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FILED

JAN 29 2007

Terri A. Lorenzon, Director
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January 30, 2007

Mr. Mark Gordon
Chairman, Environmental Quality Council
122 West 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, Wyoming 82002

RE: Docket No. 05-3102
Powder River Basin Resource Council Petition to Amend Water Quality Rules
Chapter 2, Appendix "H" and "I"
Supplemental Comments

Dear Mr. Gordon:

I presented oral testimony to the Environmental Quality Council ("EQC" or "Council") on January 18, 2007 at the rulemaking hearing in Docket No. 05-3102. My comments concerned water law and the impact the proposed rules will have on water rights. Mr. Pat Tyrell, State Engineer, also testified on water law issues. As you know, Wyoming's water law is very complex, and it is difficult to summarize in the very limited time allowed by the Council. I believe the comments Mr. Tyrell and I made are consistent. However, these supplemental comments will clarify water law as it pertains to produced water from coalbed natural gas operations in the Powder River Basin versus produced water from conventional oil and gas operations in the Big Horn Basin, as well as the rights of downstream water right owners.

Water law may apply differently to water produced in association with oil and gas ("produced water") depending on several factors, including:

- (1) If the oil and gas company has a ground water right in the well;
- (2) If a landowner has a ground water right in the well;
- (3) If the produced water is "by-product" water, meaning it has not been put to a prior beneficial use, it remains entirely within the control of the oil and gas company, it is kept separate from all other surface water supplies, and it has retained its identity separate from other surface water supplies in the drainage; and
- (4) If the produced water returns to the channel or watercourse and becomes part of the surface water supply and may mix or commingle with other surface water supplies, has

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lost its identity as produced water; rather, and thus downstream landowners can call it through the drainage to their appropriated points of diversion or use.

It is my understanding that some of the water produced in association with conventional oil wells in the Big Horn Basin has the following factors:

- (1) The oil company is not required to obtain a ground water right from the State Engineer's office. Instead, it must obtain an oil and gas permit.
- (2) Landowners don't acquire ground water rights from the State Engineer's office in the well.
- (3) The produced water has not been put to a prior beneficial use, remains entirely within the control of the oil company, is kept separate from all other surface water supplies, and is by-product water. In this case, the produced water has retained its identity separate from other surface water supplies in the drainage. The oil company may enter into an agreement to provide the water to a landowner. The landowner acquires a water right for the first beneficial use from the State Engineer, identifying the produced water as the source of supply. Any water that is not consumed by the landowner's first beneficial use and returns to the channel or watercourse is return flow, becomes part of the surface water supply and is available for use by downstream landowners.

In my experience, water produced in association with coalbed natural gas in the Powder River Basin ("CBNG" or "CBM") has the following factors:

- (1) Landowners have ground water rights from the State Engineer's office in many wells drilled by CBM companies. Any volume of water not consumed by the landowner's second beneficial use is return flow.
- (2) The CBM company is required to obtain a ground water right in the well from the State Engineer. The production of natural gas is the first beneficial use of the ground water. Any volume of water not consumed in that first use is return flow.
- (3) Even if the CBM company stores the produced water in an off-channel reservoir from which there are no surface discharges, and the water remains entirely within the control of the CBM company, it is not byproduct water because it has already been put to a beneficial use (producing natural gas). While CBM companies may allow landowners to use the water for stock watering and irrigation, the landowners cannot acquire water rights with the produced water specifically identified as the source of supply.
- (4) Any volume of water from a well drilled by a CBM company that is not consumed by the CBM company (the first beneficial use) is return flow. When the return flow reaches the channel or watercourse, then it is in the drainage and becomes part of the state's surface water supply. In fact, the return flow mixes or commingles with surface water from numerous sources, including runoff, inflows to the channel from the water table, surface discharges from landowners' stock wells, irrigation return flows, etc. Landowners who have acquired water rights to the surface water supply in the channel or drainage may divert the commingled water, put it to use, and call it through the drainage to their points of diversion and use.

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As a practical matter, return flow from a well drilled by a CBM company that goes into the channel or watercourses is usually mixed with other surface water supplies. I told the Council that downstream landowners have the right to call the produced water through the drainage. Downstream landowners have water rights to the surface water supply in the channel or drainage, and therefore they can call the commingled water through the drainage to their points of diversion and use. I did not mean to suggest water from a well drilled by a CBM company is by-product water, or that landowners can acquire water rights in that water as the specific source of supply. It is only when the return flow from a well drilled by a CBM company has become part of the surface water supply that downstream water right owners can call it through the drainage to their points of diversion or use.

Mr. Tyrell testified that a water right must identify the source of supply. For example, the source of supply for a surface water right would be identified as the name of the creek, such as Dead Horse Creek or Rawhide Creek. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 120, lines 13-22. Recognizing there are competing demands for limited supplies of water, the State Engineer looks to the source of the water supply in determining which water right owner has the prior right to use it. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 117, lines 12. The source of supply for water rights that existed prior to CBM development was, more likely than not, the natural flow in the channel. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 117, lines 24-25.

Mr. Tyrell testified that, under normal situations, he doesn't distinguish between coalbed water or natural flow. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 121, lines 19-24. However, to ensure the downstream pre-CBM water rights are able to call natural flow volumes through on-channel reservoirs, the State Engineer makes sure the on-channel reservoirs can pass through the volume of natural flow. Where a CBM company may have to store water in a reservoir under another agency's permit requirements, the State Engineer makes sure there is a way to get the volume of natural flows down to senior water rights. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 118, lines 11-14, p. 121, lines 7-12.

To protect the rights of senior downstream water owners, the State Engineer requires the volume of natural flow to be delivered down the channel. Because return flow from wells drilled by CBM companies is usually commingled with surface water from other sources, the water passed through on-channel reservoirs to senior downstream water rights is a mixture of produced and other water. For example, if snowmelt results in runoff at a flow rate of 20 cubic feet per second, then senior downstream water right owners can call 20 cfs through the drainage—and the water that will flow through the drainage is a mixture of produced water and other surface water.

I contend that, once the return flow from wells drilled by CBM companies becomes part of the surface water supply, downstream senior water right owners can call for their full appropriation of water to be delivered through the drainage to their point of diversion or use. Once it enters the

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channel and commingles with other surface waters, CBM produced water loses its identity. If there is a quantity of surface water available, senior downstream water users have the right to call for delivery of the water.

I agree with the State Engineer that appropriators who acquired water rights on the stream prior to CBM development do not have a water right in the CBM wells, or to require a CBM company to continue to produce and discharge ground water from a CBM well. Downstream water right owners cannot call for produced water before it has become part of the surface water supply by being discharged into the drainage, like other return flows.

Mr. Tyrell testified that, once the gas is produced, the water from a well drilled by a CBM company is a return flow. When the return flow gets back to a natural channel—and it is often already in a natural channel—other people are making use of it. The State Engineer does not characterize that as a waste of water. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 128, lines 9-19. Once the return flow of water from a well drilled by a CBM company gets in the channel other people can make use of it. Landowners can file a permit on the creek channel and divert the water. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 126, lines 14-15, 17-19.

Mr. Tyrell said that, when the return flow from a well drilled by a CBM company reaches a downstream headgate, intake, spreader dike, or reservoir, the owner of those downstream water rights can make use of it. Anyone that has a water right permit saying that the channel is the source of supply can divert water that is at their headgate and, if coalbed water shows up there, they can certainly divert it. People can put coalbed water to use under the current statutes, and it is being put to use. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 11, lines 19-21, p. 121 lines 14-18; p. 125, lines 15-18.

The proposed rules would prohibit the return flow from wells drilled by CBM companies from being discharged. For several years, this return flow has become part of the surface water supply and has been beneficially used by downstream water right owners. By prohibiting these return flows, the Council will take the rights of downstream water users to put the water to beneficial use.

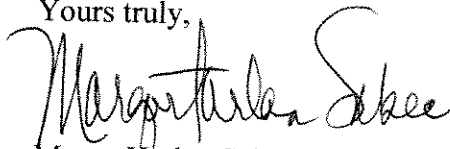
As I said, landowners have water rights in over 14,000 wells drilled by CBM companies. They have the right to produce and discharge 25 gallons per minute from wells drilled by CBM companies. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 55, line 25; p. 56, lines 2-4. The landowners' water rights in these wells are for stock watering, irrigation, and domestic use. Under the proposed rules, the water discharged to the surface by a landowner from a well would be characterized as pollution, and thus would be prohibited. Hearing Transcript (Jan. 18, 2007) (Unedited Real Time Rough Draft) Vol. II at p. 58, lines 6-22. The proposed rules would prohibit the discharge of return flow from the beneficial use of water by landowners.

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When natural gas stops being produced from a CBM well, the CBM company's water right in the well will be abandoned. However, the landowners' water rights in these wells are valuable property rights, and the landowners will continue to produce ground water and discharge return flows to the channel or watercourse. These return flows become part of the surface water supply, commingle with other surface waters and are available for use by downstream landowners. If the Council adopts the proposed rules, it will result in a taking of the landowners' water rights in the wells and downstream landowners' water rights to put return flows in the surface water supply to beneficial use.

Therefore, I ask the Council to deny the petition for rulemaking.

Yours truly,



Margo Harlan Sabec

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2 need to see what you're doing there before we grant the
3 first permit, it's not a practice of ours.

4 So clarifying a little bit further some remarks I
5 heard earlier today about the beneficial use of this water,
6 we certainly encourage and we see the beneficial use of a
7 lot of water produced from wells and out of reservoirs that
8 got there as a result of this industry.

9 We view it, however, not necessary -- even though
10 it's waters of the state -- because ground water and
11 surface water both constitutionly are the property of the
12 state -- they are from different sources and water that
13 comes out of the ground and is put in reservoirs, etc. is
14 not necessarily callable through a system by an existing
15 senior downstreat water right because it's, for all
16 practical purposes, imported water to the natural drainage.

17 It wouldn't have been there absentee efforts of
18 the industry. That doesn't mean it doesn't get used. It
19 doesn't mean we don't encourage; and if it's at somebody's
20 headgate or at thier intake or at thier spreaderdike or at
21 their reservoir that that can't make use of it.

22 The slight distinguishing feature is that if
23 there were to be a call for regulation on one of these
24 ephemeral channels, we would not be, in my opinion,
25 required to send coalbed water down to satisfy that call

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2 because their source of supply, more likely than not, is on
3 the natural flow of that channel, which will only be there
4 after a rain event or a snowmelt event.

5 These channels are somewhat different than
6 perennial channels where you have a base flow, but we do
7 get those flows in these kind of times. And that's the
8 water, generally speaking, to which those earlier rights
9 are entitled.

10 We've done quite a bit of work, in my opinion, to
11 try to make sure these systems can get better at
12 functioning to deliver that water down through the system
13 past the reservoirs; and it's because of that recognition
14 of the two different sources that we've done that.

15 Other than that, as a general introduction, it is
16 a pleasure to be here today; and I would entertain some
17 questions. As I said earlier in announcing that I would be
18 here and be available, I didn't have any printed or written
19 remarks for the council; but I did feel like you may have
20 some questions.

21 MS. FLITNER: I think you're right about
22 that.

23 Wendy, go ahead.

24 MS. HUTCHINSON: Okay. My question
25 pertains -- we've had a lot of testimony on what is our

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2 of the ground and the beneficial use has been established
3 through production of natural gas and flows down a
4 drainage, whether or not a water right can be filed on that
5 flow coming down the drainage -- and we heard testimony
6 earlier today that seemed to -- people are applying for
7 water rights and that by virtue of establishing a water
8 right from the produced water that anything we did that
9 would reduce that flow would impact on the water rights
10 system and water law.

11 Can you clarify that?

12 MR. TYRRELL: Well, I can try.

13 The -- basically, the water right has to
14 establish what is the source of supply. It says right on
15 the application, What is your source of supply?

16 For example, let's go back to precolbed days.
17 The source of supply would be dead horse creek or the
18 bellface river or raw hide creek or -- pick it -- you pick
19 a name. And that would be, then, a water right that falls
20 in the priority system along that creek. And if it's an
21 ephemeral channel, they would get water when that channel
22 is flowing and hopefully -- well, they would need to make
23 beneficial use of it.

24 But in a setting like that, it's very difficult
25 if not impossible to actually go out and administer or

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2 regulate if we ever got called because of the ephemeral
3 nature of the water being there. You get out in muddy
4 conditions, you try and see who's first, second, third in
5 prior and by then the storms over and floods.

6 So we do encourage and work to try to make these
7 systems that we've put in. We've done quite a bit of work
8 to make sure reservoirs in areas where, for example, they
9 may have to store water under other permits or other
10 requirements can have a way to get the natural drainage or
11 leave parts of it unbanned so that we can get water down to
12 those senior rights. It's not easy, but we do work in that
13 direction.

14 But I think that anybody, then, that has a permit
15 on the channel, with that channel that's the source of
16 supply, can divert water that's at thier headgate. That is
17 different; and if coalbed water shows up there, they can
18 certainly divert it.

19 We don't distinguish between water that's
20 necessarily coalbed or natural flow under normal
21 situations, unless there's, like I said, a call for
22 regulation, in which case, that call from people's whose
23 source of supply is that creek, it's going to be on the
24 natural water, not on coalbed water, in my view.

25 So to say that they're filing on that water is

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2 back to this question that we would look at it as -- once
3 it gets into the surface system, it's more of a -- an
4 imported water source should we get asked to regulate on
5 its behalf as opposed to the natural flow of the channel.

6 MR. GORDON: Okay. Well, I found a -- and
7 I just wanted -- I don't know if this is still in effect.
8 It's a April 26, 2004 memo, and it stays, Unless specified
9 in the groundwater permit, water produced in the production
10 of coalbed methane gas has no other implied use and is
11 considered to be unappropriated waters of the state of
12 Wyoming.

13 MR. TYRRELL: That would be correct,
14 because once they lose control of that, it's in the channel
15 and other people can make use of it.

16 MR. GORDON: Okay.

17 MR. TYRRELL: If they're there, they can
18 file a permit on that creek channel and they can certainly
19 divert it.

20 MR. GORDON: Okay. And then it goes on
21 under groundwater, which is next. It says, If CBM produced
22 water will be discharged and not used for any other
23 beneficial purposes no further groundwater permitting is
24 required.

25 MR. TYRRELL: That's correct.

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2 surface water side of things -- that if you are irrigating
3 and your return flows are -- or even your active irrigating
4 is going into a swamp and -- somebody -- a barrow ditch
5 along the highway where it's not going to beneficial use on
6 your property, we can come in and stay, Stop that. Get it
7 back on your ravine, get it back on your alfalfa, because
8 this going into the barrow ditch stuff is a waste of water.

9 The question, of course, we've had put to us, is
10 the production of the water after it's produced -- that's
11 in the act of using the water. In the coalbed natural gas
12 field, once the gas is produced, what you essentially have
13 is a return flow. And where -- if we can get that back to
14 a natural channel -- and often it already is in a natural
15 channel -- we, at that point, because other people have
16 been making use of the water -- and certainly the question
17 here is have they been making use of all of it -- we have
18 not characterized that as a waste of water, because the
19 beneficial use hasn't been made.

20 Now it's a problem of dealing with the return
21 flow. We do have a statute also that allows -- it's under
22 the authorities of our superintendents to allow the -- or
23 to require the construction or the returning of the curve
24 flows back to a drain or stream channel if they are causing
25 problems.