BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN RE: WATER QUALITY RULES AND REGULATIONS, CHAPTER 1, SURFACE WATER QUALITY (CHAPTER 1, APPENDIX H)	))))	Docket No. 06-3819

COMMENTS OF MARATHON OIL COMPANY

Introduction and Summary

In accordance with the Notice of Intent to Adopt Rules and Regulations published by the DEQ on or about December 22, 2006, and the provisions therein for filing written statements "at the time of the hearing or prior thereto," Marathon Oil Company respectfully submits these comments for the record. Marathon urges the Council to reject the proposed Appendix H, "Agricultural Use Protection," for adoption as a rule. Although the text of Appendix H has been under consideration for well over a year as a "policy" to accompany Chapter 1, the December 22, 2006, notice was the first time that DEQ proposed the adoption of that text as an appendix to Chapter 1, i.e., as a "rule." Neither the Water and Waste Advisory Board nor DEQ has ever solicited public comment or conducted a public hearing on this "rule." On February 5, 2007, the Water and Waste Advisory Board held a hearing on the limited issue of whether the Agricultural Use Protection standard should go forward as a "rule" or as a "policy," but the hearing notice prepared by DEQ instructed the public not to comment on the substance of the proposed "rule." Even without holding a full hearing on the proposal, the Board recommended against adoption of Appendix H, precisely because the Board realized that the public had no adequate opportunity to comment on DEQ's abrupt conversion of the document to a rule.

Marathon believes the Advisory Board correctly determined that the Agricultural Use Protection standard should not be adopted as a rule at this time. As discussed below, the Council

could not lawfully adopt this proposed "rule" under the Environmental Quality Act without prior notice and comment. DEQ's failure, and the Advisory Board's inability, to seek and consider public comment on the substantive implications of adopting Appendix H as a rule means that the proposed rule has not undergone the comment and scrutiny that the EQA requires prior to any action by the Council. The Council must reject the proposed rule, or defer it pending consideration by the Advisory Board and DEQ of full public comment on the merits of Appendix H as a rule.

Marathon recognizes the utility to DEQ of having a clear policy statement to guide DEQ's implementation of Section 20's broad mandate when writing WYDES permits. However, as also explained below, in order to be workable -- even as a policy -- the proposed agricultural use protection standard would require substantial refinement. Marathon would be prepared to work with DEQ and other stakeholders to develop an effective policy for implementation of Section 20's mandate. But the current proposal must be rejected, regardless of whether it is a rule or a policy. As discussed below, there remain many significant technical and policy issues. First, the coverage of the policy is too broad and the policy lacks clear criteria to determine what lands are to be deemed "irrigated." Section 20 was never intended to protect illicit irrigation, nor so-called natural irrigation that does not inundate grazed pasture land outside a stream channel. Second, even if the criteria were clear, the policy should require downstream landowners to provide information to DEQ to confirm that their lands are "irrigated." Third, the default effluent limits on EC and SAR in Tier 1 can rationally be applied only at downstream locations where and when irrigation will actually occur, not as end-of-pipe limits. Fourth, Tier 3's procedures are vague and need supplementation. At a minimum, DEQ needs to make clearer that a landowner's failure to provide reasonable access to its property for purposes of acquiring

data necessary under Tier 3 will relieve the permit applicant from any requirements under Section 20 with regard to that property.

Discussion

1. The Council Cannot Lawfully Adopt Appendix H As A Rule Because the Advisory Board Has Not Yet Considered It.

Major differences exist between a policy and a rule, even if they use the same words. If the proposed agricultural use protection document were a DEQ policy, DEQ would have some discretion to modify or tailor the standard to fit each particular situation in writing a WYPDES permit for a given discharge of CBNG water. If the proposed standard were a rule, DEQ would have little or no flexibility in setting effluent limits for different discharges and different situations. Until December 22, 2006, DEQ was repeatedly on record as opposing a Section 20 "rule." In DEQ's Analysis of Comments on the 4th Draft of the policy, DEQ stated:

> The proposed livestock watering and irrigation limits are based on the rule in Chapter I, Section 20. Section 20 provides general narrative criteria which require a consideration of site-specific circumstances to properly apply. We believe this is best accomplished through a procedure established **in policy** that allows the necessary flexibility to arrive at the most appropriate permit limits in each application. **Establishing the limits in the rules, either Chapter 1 or Chapter 2, would severely limit the necessary flexibility.**

Analysis of Comments at 3 (emphasis added). As the Petroleum Association of Wyoming noted in comments to the Water and Waste Advisory Board dated February 5, 2007, which Marathon hereby incorporates by reference, DEQ had long been on record as rejecting the suggestion that the policy instead be brought forward as a rule. At the Board's earlier hearing on August 2, 2006, in Buffalo, Wyoming, Bill DiRenzo of DEQ said that among a number of "basic issues" that DEQ had considered in developing the standard, "[t]he first one is rule versus policy." Transcript, p. 19, lines 11-17. Mr. DiRenzo advised the Board that, from the outset, DEQ had rejected making the standard a rule. As Mr. DiRenzo said:

- "Gary Beach, who was the administrator at that time, he put together a work group. I can't even remember. It was a rather large work group. It was pretty well represented from all facets of the community to take up that question, should we have numeric standards or stay with the narrative. . . . [T]he result of it all was a decision that it's probably best the numeric criteria -- well, **there was so many variables, we felt that an attempt to write numeric criteria to address agricultural protection across the state and all the circumstances that would be encountered, there would be many numeric criteria and there would be many exemptions, and there would be this -- this would apply in this circumstance and in this other circumstance another number would apply.** And in the end, we would have numeric criteria that really didn't work any differently than a narrative criteria that said, look, just the goal is to protect the use, and we would develop a policy that would explain what that means and how we would apply that concept in each circumstance." Transcript, p. 20, lines 22-25; p. 21, lines 1-20.

- "[T]here are some other considerations and . . . they all boil down to a concept of flexibility. And in defense of that previous decision to stay with a narrative criterion, the real thread that has run through all the comments from all sides of this issue is that one size doesn't fit all. **That whatever it is you do, how you do this, it has to be flexible, you have to be able to react, you have to be able to address all the many different situations that you're going to see and we believe that is better accomplished through a policy than a rule."** Transcript, p. 22, lines 3-14.

- "The policy -- we're sure we don't have all the answers. And as time goes on, we're going to learn more and more and we'll want to tweak, say, livestock limits or take a different approach here or there. As a policy, that can be done a little more efficiently than if it's hardwired into a rule where we have to go through this rulemaking process in order to make any change to it." Transcript, p. 22, lines 15-21.

- **"In this circumstance of ag protection, with all the variables, we think that it's -- it just -- it's better to be able to have that flexibility and to make those kind of decisions on more of a site-specific basis."** Transcript, p. 25, lines 3-6.

Not surprisingly, in light of these prior statements, the Advisory Board voted on February 5, 2007, not to recommend adoption of the policy as a "rule," and recommended that, prior to any

consideration by EQC of the policy as a rule, DEQ would need to hold a full public hearing on the substance of the standard and how it would operate as an inflexible rule.

This was the correct outcome, because, before the Section 20 implementation document could be considered for adoption as a rule, the Water Quality Division of DEQ must first consult with the Advisory Board and must seek public comment on the proposed rule. *See* W.S. § 35-11-302(a) ("The administrator, *after receiving public comment* and *after consultation with the advisory board*, shall recommend to the director rules, regulations, standards and permit systems to promote the purposes of this act.") (Emphasis added.) In this case, when the DEQ determined it wanted to change the agricultural use policy from a policy to a rule, it did so without public comment, and without first receiving the recommendation of the Advisory Board. In fact, DEQ published notice of its intent to convert the policy to a rule on December 22, 2006, and thus prejudged the issue before the Advisory Board had held even the truncated February 5 hearing.

DEQ's unilateral conversion of the Section 20 document to a rule short-circuited the rulemaking procedure required by the EQA. It is the Advisory Board's function to "recommend to the council through the administrator and director the adoption of rules, regulations and standards to implement and carry out the provisions and purposes of this act." W.S. § 35-11-114(b). "The advisory board *shall* consider all the facts and circumstances bearing upon the reasonableness of the pollution involved[,]" including certain specified factors, such as the technical practicability and economic reasonableness of reducing or eliminating the source of pollution. W.S. § 35-11-302(a)(vi). In order for the Advisory Board to meaningfully evaluate any proposed rule, the Board must solicit public comment on the substance of the proposed rule. Because the notice of the February 5 hearing instructed the public not to comment on the substance of the agricultural use protection document, the Advisory Board could not and did not

solicit comment on the substance of the proposed rule. In recommending rejection of the proposed rule, the Advisory Board recognized that, given the instruction to the public not to comment on the content of the policy as a rule, no meaningful opportunity to comment had yet been provided. It would be premature for the Council to adopt this "rule" where the Advisory Board has itself said that it has had no opportunity to consider the Section 20 implementation document as a rule.

2. Appendix H Is Not Workable Even As A Policy and Needs Modifications.

A number of substantive modifications would be necessary even if the Section 20 standard remains a "policy." However, the Council should not attempt to improvise modifications at the February 15-16, 2007 hearing, especially given that the Council must hear from interested parties and consider all oral and written comments before it makes any decision on the proposed rule.[1] These modifications would be properly the subject of additional hearings and, ideally, of a collaborative effort among all the stakeholders. Among these defects to be addressed are the following.

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[1] The Council's Rules of Practice and Procedure provide that "Before the adoption, issuance, amendment, or repeal of any rule, or the commencement of any hearing on such proposed rule-making, the Council shall cause notice to be given in accordance with the provisions of W.S. 9-4-103 [now 16-3-104]." Chapter III, Section 2(e). The referenced provision of the Administrative Procedure Act requires an agency to "[a]fford all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing."

EQC's rules further require the Council to *consider* all comments, including written submissions: "All timely comments shall be considered by the Council before final action is taken on any proposal to promulgate, amend or repeal any rule." Ch. III, Section 6(a). In addition, under the Administrative Procedure Act, an agency must "consider fully all written and oral submissions respecting the proposed rule." Wyo. Stat. § 16-3-103(a)(ii)(B).

In light of these statutory requirements, it would seem that both proponents and opponents of proposed Appendix H would expect the Council to have demonstrably considered any written and oral submissions on the proposed Appendix H before deciding to reject it or to adopt it.

A. The Definitions of "Irrigated Land" Are Overbroad and Ambiguous.

The agricultural use protection policy is overbroad with respect to its definitions of irrigated land that qualifies for protection. With respect to artificial irrigation, the document requires only that there be a "current irrigation structure or mechanism in place for diverting water from the stream channel." H-2, lines 7-8. The policy should protect only lawful use of irrigation water, conducted in accordance with a valid water right and with the rules and policies of the State Engineer. It would not be wise public policy to reward unauthorized irrigation at the expense of lawfully operating CBNG producers. The stated purpose of the policy is to "ensure that pre-existing crop production will not be diminished as a result of the lowering of water quality." This policy should apply to lawful irrigation only. The policy should not reward those who flout the water laws of the State through unlawful diversion.

With respect to "naturally irrigated lands," the policy's overarching intent is to protect irrigation water quality where there is "a substantial acreage of naturally sub-irrigated pasture within a stream floodplain." H-2, lines 9-10. However, the policy's more detailed discussion of coverage of "naturally irrigated lands" is highly ambiguous, referring first to areas along stream channels that have "enhanced vegetative production due to periodic natural flooding or sub-irrigation," but also to lands "on which the combination of stream flow and channel geometry provides for enhanced productivity of agriculturally significant plants." H-4, lines 1-5. Does "vegetative production" refer to growth of any plant, including noxious plants or those that supplant native vegetation, or only to plants that are in some unspecified way "productive"? How will DEQ determine whether plants that would receive discharged water are "agriculturally significant"? If a discharge will promote the growth of livestock forage plants that will supplant native plants, will the discharge be deemed to enhance or to decrease crop or livestock

production? The rule refers to "wetland mapping" as one method of determining naturally irrigated lands. Clearly, however, wetlands, while important for other reasons, do not necessarily provide "pasture" or forage for livestock.

Thus, while the rule may be aimed at the particular goal of protecting areas that comprise "a substantial acreage of naturally sub-irrigated pasture within a stream floodplain," the specific provisions that attempt to define naturally irrigated lands are not tailored to this objective. Instead, they speak in broad and ambiguous terms of "vegetative production" that, apparently, would include ungrazed bottomlands, ungrazable wetlands, and areas of native plants that are inferior as forage. Moreover, the plain meaning of the term "pasture" does not include vegetation within a stream channel; rather it appears clearly to mean grazed vegetation in the floodplain. Marathon is concerned that, because these terms are vague and contradictory, DEQ will tend to ignore them, and "natural irrigation" will be deemed to include any plants of any type – including insignificant, unwanted or unused ones -- that no one would consider "pasture" but which happen to receive water through sub-irrigation.

B. Landowners Should Be A Primary Source of Information About Irrigated Lands and Irrigation Practices.

Assuming that a coherent and consistent definition of natural irrigation could be developed, and artificial irrigation were properly limited, the policy would remain unworkable if the applicant for a WYPDES permit to discharge CBNG water is to have the burden of showing that the proposed discharge would *not* reach naturally or artificially irrigated lands. The proposed rule does not address access to downstream properties so that an applicant or DEQ can determine whether legal or illegal irrigation is occurring there and/or whether irrigated "pasture" of the requisite size exists there. The rule should require downstream landowners, upon receiving notice of a proposed discharge, to come forward with credible information

demonstrating that their lands qualify as artificially or naturally irrigated, properly construed. That is not too much to ask of landowners who wish to avail themselves of the protections of Section 20.

C. Tier 1 Default Limits for EC and SAR Should Be Applied At the Location of Irrigation, Not as End-Of-Pipe Limits.

Marathon anticipates that others will provide expert testimony in this proceeding to explain why the Tier 1 default limits for EC and SAR should be retained in the policy at the numbers recommended by the Advisory Board. Those values, derived from research at Bridger Plant Materials Center on plant salinity tolerances and the effects of sodicity on soils in Montana, are more credible than the lower values advocated by DEQ. Marathon wishes to emphasize that, because these limits refer to EC and SAR levels that may have impacts on plants or soils, they should be applied at the location(s) where and when a proposed produced water discharge would be used for irrigation.

DEQ's apparent intent to apply the default Tier 1 limits for EC and SAR as end-of-pipe effluent limitations is unreasonably and arbitrarily conservative. Prediction of a discharge's impact on water quality in receiving water at the edge of a mixing zone is a routine part of setting effluent limits in a WYPDES permit. Predictive modeling should be no less capable of determining probable EC and SAR levels to which plants and soils would actually be exposed at the most upstream irrigation point for artificial withdrawals and at the most upstream point when flooding or migration outside a stream channel into artificially irrigated lands will occur. Such modeling would accurately account for dilution of EC and SAR in produced water by receiving waters under varying flow regimes, including the high-flow episodes when flow is sufficient for a stream to escape its channel and flood protected pasture lands. DEQ could appropriately

require monitoring the actual EC and SAR levels at the points of compliance to validate the predicted impacts of a given discharge.

D. Tier 3 Procedures Should Make Clear That a No Harm Analysis Need Only Be Performed for Irrigated Lands to Which The Applicant Has Reasonable Access.

The procedures under which a permit applicant may seek alternative effluent limitations under a Tier 3 No Harm Analysis are extremely important and need to be carefully developed. Paradoxically, DEQ's description of Tier 3 is skeletal by comparison with other provisions of the policy, even though Tier 3 is likely to be the only route by which feasible permit limits can be established for many CBNG discharges.

In principle, Marathon agrees that, because of the site-specific nature of this approach, it may not be feasible for DEQ to specify a detailed protocol for no-harm analyses. However, Marathon strongly disagrees with the policy's inadequate "reasonable access requirement." DEQ recognizes that "in many applications," EC and SAR limits will have to be based on Tier 3 (or Tier 2) analyses because the Tier 1 default limits are unattainable. DEQ also appears to recognize that an applicant's ability to acquire data relevant to predicting impacts of the proposed discharged will require access to downstream properties where irrigation assertedly occurs. DEQ also appears to recognize that some landowners may simply deny access to their properties (perhaps to exert leverage to obtain compensation or other benefits). Yet, in that event, DEQ suggests the only sanction for such denial of access will be that Tier 3 limits for the permit will be based on "the best information that can reasonably be obtained." H-10, lines 20-27.

Section 20 is intended to prevent degradation of water quality to the extent that agricultural production from irrigated lands would be reduced. On its face, Section 20

contemplates a balancing of important interests. On the one hand, discharges of effluents are necessary for industrial, municipal and other economically valuable activities to occur. On the other hand, irrigation uses should be protected. This policy choice imposes reciprocal obligations both on industry and on agriculture. Where an irrigator is not prepared to provide information to confirm that his or her land is artificially or naturally irrigated (see above), or is unwilling to allow reasonable access to that land for purposes of assessing projected harm from a discharge and potential mitigation measures, then that irrigator should not be entitled to the benefits of Section 20. Certainly, that irrigator's recalcitrance should not impose additional burdens on the WYPDES applicant in the form of inability to make a no-harm showing, or more stringent effluent limits than would have been necessary if complete data about, e.g., the irrigated soils had been forthcoming. The just and reasonable result in that situation is that, if an irrigator wishes to ignore the reciprocal nature of Section 20 – as should be that individual's right -- then Section 20 should ignore that irrigator. In other words, the agricultural use protection policy must clearly state that a landowner's election not to provide reasonable access to its property for purposes of acquiring data reasonably necessary under Tier 3 will relieve the permit applicant from any requirements under Section 20 with regard to that property.

Conclusion

For the foregoing reasons, Marathon respectfully requests that the EQC reject the proposed Appendix H for adoption as a rule or as a policy. Until December 22, 2006, Appendix H was a proposed policy, and DEQ consistently resisted converting it to a rule because to do so would make the policy's requirements too inflexible. The Water and Waste Advisory Board declined thereafter to recommend that this Council adopt the proposed rule unless the Advisory

Board were able to conduct the notice-and-comment procedure that is required in order for the Board and DEQ to carry out their duties under the EQA.

Nor should the Council consider approving Appendix H as a policy. The document has too many crucial ambiguities, as explained above, and it would be exceedingly difficult for the Council to make the necessary revisions. Appendix H should be rejected in both guises and DEQ should convene a collaborative working group of all interested stakeholders for the purpose of expeditiously developing a consensus policy that will enable DEQ to implement Section 20 efficiently and effectively.

Dated this 15 day of February, 2007.

Respectfully submitted,

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