



Devon Energy Production Company, L.P.  
20 N. Broadway, Suite 1500  
Oklahoma City, OK 73102

*Sent via Facsimile (307) 777-6134*

**June 16, 2006**

**Ms. Sara Flitner  
Hearing Officer, Environmental Quality Council  
122 West 25th Street  
Herschler Bldg., Rm. 1714  
Cheyenne, Wyoming 82002**

**FILED**

**JUN 16 2006**

Terri A. Lorenzon, Director  
Environmental Quality Council

**RE: Docket No. 05-3102: Petitioner's First Status Report**

**Dear Ms. Flitner:**

Devon Energy Production Company, L.P. ("Devon") appreciates the opportunity to comment on the PETITIONERS' FIRST STATUS REPORT regarding the Petition to Amend Water Quality Rule, Chapter 2, Appendix H ("STATUS REPORT").

Devon produces oil and natural gas throughout the state of Wyoming, including a significant amount of coal bed natural gas ("CBNG") from the Powder River Basin.

Devon is a participant in the JOINT RESPONSE TO PETITIONERS' FIRST STATUS REPORT filed by a group of interested Wyoming oil and gas producers and a member of the Petroleum Association of Wyoming ("PAW"), which has also submitted comments to the STATUS REPORT. By these comments, we join in the responses submitted by both groups and wholly incorporate them here, as well as Devon's previous comments in this matter. In addition, Devon asks the Council to consider the following comments and requests that they be made a part of the record in this matter.

It is difficult to craft a response to Petitioners' allegations because their assertions have been inconsistent and even contradictory. In their original petition, they proposed water treatment as a method of meeting their demands, yet they also asked that the Department of Environmental Quality Water Quality Division ("DEQ/WQD") be allowed to regulate the quantity of water discharged, even if the water was distilled. In their recent STATUS REPORT, Petitioners now cite low flow conditions as a problem and ask that the DEQ/WQD be allowed to regulate water discharges in a manner so as to prevent virtually any effect on the environment. Furthermore, the primary complaint expressed during testimony by the Petitioners at the February 16, 2006 was that they did not want CBNG produced water to flow in the ephemeral and intermittent streams that cross the Petitioners' property.

Taken together, it appears that the Petitioners' main purpose is to prevent any CBNG produced water from being discharged into the ephemeral stream channels that cross their lands. Such a prohibition would, however, render an absurd result. All stream channels throughout the state, the Powder River

June 16, 2006

Devon Energy Production Company, L.P.

Re: Docket No. 05-3102: Powder River Basin Resource Council Petition for Rulemaking

Page 2 of 3

Basin, and across the Petitioners' lands, are water courses and surface waters of the state and the WYPDES system exists entirely to *permit discharges into surface waters of the state*. See generally, Wyoming Water Quality Rules and Regulations ("WQRR") Ch. 2.

A review of the Environmental Quality Act ("EQA") and associated rules confirms that these stream channels are waters of the state. WYO. STAT. § 35-11-101, *et seq.* The EQA defines "waters of the state" to mean "all surface and groundwater, including waters associated with wetlands, within Wyoming[.]" WYO. STAT. § 35-11-103(c)(vi). WQRR define "Surface waters of the state" to mean "all perennial, *intermittent and ephemeral defined drainages*, lakes, reservoirs, and wetlands which are not man-made retention ponds used for the treatment of municipal, agricultural or industrial waste; and all other bodies of surface water, either public or private which are wholly or partially within the boundaries of the state[.]" WQRR Ch. 1 § 2(b)(xiv) (emphasis added). Therefore, "waters of the state" include the intermittent and ephemeral streams that cross Petitioners' lands. If they were not waters of the state, CBNG producers would not be required to obtain WYPDES permits for their water discharge.

This Council is powerless to grant Petitioners' request. No landowner has the right to prevent water from flowing in a stream channel or other water course that crosses his land. The Wyoming Supreme Court has ruled that the state holds an easement to flow water in stream channels, even if the stream is non-navigable. *Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961). While riparian owners have title to the bed and channel of the river, that title is subject to an easement for a right of way of the state's waters in their natural channel through, over and across those lands. This easement is absolutely necessary for the most efficient use and distribution of the State's waters. To be sure, no person has a right to simply flood a neighbor's lands outside of the stream channel; such action is a nuisance for which a landowner can obtain redress in court. However, a landowner cannot void the State's easement by damaging or destroying the stream channel, be it by the landowner's purposeful flooding of his lands or otherwise.

Waters produced in CBNG production are also waters of the state. Producers obtain a permit for groundwater appropriation from the Wyoming State Engineer's Office ("SEO"), which recognizes the production of the water as a beneficial use. When the unaltered groundwater is discharged into a stream channel under a valid WYPDES permit, it becomes water of the state again, just as does water from irrigation or livestock watering wells when it is discharged into a stream channel. These groundwater discharges are return flows – water that has been beneficially used and then returned to waters of the state. As waters of the state, the supervision and control of CBNG return flows is in the State Engineer and Board of Control, which will further appropriate the water for beneficial use downstream. WYO. CONST. art. 8 § 5. Nothing in the EQA allows the DEQ to limit or interfere with that jurisdiction. WYO. STAT. § 35-11-1104 (a)(iii).

While Petitioners have claimed they are willing to allow others to beneficially use water produced in association with oil and gas, their STATUS REPORT makes it evident that this is simply not true. Petitioners' third set of proposed rules are more restrictive than their predecessors and would result on a complete prohibition on produced water discharges. Furthermore, even if this was not their intent, Petitioners have made it clear that they do not want the natural stream channels that cross their land to be used to convey water to water rights holders downstream.

**June 16, 2006**

**Devon Energy Production Company, L.P.**

**Re: Docket No. 05-3102: Powder River Basin Resource Council Petition for Rulemaking**

**Page 3 of 3**

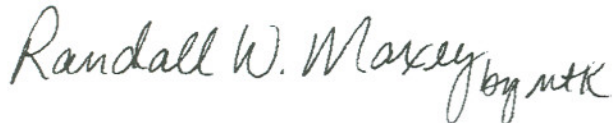
Finally, it is simply illogical to impose differing standards, whether they be quality or quantity, on certain produced water simply because it is produced from a coal seam. Natural gas wells exist in other areas of the state that produce from non-coal formations using methods similar to those employed on the CBNG wells in the Powder River Basin. Furthermore, the quality of water produced in association with CBNG is such that it is used to improve many agricultural and livestock operations throughout the Powder River Basin. In general, oil and gas produced water has been used throughout the state for decades to allow for and sustain ranching operations in places where water was otherwise unavailable or in short supply. Those agricultural producers should not be deprived of these benefits simply because a handful of landowners do not want to allow that water to be conveyed down the stream channels that cross their land.

#### CONCLUSION

In conclusion, Devon urges the Council to summarily dismiss all three of the Petitioners' requests for rulemaking. The rules proposed in the PETITION, AMENDED PETITION, and STATUS REPORT render the WYPDES program moot and represent an unconstitutional interference with the authority of the State Engineer and Board of Control. More importantly, such rules would prevent efficient use and reuse of Wyoming's water by those who have been able to grow their agricultural operations by utilizing water produced in association with oil and gas. It is simply not appropriate for the Council to engage in rulemaking at the request of a handful of residents in the Powder River Basin, when the rules have the possibility of jeopardizing the water uses of hundreds of other citizens in the state.

Thank you for the opportunity to submit our comments. Please do not hesitate to contact me should you have questions or require additional information.

**Sincerely,**



**Randall W. Maxey**  
**Senior Regulatory Specialist**