BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

JOINT RESPONSE IN OPPOSITION TO	)
PETITION TO AMEND WYOMING	)
WATER QUALITY RULE, CHAPTER 2,	)
APPENDIX H	)

The undersigned Respondents, ("Respondents"), hereby file their initial response and opposition to the above-captioned citizen petition for rulemaking ("Petition") filed by the Powder River Basin Resource Council ("PRBRC") and various individual petitioners ("Petitioners").

I. INTRODUCTION

Respondents are coal bed methane ("CBM") producers with operations in the Powder River Basin of Wyoming. Because the Respondents' interests are sufficiently aligned at this stage of the proceedings, they have elected to file this Joint Response to avoid duplication and consolidate the presentation of their views to the Environmental Quality Council ("EQC"). Each Respondent, however, reserves the right to also file individual comments and to participate individually in the event that the EQC accepts the Petition and initiates rulemaking.

II. SUMMARY OF RESPONDENTS' POSITION

Respondents urge the EQC to dismiss the Petition and decline to initiate rulemaking proceedings for legal, procedural and practical reasons. As developed fully in the arguments below, Respondents request the Petition be dismissed for the following reasons:

1. The EQC lacks jurisdiction over the Petitioners' request that the EQC exercise authority over "beneficial use" and "waste" determinations relating to waters of the state.

The Wyoming Constitution, statutes and existing Department of Environmental Quality ("DEQ") regulations vest exclusive authority over these issues in the State Engineer and Board of Control. In addition, Respondents' appropriations of water and the subsequent management of produced water are consistent with the beneficial use requirements under Wyoming law.

2. The Petition is a classic example of the "second bite at the apple." The identical issues raised in the Petition were raised by the Petitioners and others in comments to the DEQ, the Water and Waste Advisory Board ("WWAB"), the EQC and ultimately Governor Freudenthal in the recent Chapter 2 rulemaking proceedings. Now, with the ink barely dry on the new Chapter 2 rules, which took nearly four years to complete, Petitioners are attempting to reopen the rules to address issues that have already been fully considered and resolved. Neither the EQC nor the Respondents should be required to re-examine issues that were thoroughly analyzed in the recent rulemaking simply because Petitioners are dissatisfied with the result.

3. Allowing the Petition to proceed to rulemaking would undermine the reasonable investment-backed expectations of industry and other landowners, and would nullify the DEQ's ongoing watershed based permitting process. Since Petitioners allege that the majority (ninety-nine percent (99%) according to PRBRC) of discharged water is not beneficially used, they apparently seek a wholesale change to historic CBM water management practices.

4. The proposed revisions to the water quality standards for TDS, sulfate and barium are unnecessary and overly stringent.

III. ARGUMENTS

A. The EQC Should Decline to Proceed To Rulemaking On Part I of the Petition

1. Beneficial Use Determinations are Vested in the State Engineer and Board of Control.

In Part 1 of their Petition, the Petitioners argue that the EQC should amend Appendix H to Chapter 2 of the Water Quality Rules and Regulations. *See* Petition at 3-5. The Petitioners propose various amendments to Appendix H "to clarify that discharged water must actually, and not theoretically, be put to beneficial use." *Petition* at 7. Those amendments seek to have the Water Quality Division ("Division") within the DEQ limit the quantity of discharges of CBM produced water to that amount which is actually put to beneficial use. *Petition* at 3-5, 6-8. The EQC, the Division, and the DEQ are statutorily forbidden from making the beneficial use determination that Petitioners seek, and the EQC should dismiss Part 1 of the Petition without proceeding to rulemaking.

A. Water Quality, Beneficial Use Determinations and Section 35-11-1104 of the Wyoming Environmental Quality Act

The State of Wyoming has separated the regulation of water quality and water quantity issues and delegated responsibility for those two sets of issues to two distinct entities. Water quality is regulated by the Division within the DEQ. Water quantity issues, including beneficial use determinations, are the exclusive province of the Wyoming Board of Control and the Wyoming State Engineer. It is important to recognize how water quality and water quantity are regulated in Wyoming because the Petitioners are asking the EQC to ignore settled principles of Wyoming law, and improperly interfere with actions within the sole authority of the State Engineer.

1. Water Quality Regulation by the DEQ

In the Wyoming Environmental Quality Act, the Wyoming Legislature authorized the DEQ to regulate water quality through the Division. Wyo. Stat. Ann. §§ 35-11-101 to 35-11-115, 35-11-301 to 35-11-312. Consistent with its authority, the DEQ issues Wyoming Pollution Discharge Elimination System Permits ("WYPDES") for discharges of CBM-produced water. For WYPDES permits for CBM produced water, the Division authorizes the discharge so long as the "water is accessible to livestock and/or wildlife; meets the effluent limitations as specified in this appendix; and meets the criteria for the protection of livestock and wildlife as specified in the Wyoming Water Quality Rules and Regulations." Chapter 2, Appendix H(d)(i), WQRR.

2. Water Quantity and Beneficial Use Determinations by the Board of Control and State Engineer

The Wyoming Constitution places water quantity issues, and beneficial use determinations, under the control of the Wyoming Board of Control and the Wyoming State Engineer. *See* Wyoming Constitution, Article 8, Sections 2, 3, 5. The Wyoming Constitution assigns to the State Engineer the "general supervision of the waters of the state" which includes determinations of "beneficial uses." Wyoming Constitution, Article 8, Sections 3, 5. The Wyoming Supreme Court has emphasized that it is especially inappropriate to interfere with determinations of the Board of Control and State Engineer because "the Board and the State Engineer are created by the state constitution, and not from the legislature." *John Meier & Son, Inc. v. Horse Creek Conservation District of Goshen County*, 603 P.2d 1283, 1288 (Wyo. 1979).

3. Wyoming Law Prohibits the DEQ, Division, and EQC From Interfering with State Engineer's Beneficial Use Determinations

This statutory division of labor between the State Engineer and the DEQ is precise. To preserve the State Engineer's authority over water quantity and beneficial use determinations, the Wyoming Legislature mandated in the Wyoming Environmental Quality Act that the DEQ and the EQC must not interfere with the State Engineer's authority. Specifically, the Wyoming Environmental Quality Act provides in relevant part:

> § 35-11-1104. Limitation of scope of provisions.
>
> (a) Nothing in this act:
> …
> (iii) Limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control ….

Wyo. Stat. Ann. § 35-11-1104 ("Section 1104"). The Wyoming Environmental Quality Act is the source of statutory jurisdiction and authority for the DEQ and EQC. Section 1104 thus limits the jurisdiction and authority of the DEQ and EQC.[1] Nothing in its enabling statute authorizes the EQC to issue regulations that enlarge upon the DEQ's statutory authority and jurisdiction. *See* Wyo. Stat. Ann. § 35-11-112.

In accord with Section 1104, existing DEQ regulations provide that the beneficial use determinations concerning ground water are the sole province of the State Engineer.

Section 3. Underground Water Protected.

[1] In addition to Wyoming, other prior appropriation states have directed their water quality agencies not to regulate water quantity in permitting point sources discharges. For example, the Colorado legislature mandated in the Colorado Water Quality Control Act that in regulating water quality, the state cannot "supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of article XVI of the constitution of the state of Colorado." Colo. Rev. Stat. § 25-8-104(1).

> (a) All waters, including ground waters of the State, within the boundaries of the State of Wyoming are the property of the State; and control of the beneficial use of waters of the State resides with the Wyoming State Engineer.
>
> (b) Nothing herein contained shall be construed so as to interfere with the right of any person to use water from any underground water source for any purpose identified in W.S. 35-11-102 and 35-11-103(c)(i); or to limit or interfere with the jurisdiction, duties or authorities of other Wyoming State agencies or officials.

WQRR, Chapter 8, Section 3 (emphasis added).

B. The Petitioners Are Improperly Requesting the Division to Make Beneficial Use Determinations for CBM Produced Water

The EQC should dismiss Part 1 of the Petition, and reject the amendments proposed by Petitioners, because they expressly request the EQC to direct the Division to make a beneficial use determination for CBM produced water. For example, the Petitioners seek to add the following sentence to Appendix H of the Chapter 2 WQRR: "this exemption shall be limited to that quantity of water that can be demonstrated to have actually been put to beneficial use." Petition, Proposed Amendment to Appendix H(c)(1). Further, Petitioners request the EQC to define "beneficial use" of CBNG produced water to limit it "to the extent discharge water is actually used by livestock and/or wildlife." Petition, Proposed Amendment to Appendix H(d)(i).

All of Petitioners' proposed amendments that seek to limit the quantity of CBM produced water are contrary to the constitutional and statutory limits on the Division's authority. Moreover, they conflict with existing determinations of beneficial use made by the Sate Engineer in published guidance documents for CBM development. For example, limiting discharge to the extent "actually used by livestock or wildlife" directly contradicts the State Engineer's determination that "storage of CBNG water is recognized as a beneficial use." *See,* Exhibit A, *State Engineer CBNG Surface Water Policy*. Part 1

of the Petition and the Petitioners' proposed amendments are contrary to Section 1104 and should be dismissed.

C. Wyoming's Separation of Water Quantity and Water Quality Regulation Follows the Clean Water Act.

The Petitioners contend that DEQ is "drawing an artificial line between water quantity and water quality" and that the "water quality and water quantity distinction is not supported in the law." Petition at 5. The Petitioners are wrong, and they have overlooked a cornerstone of the federal Clean Water Act.

Congress recognized when it passed the Clean Water Act that water quality regulation under the National Pollution Discharge Elimination System permitting program has the potential to interfere with state water quantity determinations and water rights allocations. Congress added a provision to prevent federally-mandated water quality regulation from interfering with state authority over water rights and water allocations. Section 510 of the Clean Water Act provides:

> Except as expressly provided in this chapter, nothing in this chapter shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370(2). In 1979, Wyoming Senator Malcolm Wallop sponsored an amendment to the Clean Water Act to reiterate that federally-mandated water quality regulation shall not interfere with state water law determinations. The Wallop Amendment provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C. § 101(g).

Beneficial use determinations by the Wyoming State Engineer are squarely on the water quantity side of the water quantity/quality distinction recognized in the Clean Water Act. See Wyoming Constitution, Article 8, Section 3; Wyo. Stat. Ann. §§ 41-3-931, 41-4-502. When Senator Wallop successfully amended the Clean Water Act to ensure that State authority over water quantity issues "shall not be superseded, abrogated or otherwise impaired" by water quality regulation, Congress was protecting beneficial use determinations by the Wyoming State Engineer from precisely the interference proposed by the Petitioners.

The Petitioners appear to believe that it is appropriate for the EQC to enact regulations that would require the Division to make beneficial use determinations because the Environmental Protection Agency's ("EPA") Effluent Limitation Guideline ("ELG") for oil and gas produced water west of the 98th meridian references produced water that has a "use" in agriculture or wildlife propagation. See 40 C.F.R. Part 435, Subpart E.

The Petitioners are inappropriately applying the ELG. The existing regulations at Appendix H to Chapter 2 of the WQRR satisfy the ELG because the Division will not issue a WYPDES permit unless it determines that CBM produced water is "accessible to livestock and/or wildlife" and "meets" the water quality "criteria for the protection of stock and wildlife" set forth in the WQRR. *See* Chapter 2, Appendix H(d), WQRR. That determination by the Division complies with the ELG provision stating that the "produced water is actually put to such use during periods of discharge." 40 C.F.R. § 435.51 (c). Nothing in the EPA's ELG at 40 C.F.R. Part 435, Subpart E requires the Division to limit the quantity of water discharged under a WYPDES permit to the amount

which is actually consumed by livestock or used by wildlife. That would be an impossible and unworkable test.

Wyoming's decision to vest exclusive authority in the State Engineer over the regulation of quantities of water produced and discharged, and determination what is beneficial use of the state's water, does not conflict with the Clean Water Act. As the Supreme Court has made clear, while states have the authority under section 401(d) of the Act to regulate water quantity issues in regulating water quality, the decision whether to do so and in what fashion remains with each state. *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). Wyoming has, through constitutional and statutory mandates, determined as a matter of public policy that regulation of water quantity issues shall be the sole province of the State Engineer and that determination is lawful under the Clean Water Act. *Id., see also Colorado Wild, Inc. v. United States Forest Service*, 122 F. Supp.2d 1190, 1193 (D. Colo. 2000) (Brimmer, J.) ("while PUD No. 1 upholds a state's right to impose minimum streamflow requirements, it does not contend that such requirements are mandated by the CWA itself.").[2]

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[2] Like *PUD No. 1*, none of the other cases cited by Petitioners holds that the Clean Water Act mandates using NPDES permits to regulate the quantity of water discharged to surface waters. The only issue before the Court of Appeals in *Quivira Mining Co. v. USEPA*, 765 F.2d 126 (10th Circuit 1985) was whether EPA could require an NPDES permit for discharges of contaminated water from uranium mining operations into certain arroyos. While the Tenth Circuit upheld EPA's assertion of jurisdiction over the arroyos as "waters of the United States," its reasoning had nothing to do with whether EPA could regulate the quantity of water discharged to these waters of the United States.

In *U.S. v. Earth Sciences, Inc*, 599 F.2d. 368 (10th Cir. 1979), cited by *Quivira Mining*, the issue before the Court of Appeals was whether under section 304(f) of the Clean Water Act, which required a study of methods for controlling nonpoint sources of water pollution and "pollution resulting from . . .mining activities," point source discharges from mining operations are exempt from NPDES permitting. The court rejected the exemption, reasoning that:

> Beginning with the Congressional intent to eliminate pollution from the nation's waters by 1985, the FWPCA was designed to regulate to the fullest extent

> possible those sources emitting pollution into rivers, streams and lakes. *The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated.* The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.

599 F.2d at 373. The italicized language (which is the only portion Petitioner quotes), when read in conjunction with the references in the preceding sentence to "sources emitting pollution" and in the following sentence to "pollutants . . . enter[ing] the waters of the United States, is nothing more than the Tenth Circuit's unremarkable observation that NPDES discharge permits may regulate both the quantity of *waste* – as distinct from water in which it is present – that may be discharged from a point-source, as well the quality of the discharge. That is, EPA and states can and do impose limits on total daily discharge of a given pollutant, e.g., total mass, as well as on the concentration of waste in the discharge.

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) involved review of the Corps of Engineers' denial of a permit under section 404(a) of the Clean Water Act for construction of a dam on a tributary of the South Platte River. The Corps denied the permit based on its determination that the depletion in downstream water flow resulting from damming the water would adversely affect downstream critical habitat of the whooping crane. The Court of Appeals upheld the Corps' action on the ground that the Endangered Species Act "imposes on agencies a mandatory obligation to consider the environmental impacts of the projects that they authorize or fund." 758 F.2d at 512. The Court relied on the specific provisions in section 404 of the Clean Water Act that govern the Corps' issuance of permits for dredging and filling in waters of the U.S.:

> [Section 404] explicitly requires that a permit be obtained for any discharge [of dredged material] "incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, *where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced*." 33 U.S.C. § 1344(f)(2). . . . Thus, the statute focuses not merely on water quality, but rather on all of the effects on the "aquatic environment" caused by *replacing water with fill material*. 33 U.S.C. § 1344(f)(1)(E).

Id. (emphasis added)

Thus, the Corps' authority to consider the impact of the proposed dam on downstream flow, the Court held, is based on section 404(f)(2) of the Clean Water Act, which expressly refers to discharges of fill material and to the impact of such discharges on flow of the affected waters. Section 404 is a different provision of the Clean Water Act from section 402, under which effluent limitations are established and permits are required, and Section 404 is administered by the Corps, not by EPA or a delegated NPDES state. *Riverside Irrigation District* provides no support for the proposition that NPDES permits must regulate the volume of water discharged from a point source, as distinct from regulating the quantity of pollutants thereby discharged over a given period of time and the concentration of pollutants in the discharge. *See Earth Sciences, supra*, 599 F.2d at 373.

Wyoming has made a policy choice, reflected in the constitution and statutes, that separates the authority for water quantity and water quality determinations into two different agencies. Beneficial use determinations are the sole province of the State Engineer because it is the foundation of the State's prior appropriation water rights regime. *See* Wyoming Constitution, Article 8, Section 3; Wyo. Stat. Ann. §§ 41-3-931, 41-4-502. The DEQ issues WYPDES permits for the point source discharge of CBM produced waters into surface waters of the State. The State of Wyoming has separated water quality regulation by the DEQ from the State Engineer's functions by affirmatively forbidding the DEQ and EQC from interfering with beneficial use determinations. *See* Wyo. Stat. Ann. § 35-11-1104(a)(iii). The EQC should dismiss Part 1 of the Petition because it requests the EQC and the DEQ to take action that they *cannot* legally take: rendering beneficial use determinations for discharges of CBM produced water.[3]

2. The Petition Should Be Dismissed Because Petitioners' Issues Were Raised and Thoroughly Considered in the Recent Chapter 2 WQRR Rulemaking Proceedings.

Chapter 2, WQRR underwent extensive revisions in a rulemaking proceeding that started in 2001 and ended in November of 2004. The extensive history of the rulemaking process was summarized by the DEQ for the Governor's Office prior to the rules being signed by Governor Freudenthal in late 2004. The DEQ synopsized the proceedings as follows:

Alameda Water & Sanitation v. Reilly, 930 F.Supp. 491 (D. Colo. 1996) likewise concerns the scope of section 404, not section 402, of the Clean Water Act. The court said nothing about EPA's and states' supposed jurisdiction over the quantity of water discharged from a point source under section 402 of the Act.

[3] Even if it were not the case that the EQC lacks jurisdiction to adopt the proposed regulation, *PUD No. 1*, makes it clear that the Council may decline to do so without running afoul of the Clean Water Act.

> The Chapter 2 Rulemaking process began in April, 2001. The primary purpose of the rulemaking was to update and consolidate existing rules that were originally adopted as long ago as 1974. Over the course of the 42 months that DEQ dedicated to the Chapter 2 rule making process, eight public meetings were held and five separate written and oral public comment periods were provided. The WQD provided a written response to all comments received during the rule making process and addressed specific questions raised by the Water and Waste Advisory Board and the Environmental Quality Council.
>
> In addition, because the NPDES program is a delegated program from EPA, Region 8 EPA reviewed each of the six drafts for compliance with requirements for program primacy. EPA found that the proposed Chapter 2 rules are consistent with the federal rules.

Exhibit B, *Questions Regarding Water Quality Division Chapter 2 Rules*, p. 1 (emphasis added).

Petitioners took full advantage of the numerous opportunities to provide input and public comment during the Chapter 2 rulemaking proceedings. Indeed, the instant Petition is virtually identical to the issues raised during those proceedings. During the numerous comment and public hearings, Petitioner PRBRC, the Wyoming Outdoor Council and Kate Fox (now counsel for the Petitioners) provided numerous comments challenging the same provisions in Appendix H that they now seek to revisit. See *Exhibit C, PRBRC Comments to Chapter 2 Proposed Rules*, May 17, 2004 and *Exhibit D, Kate Fox Comments to Chapter 2 Proposed Rules*, April 22, 2004.[4]

[4] PRBRC's comments mirrored the requests in the instant Petition, urging the EQC to revise Appendix H, alleging that "implying all CBM water being discharged is of beneficial use for livestock and wildlife is mostly false" and arguing that the "beneficial use of this CBM water should be supported by the volume of water that can actually be used for livestock and wildlife by the landowner and no more should be allowed to be wasted by dumping it on the surface and allowing it cause damage downstream." Exhibit C. Ms. Fox argued in her comments concerning Appendix H that "[a] quantity parameter must be included in the quality/beneficial use standard,…" and, using the same terminology employed in the instant Petition, alleged that Appendix H "appears to be a great big loophole." Exhibit D.

The DEQ considered and formally responded to all these comments in June of 2004. Exhibit E, *Response to Comments (Excerpts)*. In particular, the DEQ addressed comments about beneficial use under Appendix H and responded by stating:

> 40 CFR 435 allows for the discharge of produced water if the water is used by wildlife or agriculture during periods of discharge. This was a provision that was supported by the Wyoming DEQ, Wyoming Game and Fish and many landowners within Wyoming to allow for the continued use of produced water rather than reinjecting the water. It is the DEQ's opinion that there should not be a quantity limitation related to the agricultural and wildlife use determination. The federal regulations did not contemplate a maximum allowable flow rate but rather that the water being discharged was actually used by wildlife or agriculture during periods of discharge. It was not the intent of the federal regulations that all of the water be consumed.

Exhibit E, pp. 36-37 (emphasis added). The DEQ's response to the beneficial use comments raised by Petitioners demonstrates that the agency fully considered the comments, addressed them in light of analogous federal regulations, considered the views of other interests such as the Game and Fish and other landowners, and concluded that no change was warranted. In addition, the DEQ also addressed Petitioners' comments about potential effects of CBM water on downstream draws and meadows. The DEQ noted that Chapter 2 and existing statutes allowed for appropriate management of these possible effects. See, *Id.* p. 17-18.

In July and August, 2004, the EQC held hearings to consider the draft Chapter 2 rules. Following the July EQC meeting, the DEQ provided a document for the EQC responding to questions raised by the EQC at the hearing. *See, Exhibit F*, *Response to July 7, 2004 EQC Questions.* In that document, the DEQ explained that groundwater matters, such as those raised in the instant Petition, are addressed in Chapters 3 and 8 of the WQRR, not in Chapter 2. *Id.*, p. 1. The DEQ also addressed Appendix H issues

related to protection of irrigation and soils from potential adverse effects of CBM water by referencing the agricultural protection provision of Chapter 1 Section 20. *Id.,* page 6. The Addendum to the document addresses the Effluent Guideline at 40 C.F.R. Part 435, and notes that the provisions of Chapter 2 are consistent with the guideline. *Id.*, Addendum, p. 3.

Following the EQC's approval of the regulations they were submitted to the Governor for approval. Still dissatisfied, Petitioners attempted to derail the rules by requesting that the Governor not sign them into law. On September 10, 2004, Kate Fox sent a letter to Governor Freudenthal (on her own behalf) objecting to the rules. In her letter, Ms. Fox raised the same issues, arguing that the rules ignored potential groundwater effects and were deficient because they did not address water quantity issues. *Exhibit G, September 10, 2004 letter from Kate Fox to Governor Freudenthal.*

In addition, several of the Petitioners, including PRBRC, Bernadette Barlow, Clay Rowley and Nancy Sorenson, arranged a meeting with the Governor for September 14, 2004. *Exhibit H, PRBRC Proposed Meeting Agenda*. Jill Morrison of PRBRC provided the Governor with an agenda for the meeting. With regard to the Chapter 2 rules, the agenda asserted that "the most serious problems with these proposed rules concern the failure of the DEQ to address…[t]he lack of true beneficial use of CBM water…in reality this [beneficial use] is true for maybe 1% of the total amount of discharge water." PRBRC's request as outlined in the agenda was "[w]e ask the Governor not to sign these rules until they address the above issues and are written clearly." *Id.*

DEQ provided input to the Governor's office on the issues raised by Ms. Fox, PRBRC and others Exhibit B. The DEQ's response addresses the beneficial use issues

by noting that "this issue was addressed in the public comment process." It then reiterates that:

> [i]t is the DEQ's opinion that there should not be a quantity limitation related to the agricultural and wildlife use determination. The federal regulations from which this provision originates, did not contemplate a maximum allowable flow rate… It was not the intent of the federal regulations that all of the water be consumed.

Id. at p. 1-2. After fully considering the contentions of Petitioners and Kate Fox, the Governor concluded that no changes to the rule were warranted and approved them. In a letter responding to Ms. Fox on December 3, 2004, the Governor wrote, in pertinent part:

> To get at your concern over quantity of discharge from coal bed methane dischargers, it is my hope that through the watershed based permitting approach downstream landowners can express their concerns and have a voice in how the produced water is managed….
>
> Furthermore, the rule is clear that any permit must also ensure protection of all surface water quality standards as outlined in Water Quality Rules and Regulations Chapter 1. Consequently, I do not see this provision [Appendix H] as the loophole you have suggested.

Exhibit I, *December 3, 2004 Letter from Governor Freudenthal to Kate Fox*, (emphasis added).

In summary, it is clear that the concerns of the Petitioners were fully raised and addressed by the DEQ, the WWAB, the EQC and the Governor, prior to their adoption. The residual dissatisfaction of the Petitioners over the fact that not all of their comments were addressed in the way they preferred is no justification for reopening the rules now. Indeed, to allow the Petitioners to reopen the rules after their views have been fully considered and addressed at all levels would not only be unfair to Respondents, who have worked in good faith to conduct their operations consistent with the 2004 regulations, but

it would also turn the notice and comment rulemaking procedures on their head and create uncertainty for all interested parties.

3. Reopening Chapter 2 would Interfere with Reasonable Investment-Backed Expectations of Industry and Landowners who Benefit From CBM Discharge Water, and Would Nullify the DEQ's Watershed Based Permitting Process.

After the Chapter 2 revisions were adopted by the EQC and signed by the Governor in November, 2004, CBM operators began to adjust to the new rules by planning their water management strategies to meet the requirements of the new rule. In many cases, this included planning for on and off-channel reservoirs, treatments systems, land application systems, managed irrigation and other surface discharge management options.

In addition, in the summer of 2004, the DEQ began a very labor and resource intensive watershed based permitting process, designed to ensure that CBM water management within sub-drainages in the Powder River Basin is carried out in a coordinated manner that will ensure compliance with Chapter 2. The process developed by the DEQ actively involves all stakeholders in a given drainage, including landowners, industry, the environmental community and interested state and federal agencies such as the BLM and the Game and Fish Department.

The Petitioners' request to have the EQC curtail surface discharges by up to ninety-nine percent (as suggested by PRBRC) would undermine the extensive planning, permitting and on-the-ground water management efforts carried out by industry in reliance on the new Chapter 2 and Appendix H. It would also have enormous economic consequences due to the very extensive investments made by industry to comply with the

applicable regulatory standards. These irretrievable financial commitments have been undertaken in good faith and in compliance with existing regulations.

Adopting a rule such as proposed by Petitioners would also render the DEQ's Watershed Based Permitting efforts moot, as there would be little or no surface discharge water to manage. It is simply not feasible to build the water infrastructure necessary to convey produced water the long distances that CBM operators routinely do to provide stock, wildlife and irrigation water at varying locations for landowners when only a minimal amount of water would be authorized to be discharged at those locations. Thus, as a practical matter, if Petitioners' objectives were realized, water management strategies would have to be changed to non-surface management methods, i.e., reinjection or massive pipeline projects.

In addition, the Petitioners' proposed rule would have negative consequences for other landowners whose livestock operations benefit from CBM discharge water. Many landowners disagree strongly with the views of the Petitioners regarding what constitutes beneficial use of CBM produced water. In fact, most of the landowners with whom CBM operators interact believe that the discharge water is beneficial to their operations.[5] In most instances, CBM operators and landowners are able to work together cooperatively to make CBM water a benefit for the landowners and to address concerns about possible negative impacts from discharges.

Sometimes, however, landowners are not willing to work cooperatively with CBM operators to resolve potential impacts. For example, the Petition alleges that Petitioner Ken and Glessie Clabaugh's ranch "has been inundated by CBM discharge

[5] Respondents are aware of several landowners who have expressed opposition to the Petition and who have or will be submitting comments for the record.

water flowing down Wild Horse Creek causing serious problems with flooding, soil and vegetation damage and problems wit moving cattle and calves." *Petition*, p. 1. However, what the Petition fails to mention is that the operators in the Wild Horse Creek Drainage have *twice* contacted Mr. Clabaugh to attempt to address and resolve his concerns. In particular, on February 17, 2005 and again on May 25, 2005, operators in the Wild Horse Creek Drainage sent Mr. Clabaugh correspondence in which they stated:

> This letter is submitted on behalf of several operators in an effort to identify, and hopefully resolve, issues and complaints regarding water flowing in the creek.
>
> The operators would like to set up an inspection of the creek on your ranch, and to meet with you at the ranch to discuss your concerns. It should be possible to develop solutions to any problems which you may identify, but they need to look at the land and the creek channel as part of that process….
>
> The purposes of this site visit are to learn about any problems and identify solutions. The operators are willing to clean debris out of the channel and to discuss other site work they could conduct to address your concerns. The operators look forward to hearing any constructive suggestions you might have.

Exhibit J, *Letters of February 17, 2005 and May 25, 2005 to Ken Clabaugh, President, Clabaugh Ranch*. Despite these repeated overtures to address Petitioner Clabaugh's concerns, Mr. Clabaugh has not been responsive. Without the cooperation of affected landowners, the operators' ability to address potential downstream impacts or concerns is severely limited. However, when both sides cooperate, such matters can be, and routinely are, addressed to the satisfaction of both the landowner and the operator.

B. **The EQC Should Decline to Proceed To Rulemaking On Part II of the Petition**

The PRBRC Petition urges the DEQ to promulgate new effluent limitations for sulfates, total dissolved solids and barium. Rulemaking on this issue should not proceed for two reasons. First, PRBRC made the same comments and objections during the WWQRR Chapter 1 Triennial Review process and the DEQ considered and rejected those objections on the grounds that the existing effluent limitations were protective of livestock and agricultural uses. In addition, PRBRC failed to comment and/or object during the public comment period when Chapter 2 was revised. Second, the proposed effluent limitations fail to take into account the fact that existing effluent limitations typically reflect the quality of surface water and groundwater quality that has historically been used for livestock watering, as evidenced by existing groundwater classifications under Chapter 8, WQRR.

1. Petitioners' Proposed Effluent Limitations Have Been Reviewed and Rejected by the DEQ During the Triennial Review Process

PRBRC has failed to provide any new or additional information to justify a reduction in the sulfate, TDS and barium effluent limitations. PRBRC previously has sought a number of these very same revisions to sulfate and barium effluent limitations during the 2005 WQRR Chapter 1 Triennial Review process. During that process, the DEQ set forth effluent limitations for TDS and sulfate which were intended to ensure that water was safe for livestock in the Chapter 1, Section 20 "Agricultural Use Protection Policy" which was published for public comment in August and November, 2005. PRBRC objected to the sulfate effluent limitation. PRBRC also objected to the lack of a barium effluent limitation at that time. WDEQ considered PRBRC's objections and

rejected them based on the data available to the agency. Without introducing any substantial new evidence, PRBRC is attempting an end-run around the Triennial Review process specifically established by the federal Clean Water Act to update and revise water quality standards in a considered and comprehensive fashion.

PRBRC's own statements demonstrate that they have raised the sulfate effluent limitation issue in front of the DEQ numerous times. During the Chapter 1 rulemaking session, PRBRC asserted that:

> 3,000 mg/L for Sulfates contradicts the very language presented in draft on P. 53 line 21-22. As we have pointed out to DEQ many times previously, this level of Sulfates allowed in livestock water is a detriment to animal health, growth and reproductive potential.

Exhibit K, *Analysis of Comments, Chapter 1 Rulemaking, p. 45*. WDEQ, in turn, responded:

> This concentration for sulfate is an effluent limit established in Chapter 2 of the WQR&R. It has been in use for oil and gas discharges for many years and we are not aware of any circumstances where it has been a problem.

Id. The DEQ's position is supported by the fact that none of the nineteen landowners listed in the Petition have alleged adverse health effects to livestock as the result of livestock watering using produced water. It is also important to note that, PRBRC has not alleged *anywhere* in its petition that livestock has actually suffered adverse health effects.

At the time the Chapter 1 revisions were published for public comment in 2005, PRBRC did not object to the effluent limitation for TDS set forth in the Agricultural Use Protection Policy. In its Petition, PRBRC does not provide any new information or data that justifies a revision to the TDS effluent limitation. This is clear based on the fact that

the exhibits they rely upon in support of the revised effluent limitation predate both of the DEQ's recent Chapter 1 and Chapter 2 proceedings.

With respect to barium, PRBRC challenged the lack of an effluent limitation during the Chapter 1 review and requested the same limit requested in this Petition. The DEQ, relying on its anti-degradation review for barium, responded that:

> The effluent limit for barium was established as part of an anti-degradation review that was done to achieve compliance with the human health criteria. In short, this effluent limit is adequately protective of waters in the watersheds where it applies (NE Wyoming) because the barium in these waters is primarily in the form of barium sulfate which is an inert substance with little potential for health effects.

Exhibit K, *p. 45*. This response was based on conclusions drawn in the Antidegradation Review, Analysis and Findings – Concentrations of Barium in the Surface Waters in Northeastern Wyoming Related to Discharges of Coal Bed Methane Produced Water (December 1, 2000, page 8). In that document, WDEQ determined that a 2 mg/l barium limit (based on the human health drinking water maximum contaminant level) was protective of all other uses, including agriculture.

It should be noted that the Colorado State University Cooperative Extension (the same progenitor of Petitioners' Exhibit 23, Water Analysis Livestock, undated, relied on by PRBRC in asserting a barium standard of 0.2 mg/l) no longer lists barium in its "Recommendations for levels of toxic substances in drinking water for livestock." *See,* Livestock Drinking Water Quality, Colorado State University Cooperative Extension website, updated August 24, 2004 (http://www.ext.colostate.edu/pubs/livestk/04908.html).

Finally, PRBRC did not object or provide any data or information to justify a revision to the proposed effluent limitations during the Chapter 2 rulemaking process.

Given this fact and the fact that WDEQ has already considered PRBRC's past objections, it is a waste of the agency's resources to again revisit effluent limits when no new addition information has been submitted.

2. Petitioners' Proposed Effluent Limitations Only Apply to Oil & Gas Production and Fail to Consider that Produced Water is Typically Similar to or of Better Quality than Groundwater Commonly Used for Livestock Watering.

The Petition focuses solely on revisions to Chapter 2, Appendix H, which is applicable only to oil and gas production. Hence, the proposed revisions to the Appendix H effluent limitations would impose more stringent requirements only on oil and gas production and not on any other industry. Essentially, this means that only oil and gas producers would be required to meet a standard that is more stringent than required by the Surface Water Quality Standards set forth under Chapter 1, Section 20 (which provides for the protection of agricultural use of surface waters). This imposition is untenable given the fact that other industries discharge water which is used for livestock watering and would not be subject to the same standard. This is especially true of the agriculture industry, which commonly pumps groundwater (including groundwater from the same seams as the CBM producers) for use in livestock watering.

The DEQ has determined that groundwater is acceptable for livestock watering purposes if it meets the standards for Class III groundwater. Significantly, the Chapter 8 Class III groundwater standards for sulfate, TDS and barium are identical to the existing effluent limitations prescribed in Appendix H. *See* WWQRR Chapter 8, Section 5, Table I. Requiring only oil and gas producers to meet more stringent standards than the groundwater standards is overly burdensome and inconsistent with the long-standing surface water and groundwater quality standards, which as the DEQ noted in its review of

comments in the Chapter 1 Proceeding, have not been known to cause problems for the livestock industry.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request the EQC to dismiss the Petition and decline to proceed to rulemaking on the matters raised by the Petitioners.

RESPECTFULLY SUBMITTED this _____ day of February, 2006.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document together with all exhibits was served upon the following persons, on this 10th day of February by depositing the same in the US Mail, postage prepaid and addressed as follows:

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