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February 16, 2006

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Terri A. Lorenzon, Director
Environmental Quality Council

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

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

Dear Mr. Gordon:

Devon Energy Production Company, L.P. ("Devon") appreciates the opportunity to comment on the Powder River Basin Resource Council's ("PRBRC") Petition to Amend Water Quality Rule, Chapter 2, Appendix H ("Petition").

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. We are a member of the Petroleum Association of Wyoming ("PAW"), and join with PAW in requesting the Environmental Quality Council deny the PRBRC's Petition. In addition to consideration of PAW's comments, Devon asks the Council to consider the following comments and requests that they be made a part of the record in this matter.

WHOLESALE CHANGE IN WYOMING WATER LAW

The Council need only read the first two pages of the Petition to realize the intent of the petitioners is to address issues they perceive with CBNG production in the Powder River Basin. All the petitioners represent that they reside on or own land along tributaries to the Powder River. Nearly every person mentions CBNG production on or near their property and three of the ten claim to have damages to their soil, vegetation, or livestock caused by CBNG water.

It is important to note that the proposed rules are not limited to CBNG production, nor to the Powder River Basin. The Petition proposes amendments to Section (c)(i) of Appendix H. The Petition states the provision, which allows "grandfathering" for some beneficial uses of water" will be changed to add a limit so that the exemption would only apply "to that quantity of water that can be demonstrated to have actually been put to beneficial use." However, Section (c) is actually entitled "Additional Permit Conditions and Limitations Specific to Oil and Natural Gas (*other than coal bed natural gas*) Production Facilities." (Emphasis added). The exemption to which the petitioners referred is an effluent limit exemption which only applies to "existing permits where the original permit application was submitted prior to September 5, 1978." See, Petition, Ex. 1.

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We believe the primary aim of the Petition is to force DEQ to preserve natural flow regimes in ephemeral stream systems by requiring oil and gas producers to find and prove a *consumptive* use for all water discharged. Notwithstanding the conflict this creates with the State Engineer's constitutionally provided jurisdiction, requiring the DEQ to regulate flow to prevent changes in vegetation patterns or to stop flow so that cattle can graze on the bottom of a stream bed will have far reaching repercussions.

INTERFERENCE WITH THE AUTHORITY OF THE STATE ENGINEER

The DEQ's authority to regulate the discharge of water produced in association with the oil and natural gas extraction industry is derived from its delegated authority to administer the National Pollution Discharge Elimination System permits. Environmental Protection Agency regulations allow areas west of the 98th meridian to discharge this water into "navigable waters" when it has a use in agriculture or wildlife propagation. 33 U.S.C. §1342; 40 C.F.R. §435.50. "Use in agriculture or wildlife propagation" means that the water is "of good enough quality" to allow its use for 1) wildlife, or 2) livestock watering, or 3) other agricultural uses and that the water "is actually put to such use during periods of discharge." 40 C.F.R. §435.51(c).

Current DEQ water quality regulations mimic the federal provision, and only apply to the quality of water discharges. The regulations state:

The 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*.

Although its jurisdiction is specifically limited to water *quality*, DEQ takes water *quantity* into account in determining whether the water is "of good enough quality" to be used for wildlife and agriculture, especially when it comes to mixing zones. The DEQ also monitors the quantity of water being discharged by oil and gas producers, and permits in the Powder River Basin specifically require them to work together to prevent overtopping of streambeds, icing, and erosion of the channel.

Petitioners want DEQ to impose a "beneficial use" standard on CBNG by-product water that would require that all water be fully *consumed*, thus preventing any discharge into the streams of the state. However, the term "beneficial use" is not synonymous with the term "agriculture or wildlife propagation" found in the federal law. Under Wyoming's constitution, "beneficial use" standards are within the exclusive jurisdiction of the State Engineer. "[T]he supervision of the waters of the state and of their appropriation, distribution and diversion," lies with the Board of Control and the State Engineer. WYO. CONST. art. 8, §2. The State Engineer has "general supervision of the waters of the state and of the officers connected with its distribution." WYO. CONST. art. 8, §5. "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests." WYO. CONST. art. 8 §3. "Beneficial use shall be the basis, the measure and limit of the right to use water at all times[.]" WYO. STAT. ANN. §41-3-101 (Lexis 2005). The legislature specifically limited DEQ's authority to regulate water quality, providing that nothing in the Environmental Quality Act "limits or interferes with the jurisdiction, duties or authority of the state engineer, [or] the state board of control." WYO. STAT. ANN. §35-11-1104(a)(iii) (Lexis 2005). Further,

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DEQ acknowledges that it does not have the authority to determine what constitutes a "beneficial use" of the state's waters. The introduction to Chapter 2 of the Water Quality Rules states that nothing in the regulations "supersede or abrogate the authority of the state to appropriate quantities of water for beneficial uses." DEQ Water Quality Rules Ch. 2 §1(a).

To the extent that petitioners advocate allowing DEQ to limit the amount of groundwater that may be withdrawn, that contention too must fail because such actions would again conflict with the State Engineer's jurisdiction. The withdrawal of groundwater for purposes of oil and gas exploration is specifically acknowledged as a beneficial use under Wyoming law:

Any person who intends to acquire the right to beneficial use of any underground water in the state of Wyoming, shall, before commencing construction of any well or other means of obtaining underground water or performing any work in connection with construction or proposed appropriation of underground water or any manner utilizing the water for beneficial purposes, file with the state engineer an application for a permit to make the appropriation and shall not proceed with any construction or work until a permit is granted by the state engineer, provided, that whenever a bore hole constructed for mineral exploration, oil and gas exploration, stratigraphic information or any other purpose not related to groundwater development shall be found to be suitable for the withdrawal of underground water, application shall be filed with and approved by the state engineer before water from the bore hole is beneficially utilized.

WYO. STAT. ANN. § 41-3-930 (Lexis 2005).

"BENEFICIAL USE"

The rules proposed by the PRBRC would effectively impose the petitioners' idea of beneficial use on every operator in the state who needs to discharge water in association with oil and gas production and those who wish to use such water. This will necessarily lead to a restriction on the use of water from other groundwater wells, along with the return of water that has been beneficially used to waters of the state (to surface water or through infiltration to groundwater). Petitioners justify their position by painting a picture of the Powder River Basin with a very broad brush. CBNG water is not "salty"; while there may be elevated salinity in some water, there are plenty of areas where this water may be used to improve irrigation. In fact, CBNG water is often cleaner, and does a better job at leaching the soils, than the natural runoff traditionally used in spreader irrigation systems in this area.

The Petition also seems to request that landowners not be allowed to irrigate with CBNG water without the DEQ's approval. Several landowners with which Devon works are very protective of their private property rights and would not welcome such an intrusion into their affairs. Most water management plans in the Powder River Basin are developed through good faith cooperation between landowners and producers. It is unfair to those landowners that want to use the water to allow a few to prevent the use.

Overall, the petitioners present a very limited view of the benefits that can be provided by discharging and storing CBNG water. The presence of water on the surface, especially during the recent prolonged drought, presents bountiful opportunities for wildlife propagation, not just for drinking water, but also

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for increased forage, wetlands, nesting areas, and other wildlife habitat. In fact, Devon received Wildlife Stewardship awards from the Wyoming Game and Fish Department in 2002 and 2004 for establishing CBNG water reservoirs that benefit wildlife. These water reservoirs enhanced vegetation and established watering sites for wildlife as well as habitat for water fowl and fish.

Finally, the allegation that water is being "flushed" downstream into Montana is simply false. The Wyoming DEQ has issued a draft policy for "Assimilative Capacity Allocation and Control" for the Powder River that caps the quantity of CBNG produced water that can reach the Powder River and prevents the changes in conductivity and sodium adsorption ratio in the mainstem that addressed in the Petition. Since March 2001, CBNG operators have, on a monthly basis, monitored the flow and water quality of the tributaries to the Powder River that receive CBNG discharge. They have also monitored the water quality on the mainstem of the Powder River upstream and downstream of the tributaries in accordance with NPDES permit monitoring plans. The USGS monitored flow and water quality at several locations on the mainstem of the Powder River and on major tributaries in Wyoming, including Clear Creek and Crazy Woman Creek, with varying locations and frequency. The flow data from both of these programs for the March 2001 through December 2004 monitoring period show that the flow contribution from both natural runoff and CBNG discharges has been less than 2.3% of the total flow in the Powder River measured at the Wyoming-Montana State Line.

EFFLUENT LIMITS

Devon also asks the Council to deny the PRBRC's request to impose more restrictive effluent limits for sulfates, total dissolved solids, and barium. The current effluent limits have been effective in protecting livestock and wildlife and the Petitioners have not demonstrated otherwise. Furthermore, these regulations were just amended in a process that took years to complete. The limits proposed in the Petition are overly restrictive and would result in an unnecessary requirement to treat or end discharges that are suitable and safe for livestock and wildlife, resulting in a waste of resources.

A change in the sulfate limit to 500 mg/l would result in a change in the classification of most of the natural shallow groundwater in the Powder River Basin from Class II to Class IV. Produced water from CBNG operations have extremely low sulfate levels and would generally not be affected by a change in the sulfate standard. The documents presented by petitioners also show higher levels are safe for livestock. Likewise, a TDS level of 5,000 mg/l is safe and suitable for livestock and lowering the limit to 2,000 mg/l would provide little actual benefit compared to the resources that must be expended to implement such standards.

The petitioners' proposal to reduce the effluent limit for barium is also unnecessary. The Extension Service document referenced by the Petitioners references an outdated EPA source for its recommendation. Most references do not even include barium in the livestock water quality criteria, including the Colorado State University Extension Service, which is quoted in the Petition as the source for a 0.3 mg/l barium limit for livestock. (See, <http://www.ext.colostate.edu/PUBS/LIVESTK/04908.html>; See also, http://www.agr.gc.ca/pfra/water/livestck_e.htm).

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CONCLUSION

In conclusion, Devon urges the Council to summarily dismiss the PRBRC's Petition. The rules proposed in the Petition represent a violation of the constitutional authority of the State Engineer and Board of Control, as well as a violation of the statutory limits on the DEQ's authority. It would also impose unnecessary and imprudent restrictions on the discharge of water associated with oil and gas production facilities, and place the DEQ in the precarious position of impeding on private property rights. Further, it will necessarily lead to a restriction on the use of water from other groundwater wells, along with the elimination of return flows from beneficial uses. 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 will jeopardize the beneficial use of surface and groundwater by thousands of others in the state.

Thank you for the opportunity to submit our comments. Devon reserves the opportunity to submit additional comments in response to hearing testimony and comments submitted by other parties. Please do not hesitate to contact me should you have questions or require additional information.

Sincerely,



Randall W. Maxey *by [signature]*
Senior Regulatory Specialist