EXHIBIT D

DAVIS & CANNON
ATTORNEYS AT LAW

RICHARD M. DAVIS, JR.*
KIM D. CANNON
HAYDEN F. HEAPHY, JR.
ANTHONY T. WENDTLAND**
KATE M. FOX
JOHN C. McKINLEY***
NANCY D. FREUDENTHAL
DEBRA J. WENDTLAND***
KATHLEEN G. HEALY
CLINT A. LANGER
*ALSO ADMITTED IN COLORADO
**ALSO ADMITTED IN MONTANA
***ALSO ADMITTED IN UTAH

2710 THOMES AVENUE
P.O. BOX 43
CHEYENNE, WYOMING
82003

TELEPHONE (307) 634-3210
FAX (307) 778-7118

40 SOUTH MAIN
P.O. BOX 728
SHERIDAN, WYOMING 82801
TELEPHONE 307-672-7491
FAX 307-672-8955

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Terri A. Lorenzon, Director
Environmental Quality Council

Olin Sims, Chairman
Environmental Quality Council
Herschler Building 1W
Cheyenne, WY 82002

RE: Proposed changes to Chapter 2, Water Quality Rules and Regulations

Dear Chairman Sims:

I have reviewed the proposed changes to Chapter 2 of the Water Quality Rules and Regulations and have the following comments. I submit these comments on my own behalf, as someone who has worked closely with water discharge issues in Wyoming and who served on the 2003 Task Force to review and evaluate the Wyoming National Pollution Discharge Elimination System Permitting Process. I appreciate the Council's consideration of them.

First, I would say the rule revisions are absolutely necessary, and it is clear that many people have put a great deal of work into them. As sometimes happens after such an effort, the end result is unnecessarily complicated, convoluted, repetitive, and in places just plain makes you want to pull your hair out. The purpose of rulemaking is to put flesh on the framework of laws enacted by the legislature; so that regulators, regulated, and the affected public can know what is required for compliance with the law. Proper rulemaking requires a fine balance between providing specific regulatory guidance and maintaining administrative flexibility. The Chapter 2 rules fail on both counts; providing so much detail in some respects as to be incomprehensible (see the definition of "authorization," or §5(b)), and in important substantive areas setting no clear criteria (see §4 on general permits).

**1. Substantive matters**

A. § 2 Applicability - Waters of the State

"Waters of the State" are defined in the Environmental Quality Act as "all surface and groundwater, including waters associated with wetlands, in Wyoming." W.S. 35-11-103(c)(vi). The Chapter 2 rules, however, are limited to discharges to Wyoming surface waters. Chapter 8 rules cover groundwater. This segregation overlooks the reality, which is that surface water and groundwater are interconnected. For example, seepage from reservoirs (discharge storage plans rely heavily upon infiltration rates) does not simply disappear when the water goes underground. Seepage and channel infiltration do have the capacity to impact groundwater. Groundwater, in turn, frequently reappears at the surface in the form of return flows. This interconnection should,

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at the least, be recognized. In the past the DEQ has sometimes taken the view that water out of sight is out of mind. This view is incorrect and results in ineffective regulation of Wyoming water quality.

I suggest an addition to §2 Applicability, which states:

Groundwater and surface water are interconnected, and these rules shall be applied in conjunction with the Chapter 8 rules governing groundwater.

It may be that the Federal Law requires these rules only to be applied to surface water. Does DEQ intend to do the minimum required by federal law, or will it do what is right for Wyoming?

B. General Permits §4

Section 4 is alarmingly void of firm standards for issuance of general permits. A general permit is essentially a vehicle for the expedited issuance of categories of permits, without the notice required for individual permits. While general permits have the advantage of providing applicants with a great deal of speed and flexibility, they also can be fertile ground for regulatory abuses, as they allow for minimal administrative scrutiny and no public scrutiny, once the General Permit has been issued. General permits should be allowed only with effective checks and balances.

Section 4(a)(iii) would allow the Administrator, in his discretion, to issue a general permit for all CBM discharges, within a geographic area defined by the Administrator. After issuance of the general permit, operators would need only submit a notice of intent to add discharges. Affected persons would have no notice of the additional discharges, no opportunity to comment, and no opportunity to appeal to the EQC. (The time for appeal is linked to the date of issuance of the general permit, and expires 60 days after issuance. New discharges, even discharges in completely new drainages, could be added for years). A general permit deprives the public of its due process rights to notice and an opportunity for a hearing. General permits should be issued, if at all, only with strict safeguards. These rules lack such safeguards.

At a minimum, the General Permit rule should set forth criteria for when a discharge is more appropriately controlled under a general permit than under an individual permit, including consideration of the public interest and the potential cumulative effect of all discharges under a general permit on the environment in general and any drainage in particular. (See for example, the criteria at §4(b)(v)[1] for discharges without a notice of intent.) Special consideration should be given to the fact that regular people have enough difficulty tracking permit issuance for identified discharges in their drainages; how can they be expected to take notice of a general permit for

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[1] §4(b)(v)requires the Administrator to consider:
the types of discharges, the expected nature of the discharges; the potential for toxic and conventional pollutants in the discharges; the expected volumes of the discharges; other means of identifying the discharges covered by the permit; and the estimated number of discharges covered by the permit.

unspecified drainages and unspecified quantities of water? These types of identifying information must be required in the general permit, because otherwise affected persons cannot have adequate notice of the potential impacts to them.

Also at a minimum, in addition to the opportunity for affected persons to petition the Administrator under §4(i)(ii) for issuance of individual permits, the decision of the Administrator must be appealable to the EQC.

Before leaving §4, I must say that §4(b)(i – iv) is gobbledygook. I think what it means is that nobody should discharge without first receiving authorization. If so, there are clearer ways of saying so. If not, there are clearer ways of saying so.

C. Effluent permits §5

Section 5(a)(v)(T), requiring listing of associated permits, does not mention the Wyoming State Engineer, a key player in many water discharge scenarios. For instance, many Water Management Plans, particularly in the case of CBM, depend upon reservoirs for storage of effluent. In many cases the reservoirs have not yet been permitted because of the SEO permitting backlog. Yet the reservoirs are constructed and the NPDES permits issued on the basis of their role in the Water Management Plan. Aside from begging the question – what is the point of a reservoir permit, which is outside the scope of these proceedings -- the situation results in permitting discharges based on shaky building blocks. If the reservoir permit is eventually denied, or granted with conditions incompatible with the Water Management Plan (because, for instance, it interferes with senior rights), then the Water Managemant Plan and the NPDES permit are no good. These rules entirely ignore this scenario, although it is common and is well-known to the DEQ. **The Chapter 2 rules should require proof that a valid State Engineer reservoir permit has been issued before any DEQ permit that depends on a reservoir for water management is issued.**

Section 5(b), establishing timelines for the DEQ to process permit applications, ignores the clear findings of the Task Force on the NPDES permitting process. The Task Force Report states: "Since 2000, the median number of days required to obtain a NPDES permit fell from 163 days to 79 days – a 51% decrease." Appendix C, Task Force Report.[2] There is no delay in DEQ's issuance of NPDES permits. The major delays in DEQ processing identified by the Task Force (§4.1.3) were in reviewing the monitoring reports submitted by permittees. These delays go to monitoring and enforcement, not to permit issuance. The truth is that DEQ resources are dedicated disproportionately to permit issuance rather than monitoring and enforcement. If permitting lags, it will be because the volume requires more staff and resources. The time frames for completeness review and decisions on permits address a problem that does not exist and impose unnecessary administrative burdens. (§5(b) is also one of the most obtuse and impenetrable portions of these rules – reason alone to get rid of it.)

D. Public Participation § 15

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[2] The Task Force Report can be found on the DEQ/WQD website under NPDES Point Source.

The NPDES Task Force found that there was insufficient notification of NPDES discharges (§4.3), and it recommended that notification be provided to "all identified surface water users, surface owners or lessees, the surface user immediately downstream of the property subject to the permit application, and any downstream irrigator or livestock producer from the point of discharge to the confluence of the main stem river." (Task Force Report, § 4.3 ¶4.) This is important because discharges can have an important effect on non-surface owners downstream, and they should have notice. These categories of people should be included at § 15(a) as persons who should receive notice.

The response to comments provisions should also be revised. As written, the Administrator need only include in his response to public comments which provisions have been changed and the reason for the change (§5(g)(ii)). Of more interest to the commenter would be the reason that proposed changes have not been made. The language of §5(e), regarding responses to comments from affected states, states that the Administrator "shall take these comments into account," and shall include in his response "a written explanation of his reasons for failing to accept any of the comments." Surely the citizens of Wyoming deserve the same deference.

E. Appendix H – Oil & Gas

Appendix H, S(a)(i) requires that:

> produced water discharged into surface waters of the state shall have use in agriculture or wildlife propagation. The produced water shall be of good enough quality to be used for wildlife or livestock watering or other agricultural uses and actually be put to such use during periods of discharge.

This requirement continues the practice, familiar in CBM effluent permitting, of requiring a showing that the water will be put to beneficial use. This might give you a warm fuzzy feeling about the quality of the water being discharged. Do not be deceived. The requirement that a showing be made the water is of a quality to be used for wildlife or livestock watering serves a limited purpose of setting a base quality. It serves no other purpose. The reason is that there is no consideration whatsoever of quantity. Consider the scenario in which CBM wells produce water over a 100-square-mile area where previously there had been no reliable water source. It would be a good thing for a small herd of antelope and a few head of cows to have water available. That's all that's required by the current practice or by these proposed rules. But, will a few tire tanks satisfy the wildlife and cattle needs? What about several 15-acre-foot reservoirs? And what about the water that is being flushed down the drainage and into the mainstem? Many downstream ranchers and irrigators (including the State of Montana) do not welcome the water. It is a simplistic and dishonest standard to say that's okay because there's an antelope up there somewhere that may be thirsty. A quantity parameter must be included in the quality/beneficial use standard in order to have it serve any useful purpose. Of course this will present challenges in defining the parameter (and maybe even lengthen these rules), but it is worth making them mean something. (Appendix H(d)(i) suffers from the same infirmities.)

Appendix H (d)(ii) appears to be a great big loophole, again relying on the false premise

that a "letter of agricultural or wildlife use" from a landowner makes it all okay. It doesn't. One landowner (who stands to gain from royalties or a surface use agreement) cannot vouch for the desirability of the water that has significant impacts far down the drainage beyond his own land.

**A major flaw throughout these rules is the failure to consider drainage-wide impacts** (for example, in Appendix H and in the notice provisions).

**2. Form of the Rules**

Rules first of all ought to be an effective communication tool for the regulated and for the public. Any rules containing so many definitions that their roman numerals surpass the understanding of ordinary mortals fail in this fundamental purpose of rulemaking. (Who knows how many lxxviii is?) The Chapter 2 rules are 100 pages long; twice that with the appendices (A through N). They contain 13 "definitions" and 110 "supplemental definitions" (that's cx, I looked it up).

The rules are clearly the result of a great deal of commendable work. Now it would be an act of mercy to sent them back and require someone with a fresh eye to take a red pen to them. For example:

A. Applicability § 2

This section requires that all effluent discharges into surface waters of the state be permitted, and then lists exceptions. It doesn't say that, however, instead it backs into it with some convoluted language and an inexplicable distinction between §2(a) and §2(b) (§2(a) says all discharges are to be permitted, except. . . §2(b) lists the exceptions). Section 2(c)"no conveyance of property rights or exclusive privilege," belongs in §1, General Provisions; it doesn't go to applicability (and after the first time, it doesn't need to be said again in other sections – like §5(i)(K)). Section 2(d), Permit modifications, etc. is thoroughly addressed in §12, Permit or Authorization Modifications, and §13, Permit and Authorization Terminations. There is no need to say it here. The purpose of §2(e) is obscure and should probably be deleted. If it can be justified, it should find a home in Definitions (like §3(b)(xcv), Surface waters of the State).

These may seem to be trivial edits, but they would go a long way towards putting the incomprehensible within reach of the humans residing in Wyoming. The same type of editing would greatly benefit the rest of these rules. I'm not going to do it; I assume someone is well-paid for the job.

B. Definitions §3

These are, as stated above, excrutiatingly and unnecessarily comprehensive. For example, do they really need separate (and lengthy) definitions of "pollution" (§3(a)(ix)) and "pollutant" (§3(b)(lxxix))? Are they going to call it the "CWA" (§3(b)(xx)), the "Federal Act" (§3(b)(xxxi), or the "Clean Water Act" (§1(a))?

**3. Rulemaking Procedure – a reminder**

The rulemaking process frequently employed by the DEQ of encouraging input through

stakeholder process, public meetings and advisory boards is a good one. Nobody should be lulled into the belief, however, that any of that process can take the place of the public comment procedure. Although often rules are nearly fully-formed by the time they are noticed for public hearing, it is a mistake to think that very significant changes may not be made as a consequence of public comment. The Administrative Procedures Act, which governs rulemaking, requires that the public receive at least 45 days notice of an agency's intent to adopt, amend or repeal rules. It requires that all interested persons be afforded a reasonable opportunity to submit data, views, or arguments. And the law requires the agency to "consider fully all written and oral submissions respecting the proposed rule." W.S. §16-3-103. Public comment, and the agency's careful consideration of the public comment, are an essential part of rulemaking, and no amount of "process" can replace it.

These rules need significant improvement in both form and substance before they can be unleashed on the people of Wyoming. My comments are only meant to highlight some of what I consider to be the most significant issues. Thank you for considering them.

Sincerely,

DAVIS & CANNON

Kate M. Fox

Kate M. Fox

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