the council may: (i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator;. . . ." However, this language does not say the Council is authorized to "approve, disapprove, repeal, modify or suspend" rules only when it engages in rulemaking in response to citizen petitions. Thus, W.S. § 35-11-112(c)(1) could not be read to negate W.S. §§ 25-11-112(a)(i) and (ii) *only* with respect to citizen petitions. If read as an independent grant of authority to EQC, W.S. § 35-11-112(c)(i) would have to be operative in all rulemakings and, thus, would also negate W.S. §§ 35-11-112(a)(i) and (ii) for DEQ-proposed rules as well. To avoid that absurd result, and to harmonize these provisions and give meaning to both, W.S. § 35-11-112(c)(i) must be read as being subject to the "applicable state law" in the preceding W.S. § 35-11-112(a)(1).

Therefore, even citizens' petitions must be submitted to the Director, the Administrator of the appropriate division and the respective advisory board so that the Council will have the requisite professional advice on whether a proposed rule meets EQA's criteria and is in the best interests of Wyoming. By neglecting this duty, the Council compromised the quality control and consultation procedures the Legislature established for rulemaking on highly technical subjects under the EQA. As a result the Council struggled, and the State will suffer, with rule language that not even Petitioners' counsel could adequately explain at the January 17-18 hearing, as she said the Council would have to "work this language" to make the rule clear. Hearing Transcript

(Jan. 17, 2007) at p. 61, lines 17-25; p. 62, lines 1-3. "Working" the language of environmental regulations is the function of DEQ and the Advisory Board, and should have occurred before Appendix I was presented to the Council for final approval.

3. EQC Failed to Hold an Effective Hearing on Appendix I, As Amended.

Petitioners would have the Council find that "a hearing was held [on the adopted rule] January 17 & 18, 2007." It is true that EQC held a hearing on Petitioners' proposed rule, which included section (c)(i). However, EQC has never held a hearing on the fundamentally different rule it adopted on February 16.

Any rulemaking that an agency undertakes in response to a petition from a citizen must conform to the procedures for rulemaking in W.S. § 16-3-103, under which:

> (a) Prior to an agency's adoption, amendment or repeal of all rules other than interpretative rules or statements of general policy, the agency shall:
>
> (i) Give at least forty-five (45) days notice of its intended action. . . . The notice shall include:
>
> (A) The time when, the place where and the manner in which interested persons may present their views on the intended action;
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> (B) A statement of the terms and substance of the proposed rule or a description of the subjects and issues involved . . . .
>
> (ii) Afford all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing, provided this period shall consist of at least forty-five (45) days from the latter of the dates specified under subparagraph (A) of this paragraph . . . .

The agency is further required to "consider fully all written and oral submissions respecting the proposed rule." W.S. § 16-3-103(a)(ii)(B),(D).

The Legislature enacted these requirements as quality-control measures in rulemaking and to ensure due process for those who may be affected by new or amended rules. As the Supreme Court explained in *Laughter v Board of County Com'rs for Sweetwater County*, 110 P.3d 875

(Wyo. 2005), proper notice of a rule entails notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Laughter*, 110 P.3d at 882 (citing *Pfeil v Amax Coal West, Inc.*, 908 P.2d 956, 960-61 (Wyo. 1995)). Procedural due process is satisfied only "if a person is afforded adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner." 110 P.3d at 882 (citing *Pfeil*, 908 P.2d at 960-61, *Amoco Production Co. v Wyoming State Bd. of Equalization*, 882 P.2d 866, 872 (Wyo. 1994)).

EQC amended the proposed Appendix I in a very significant and material way, by deleting section (c)(i) of the proposed rule. Section (c)(i) provided that any discharge that meets that livestock water quality limits would be presumed to be beneficially used by livestock or wildlife if discharged to the surface and, thus, the permit applicant would not have the burden of demonstrating beneficial use. As a result of the EQC's *sua sponte* deletion of the language in section (c)(i), however, a permit applicant now has the burden to "establish" that the discharge will actually be put to a beneficial use. As explained below in the next section of these comments, this amendment – depending how it is interpreted – may impose requirements on applicants for WYPDES permits that go well beyond what Petitioners sought in the rule.

Looked at another way, the extent of the Council's action – and why it cannot be reconciled with the EQA and the WAPA – becomes even clearer. At the time the Council took up the Petition, section (c)(i) was the applicable standard for CBM discharges under Appendix H. The Petition proposed various changes to Appendix H, which took the form of a new Appendix I, but *did not* propose any changes to section (c)(i). As a result the Petition proposed *no change* to section (c)(i). When the Council struck section (c)(i) on February 16, 2007, it repealed a section of the governing regulations with no advance notice whatsoever.

It is a basic principle of administrative law that agencies may make changes to a proposed rule after the comment period has closed *only* if the changes are "in character with the original scheme and [are] foreshadowed in proposals and comments advanced during the rulemaking." *Beirne v Sec'y of Dep't of Agric.*, 645 F.2d 862, 865 (10th Cir. 1981) (citation and internal quotation marks omitted). In *Beirne*, the court found that although the proposed and final regulations differed, the final regulation was "only another, perhaps clearer, way of saying what was explicit in the proposed regulation." *Id.* at 864. The "bare words of the proposal were adequate to alert those interested" and the final rule did not change "either the effect of or the intent behind the proposed rule." *Id.* at 865.

EQC's deletion of the language in section (c)(i) regarding the presumption of beneficial use of CBM produced water discharges is *not* in character with the original proposal and was *not* foreshadowed during the rulemaking so as to alert interested parties that this presumption could be removed. In fact, Petitioners' attorney stated the intent of their revised proposed Appendix I was not to change the standard for agricultural use, but only to change the type of data required by the rule. Hearing Transcript (Jan. 18, 2007) at 254-256. EQC nevertheless *repealed* an existing regulation when this action was not requested by the Petition. This drastic change goes well beyond simply the kind of "mere change in wording" that was at issue in *Beirne*. *Id.* The public were mere spectators at the February 16 EQC meeting and had no notice or opportunity to comment on this amendment when it was offered, let alone an opportunity to "be heard at a meaningful time and in a meaningful manner" and to urge "considerations against its adoption." *See Laughter, supra*, 110 P.3d at 882. The Council's radical rewrite of the proposed rule's provisions on beneficial use without the benefit of any public comment was contrary to the

Legislature's desire for careful adoption of high-quality rules and was arbitrary and capricious as well as a denial of constitutional guarantees of due process.

4. Contrary to the Proposed Statement, Appendix I, As Amended, Appears to Unlawfully Regulate Quantity of Water Discharges Contrary to the Environmental Quality Act.

Section (a)(i) of the rule requires a WYPDES permit applicant to "establish," *inter alia*, "that the produced water discharged into surface waters of the state . . . shall be of good enough quality to be used for wildlife or livestock watering or other agricultural uses and *actually be put to such use during periods of discharge*." (Emphasis added.) This language was carried over unchanged from Appendix H. Section (c)(i) of the proposed rule, also carried over from Appendix H, created a presumption of such "actual use" where the proposed discharge "is accessible to livestock and/or wildlife, meets the effluent limitations specified in this appendix, and meets the criteria of the protection of livestock and wildlife as specified in Chapter 1." With the Council's decision to delete section (c)(i), the final rule – if interpreted to require a showing of "actual use" of all or some particular quantity of discharged CBM water – if runs afoul of the Attorney General's formal opinion of April 12, 2006.

In that opinion, the Attorney General addressed the issue of whether the EQA "grant[s] authority to regulate water quantity to ensure that all produced water from coalbed natural gas (CBNG) production is at all times actually used for wildlife or livestock watering or other agricultural uses." Formal Opinion No. 2006-001 at 1. His answer was "no," because "the EQA allows regulation of the quantity of water [only] if the quantity has an unacceptable effect on the quality of the water." *Id.* Petitioners' original petition, the Attorney General noted, "wants the EQC to dictate to DEQ that it must consider 'how much the cows or antelope will actually drink.'" *Id.* at 2. "The EQA does not authorize such an action." *Id.* "Petitioners want

the regulation of water quantity for agricultural use, regardless of the quality of the water. There is no such authority under the EQA . . . . There is no express authority, nor is there any implied authority, in the EQA for regulation of water quantity in the absence of a *direct tie* to water quality." *Id.* at 5-6 (emphasis added). Thus, the EQA does not authorize a rule "to ensure that all produced water from oil and gas production is at all times actually used for wildlife or livestock watering or other agricultural uses." *Id.* at 8.

Council Member Boal pointed out repeatedly that deletion of section (c)(i) would render the rule unlawful under the EQA: "See, you got to remember this the original Powder River petition was essentially to undue [sic] (c)(i), and that provoked the AG's opinion that we didn't have authority to do it." Draft Transcript, Feb. 16, 2007, at 89, lines 17-20. Elaborating, he observed:

> [T]he first petition was aimed at, you know, doing the assumption which is contained in subsection (c)(i). That was – that was the whole idea, and you know, you'll recall that we went forward on – we wanted to go forward on considering taking out that assumption. Next thing we know, we get a formal AG's opinion saying we don't have authority to do that, because we're regulating quantity.

Draft Transcript at 90, lines 19-25. He cautioned against the amendment because it would go beyond what even the Petitioners sought under section (a)(i) and render the rule unlawful:

> Powder River reads the same petition, they read the same opinion, their revised language takes that out. I mean, we shouldn't enact something that we know has a high degree of probability that it will not withstand scrutiny from the AG. We're waisting (sic) everybody's time to do that.

Draft Transcript at 96, lines 23-25; 97, lines 1-2.

The Council went ahead and deleted section (c)(i)'s presumption that water of adequate quality will be used, leaving an ambiguous but potentially Draconian "actually used" test. The Statement of Principal Reasons must make it clear that section (a)(i) requires, at most, a showing

that discharged water that meets applicable quality standards will be available to "actually be put to such use [for livestock or wildlife watering or other agricultural uses] during periods of discharge." Otherwise, as Council Member Boal explained, the rule is an unlawful attempt to regulate the quantity of water discharged even though the discharge meets applicable effluent quality standards, i.e., to limit quantity without regard to quality.

5. Appendix I Could Not Lawfully Be Applied to Impose Effluent Limits on CBM Discharges Based on the Downstream Fate of Their Constituents.

Under section (a)(ii) of the rule, a permit applicant must establish that the "quantity of produced water shall not cause, or have the potential to cause, unacceptable water quality." Petitioners' draft Statement of Reasons would have the Council graft an entirely new concept onto this requirement, namely that DEQ must "require applicants to establish more than just acceptable water quality at the end of pipe." Petitioners would have the Council find that DEQ has "failed to look to the fate of discharged water as it travels downstream." Proposed Statement at 11.

However, Appendix I is an effluent limitation guideline, to be established in accordance with section 304(b) of the Clean Water Act, 33 U.S.C. § 1314(b).[4] ELGs are, by definition, generally applicable, technology-based limitations that apply at the end-of-pipe, and which incorporate considerations of availability, feasibility, and cost. *See* 33 U.S.C. § 1314(b).[5] ELGs

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[4] Under the EQA, DEQ establishes "standards for the issuance of permits as authorized pursuant to section 402(b) of the Federal Water Pollution Control Act [33 U.S.C. 1342(b)]." W.S. § 35-11-302(a)(iv). Section 402(b) incorporates, inter alia, section 311 of the Clean Water Act, which requires application of effluent limitations promulgated under the Act to all point source discharges. See 33 U.S.C. §§ 1342(b); 1311(e).

[5] Effluent limitations in CWA permits fall into two categories: technology-based effluent limits and water-quality-based effluent limits. *Catskill Chapter, Trout Unlimited v NYC*, 451 F.3d 77, 85 (2nd Cir. 2006). Technology-based limits require installation of various forms of technology that will reduce the discharge of pollutants. *See Texas Oil & Gas Ass'n v EPA*, 161 F.3d 923, 927 (5th Cir. 1998); *see also Maier v EPA*, 114 F.3d 1032, 1034 (10th Cir. 1997) ("The CWA mandates varying standards of technology-

are inherently not tailored to site-specific or local situations; rather they represent generic limitations for industrial categories that typically must be incorporated in an NPDES permit. The fate of CBM discharges after discharge and mixing is by definition not relevant to ELGs, which apply to all discharges within a given industry.

6. No Evidence of "Shoddy Science" on DEQ's Part Was Presented In This Proceeding.

Apparently in an effort to fabricate a rationale for this rule, Petitioners would have the Council state that "evidence in the record demonstrates that too often permit applications are based on shoddy science and DEQ issues permits based on shoddy science." Proposed Statement at 12. Petitioners do not, and could not, cite to any specific evidence of "shoddy science" because none was presented. Petitioners presented no evidence from any expert in the course of this proceeding. Even Professors Munn and Paige, offered as "resources," at no point suggested that either permit applicants or DEQ permitting staff have ever asserted or relied on technical or scientific findings that they knew were wrong or unreliable in the process of issuing WYPDES permits. This proposed finding is a gratuitous insult to DEQ technical staff and to the engineers and consultants who represent CBM producers in WYPDES permitting, and should be deleted.

Conclusion

For the foregoing reasons, the Industry Respondents urge the Council to adopt a Statement of Principal Reasons that does not include the erroneous statements identified in

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based treatment as the minimum requirement for different categories of point sources.") (citing 33 U.S.C. §§ 1311, 1314). In setting technology-based limits, the agency "will consider the available technologies, costs in relation to effluent reduction benefits, engineering aspects of various control techniques, available best management practices, and non-water-quality environmental impacts." *Catskill Chapter,* 451 F.3d at 85 (citing 40 C.F.R. §§ 125.3(c), (d)). This is inherently an industry-wide, not a site-specific, rulemaking exercise.

Points 1, 2, 3, 4, 5, and 6 above and which clarifies that the rule does not seek to regulate the quantity of produced water discharges without regard to the quality of such discharges.

Dated: February 22, 2007.

Respectfully submitted,

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ATTACHMENT 1

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

PETITION TO AMEND WYOMING WATER QUALITY RULE, CHAPTER 2, APPENDIX H	)))	05-3102

STATEMENT OF PRINCIPAL REASONS

The Environmental Quality Council, pursuant to its authority under the Environmental Quality Act, W.S. § 35-11-112, and the Wyoming Administrative Procedure Act, W.S. § 16-3-103, proposes rulemaking to amend Chapter 2 of the Wyoming Water Quality Rules. The proposed rule change leaves the Appendix H unchanged as to traditional oil and gas production facilities, removes the Appendix H provisions specific to Coal Bed Natural Gas, and revises the standards applicable to produced water discharged from Coal Bed Natural Gas Facilities in a new Appendix I.

Background

The Federal Water Pollution Control Act (the Act) of 1972, as amended by the Clean Water Act (CWA) of 1977 and the Water Quality Act of 1987, give the Environmental Protection Agency (EPA) the authority to regulate the discharge of pollutants to waters of the United States. The Act provides broadly defined authority to establish the National Pollutant Discharge Elimination System (NPDES) Permit Program, define pollution control technologies, establish effluent limitations, obtain information through reporting and compliance inspections, and take enforcement actions when violations occur.

The Code of Federal Regulations, Chapter 40 Part 123, provides procedures for States to assume responsibility for implementing the NPDES Permit Program. On

November 1, 1974, Wyoming Governor Stan Hathaway submitted a request to the EPA for Wyoming to conduct a state permit program pursuant to the provisions of the NPDES under Section 402 of the Act. On January 30, 1975, pursuant to § 402(c) of the Act, the EPA approved the Wyoming Department of Environmental Quality (WDEQ) NPDES program and suspended the issuance of NPDES permits by EPA, with a few exceptions. The Wyoming NPDES program authority was amended September 24, 1991 to include state authority for issuance of general permits. The program has been renamed Wyoming Pollutant Discharge Elimination System (WYPDES).

The WYPDES program must, at all times, be in accordance with § 401 of the Act, all guidelines promulgated pursuant to § 304(h)(2) of the Act, and the Memorandum of Agreement between the EPA Regional Administrator and the Director of the Wyoming DEQ.

Principal Reason for Revision of the Rule

The principal reason for the proposed rule revisions is: The existing Appendix H, although apparently effective to regulate water discharged in traditional oil and gas operations, has been demonstrated to be inadequate to protect water quality and prevent pollution resulting from the discharge of water from coal bed natural gas (a/k/a coalbed methane, "CBM"). The proposed Appendix I, specifically applicable to water discharged from CBM facilities, addresses those shortcomings, brings the rules in compliance with the Wyoming Environmental Quality Act, and will maintain Wyoming's primacy for delegated programs of the federal Clean Water Act.

Rulemaking Process

A group of 19 landowners and the Powder River Basin Resource Council filed a Petition to Amend Chapter 2, Appendix H December 7, 2005. The Environmental Quality Council held two public hearings on the Petition (February 16, 2006 in Cheyenne and July 17, 2006 in Casper), received and reviewed voluminous written comments, and determined that environmental concerns existed sufficient to consider a rule revision in formal rulemaking proceedings. The documents are available for review on the EQC website, http://deq.state.wy.us/eqc/index.asp, Docket No. 05-3102. The rulemaking hearing was noticed pursuant to the Wyoming Administrative Procedures Act, W.S. 16-3-103(a)(i), and a hearing was held January 17 & 18, 2007 in Cheyenne, Wyoming. The record was left open until January 29, 2007. The members of the Council have carefully reviewed the entire record, including the public comments at the rulemaking hearing as well as the entire documentary record. It is the judgment of the Environmental Quality Council that Wyoming Water Quality Rules and Regulations Chapter 2 should be amended for the reasons set forth below.

Summary of the Proposed Revisions

Appendix H is unchanged as to water quality standards applicable to traditional oil and gas production facilities. A new Appendix I would include new standards applicable strictly to water produced from CBM facilities. The Appendix I language is derived from the definition of "pollution" at W.S. § 35-11-103(c)(i) and the Wyoming Attorney General Formal Opinion No. 2006-001. It requires applicants for CBM-WYPDES permits to establish that the quantity of produced water would not cause or

have the potential cause unacceptable water quality and would not cause pollution; and it would require permit applicants to submit scientifically valid data to establish those requirements will be met.

1. EQC rulemaking authority

The Wyoming Administrative Procedures Act provides an avenue for citizens to "petition an agency requesting the promulgation, amendment or repeal of a rule." W. S. 16-3-106. The EQA also gives the EQC authority to "approve, disapprove, repeal, modify or suspend any rule [or] regulation. . ." W. S. 35-11-112(c)(i). That provision, unlike W.S. 35-11-112(a)(i), does not require recommendation from the director, administrator and advisory boards. In accordance with the WAPA, the EQC over the years has regularly considered citizen rulemaking petitions (*e.g.* the recent smoke rules, hog farm rules, and numerous petitions brought by industry itself under Chapter 1 for reclassification) without advisory board input. Citizens should be able to petition for rulemaking in exactly this sort of situation, in which the agency itself has been unable or unwilling to address a very significant environmental issue. This historic practice is authorized by the WAPA and the EQA and should not be stopped now. The suggestion that the EQC should accept the Petition and then refer it to the Advisory Board and Administrator would defeat the purpose of the citizen Petition. This rule has gone through several years of the Advisory Board and Administrator process. A referral now would only serve to delay.

The Council applauds the efforts of the CBM Task Force, the voluntary Produced Water Initiative, and the Wyoming legislature to address some of the issues arising from

CBM development, and it is hoped they each will find some success within their spheres. Similarly, the Council encourages any cooperative efforts to resolve differences between industry and landowners. The Council agrees such efforts may often bring the best solution. However, the Council notes the playing field is not level, and hearing testimony made it clear significant problems persist. The possibilities for other approaches to solutions do not alter this Council's authority, jurisdiction, or obligation to proceed with rulemaking.

2. Regulating traditional oil and gas separately from CBM

There was extensive public comment regarding the fear that the rule change would impact water users who use water discharged from traditional oil and gas operations, and there were (somewhat contradictory) comments questioning the basis for issuing a different regulation for CBM. The Council finds the distinction between water produced from traditional oil and gas is evident in the unqualified support in the record for continued discharge of such water, in contrast to the very strong opposition expressed by some to the water produced from CBM.

The Wyoming Attorney General has opined that, "if the Council desires to promulgate a separate and distinct section related to CBNG, it may do so." July 12, 2006 letter from AG to EQC Chair Gordon at 8. The distinction is supported by the degree of environmental impact caused by the overwhelming volume of CBM water (cumulative water production from CBM in the Powder River Basin estimated at 1,495,153 acre-feet (11.6 billion barrels). Water production is expected to peak between 2011 and 2014 at

154,671 acre-feet (1.2 billion barrels) annually, or double the current rate. Oil production is long-term as opposed to CBM, and therefore there is a historical reliance on the oil-field water (and they are grandfathered), the SEO requires a permit for CBM water and not oil-produced water, the existing Appendix H (d) language is targeted specifically to CBM, and EPA is drafting guidance specific to CBM. All of these considerations provide a separate and distinct basis for regulating CBM water separately from traditional oil and gas-produced water.

3. Regulation of pollution

The Wyoming Environmental Quality Act charges the DEQ to "prevent, reduce and eliminate pollution." W.S. 35-11-102. There are two distinct questions: First, does the DEQ have the authority to regulate CBM water's impacts as "pollution?" Second, how should DEQ regulate CBM water as "pollution?"

(a) CBM discharge water is "pollution"

"Pollution" is defined for purposes of water quality as:

> . . . contamination or 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 waters of the state which creates a nuisance or renders any waters 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.

W.S. 35-11-103(c)(i).

CBM water alters the physical properties of the waters of the state. CBM water is "industrial waste." Northern Plains Resource Council v. Fidelity Exploration and

Development Co., 325 F.3d 1155, 1161 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003) ("Because Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM water falls squarely within the ordinary meaning of 'industrial waste.'"); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 568 (5th Cir. 1996)(concluding "produced water" is encompassed as "industrial waste"). In addition, CBM water falls under the catchall definition of "waste" by virtue of it being both an "industrial waste" and a "liquid" or "other substance which may pollute any waters of the state."[1]

(b) DEQ has the authority to regulate CBM water's pollution effects

There is no basis for the DEQ position that it is only authorized to regulate water quality. To the contrary, the EQA specifically recognizes that quantity of water has important environmental impacts that can and should be regulated. That is why, for example, the EQA contains the following language:

> No person, except when authorized by a permit issued pursuant to the provisions of this act, shall:
>
> . . .
>
> (iv) Increase the quantity or strength of any discharge. . .

W.S. 35-11-301(a).

The Wyoming Attorney General has also recognized that authority. In answer to the question posed by the EQC, the Wyoming Attorney General has opined that the Council has "the authority to regulate the quantity of water produced" from CBM, if the Council determines that the produced water is a "nuisance" under the statutory definition of "pollution."

[1] "Waste" is defined as "sewage, industrial waste and all other liquid, gaseous, solid, radioactive, or other substances which may pollute any waters of the state." WYO. STAT. § 35-11-103(c)(ii). CBM water is a substance which may pollute waters of the state.

> 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.

July 12, 2006 AG letter at 6 (emphasis added). The AG recognized that "nuisance" includes "waste." "Waste" includes CBM water. When the waste causes harm or injury, it is the DEQ's charge to control the environmental degradation through effective rules that are effectively implemented.

CBM water quality (including its quantity and timing) is creating a nuisance that renders the waters harmful to agricultural and other beneficial uses, and to livestock, wildlife or aquatic life. (W.S. 35-11-103(c)(i)). The EQC and the DEQ have the authority, as well as the obligation, to regulate "pollution" – including the quantity and timing, as well as the quality, of water that creates that nuisance.

(c) The rule does not infringe on the State Engineer's authority or affect irrigation return flows

This approach is consistent with the EQA, and does not run afoul of the limitation on interference with the State Engineer jurisdiction, duties or authorities. W.S. 35-11-1104. (The State Engineer specifically stated at the hearing that he did not believe the proposed rule infringed upon his authority). DEQ will not mandate water rights administration, but would leave it as usual to the SEO and Board of Control. DEQ will require permittees to reduce or eliminate pollution; the mechanism for doing so is up to the permittee, who would need to obtain necessary permits from the other agencies as applicable. This is no different than the current structure: many DEQ-issued permits are

dependent upon reservoirs in order to meet WYPDES permit terms. Reservoir permits are then obtained from the SEO, and that structure does not interfere with SEO jurisdiction. The Council rejects the attempts of some commenters to style the issue as one of Constitutional law or "waters of the state" as unfounded. The Council is aware of the limits of its jurisdiction and will not exceed them.

The Council also notes that 40 CFR § 131.10(a) requires that:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States

Finally, "return flows from irrigated agriculture," are specifically excluded from discharges requiring a WYPDES permit, which should allay the fears of some commenters that this rule would have any impact on irrigation return flows. (Water Quality Rules, Chapter 2, §2(b)(v).

(d) The rule would not prohibit discharges of CBM water

Pollution is allowed within "clear and defined boundaries." The Council finds nothing in the record to support the contention that the proposed rule would require DEQ to prohibit CBM water discharge. The rule would require DEQ to regulate its impacts, in accordance with the Environmental Quality Act.

Appendix I(a)(iii) has two parts: First, it defines when discharged water should be regulated by the DEQ – when it is "pollution." "Pollution," in the context of CBM water, includes discharges that alter the physical, chemical or biological properties of

water, including industrial waste. The Environmental Quality Act authorizes DEQ to regulate pollution. "Pollution" is a function of chemical concentrations as well as turbidity, temperature, alterations to the hydrograph, timing and flows. The first paragraph of Appendix I(a)(iii) directs DEQ to regulate CBM water that causes pollution in all its forms.

Second, Appendix I(a)(iii) limits the scope of CBM water that should be regulated by DEQ to water "which:" creates a nuisance or causes injury. The rule's opponents have ignored the qualifications following the word "which" that are set forth in (a), (b), (c) and (d). Not all pollution would be regulated or prohibited under this language; only pollution that causes injury.

The contention that the language would require all discharges to cease is unsupported in the record. The Council rejects some commenters' attempts to create an ambiguity by their determination to interpret the rule in a distorted fashion, saying it would prevent all discharges. That is not the case.

The Council does recognize the validity of some of the criticism regarding the rule language, and has edited portions that are superfluous and may cause confusion. This is not a "new" rule. The nuisance standard that some commenters protested was sprung upon them at the January hearing has in fact been in the language of the proposed rule since May 8, 2006 (Petitioner's First Status Report, Exhibit 24), and is in the language of the proposed rule that was sent to public notice pursuant to the APA. Appendix I(a)(iii)(a) "creates a nuisance")

The rule requires that discharges that cause damage such as the damage to Marge West's alfalfa meadows would have to be handled by one of the several alternatives to

surface discharge (or better water management). For those people who say they like the water, it is not a nuisance and does not cause injury. Its discharge would continue to be permitted under this rule language (and the permit applicant may have to pipe around the West Ranch). This is not an "all-or-nothing" solution; rather it is a solution that requires DEQ to regulate the effect of pollution when they cause harm.

The Council expects that the DEQ will continue to exercise its discretion in applying this rule, as it does any other rule. For example, DEQ has regulated water quality, not by prohibiting discharges that result in degradation of quality by elevating EC and SAR, but by allowing that degradation to a level that DEQ considers to be protective. DEQ has the ability to implement rule language in a reasonable and not an absolute manner. For example, it interprets the Chapter 1, Section 20 "no measurable decrease in crop or livestock production" language by allowing an "acceptable" level of decrease in production. It could and should apply the same sort of implementation approach to the proposed Appendix I language. Appendix I (a)(iii) instructs DEQ to regulate pollution within defined boundaries.

4. Regulation of water quantity that impacts water quality

Section (a)(ii) of Appendix I conforms with Wyoming Attorney General Formal Opinion 2006-001 by requiring permit applicants to show that the "quantity of produced water shall not cause, or have the potential to cause, unacceptable water quality." The reason for this language is to instruct the DEQ that it must require applicants to establish more than just acceptable water quality at the end of pipe. The record shows that DEQ has historically failed to look to the fate of discharged water as it travels downstream.

The SA Creek example in Petitioner's Rulemaking Hearing Brief and related exhibits demonstrate the need for this provision (as do portions of the *Maycock* transcript designated in this record). Water quality in SA Creek exceeded the 7500 µmhos/cm limit for EC that DEQ set as being protective of livestock and wildlife. Livestock and wildlife do not consume water solely at the end of pipe. Yet when presented with evidence the EC downstream exceeded 7500 µmhos/cm, DEQ said it could take no action. DEQ must issue permits that authorize it to require a quantity and quality of discharge that protects downstream water quality.

The Council understands that DEQ may have valid reasons for *enforcing* effluent limits at the end of pipe; however, it must set those limits based upon a scientifically valid modeling of what the water quality will be at relevant points downstream.

5. Requirement of scientifically defensible data

The Council finds that the Petitioner's proposed requirement of "credible data" is not justified. Instead, the Council's Appendix I(a) requires applicants to submit "scientifically defensible site specific data establishing each of the following:" (This is the term proposed by the Advisory Board in the proposed Agricultural Use Policy – Tier 3 – No harm analysis.) The reason this language is necessary is that the evidence in the record demonstrates that too often permit applications are based on shoddy science, and DEQ issues permits based on shoddy science. The "scientifically defensible site specific data" requirement is a specific instruction to DEQ to raise its standards so that the data submitted by permit applicants is adequate to justify permit issuance and so that DEQ issues permits with meaningful and enforceable terms.

Conclusion

The Council has determined that amendment of Chapter 2, Appendix H and addition of Appendix I are necessary to address the demonstrated failures of the current rule in regulating the pollution caused by CBM discharges, to provide the department with adequate authority to operate the WYPDES program and to maintain primacy under the requirements of the Clean Water Act and the requirements of W.S. 35-11-301(a)(i), (ii) and (iv) and 35-11-302(a)(ii) and (v) and to provide improved protection to public health and the safety for public water supplies.

EXECUTED THIS _____ DAY OF _____, 2007.

FOR THE ENVIRONMENTAL QUALITY COUNCIL

_____

Chairperson