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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING**

**Terri A. Lorenzon, Director
Environmental Quality Council**

IN THE MATTER OF THE PETITION OF POWDER RIVER)
BASIN RESOURCE COUNCIL TO AMEND WYOMING)
WATER QUALITY RULES, CHAPTER 2, APPENDIX H) DOC #05-3102
)

COMMENTS OF MERIT ENERGY COMPANY

Merit Energy Company (Merit) thanks the Environmental Quality Council for the opportunity to submit comments on this very important and far-reaching issue. It is the position of Merit that the Petition of the Powder River Basin Resource Council should be rejected for two reasons. First, the Department of Environmental Quality and the Environmental Quality Council lack the statutory authority to regulate water quantity or determine beneficial use. That authority is vested in the State Engineer and the Board of Control. Second, the proposal will result in a severe economic loss to Wyoming communities, the labor force, agricultural, and the State of Wyoming through loss of business, a loss of wildlife and livestock habitat and beneficial use, and loss of tax revenues.

**THE PETITION IS BEYOND THE STATUTORY AUTHORITY OF THE DEQ
AND EQC AND CONFLICTS WITH THE CONSTITUTIONAL POWERS
GRANTED TO THE STATE ENGINEER AND BOARD OF CONTROL**

It is well settled in Wyoming law that an administrative agency has limited powers and can do no more than it is statutorily authorized to do. *U.S. West Communications, Inc. v. Wyoming Public Service Commission*, 988 P. 2d 1061, 1068 (Wyo. 1999). Because an administrative agency has only the powers granted to it by statute, the

justification for the exercise of any authority by the agency must be found within the applicable statute. *French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo 1998). An agency may not exceed the authority expressly delegated to it by the Legislature when the agency is promulgating regulations. *State Department of Revenue and Taxation v. PacifiCorp*, 872 P.2d 1163, 1166 (Wyo. 1994). Therefore, a statute will be strictly construed when determining the authority granted to an administrative agency, and reasonable doubt of the existence of the authority must be resolved against the exercise thereof. *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001). "A doubtful power does not exist." *Id.* at 1181, quoting *French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo 1998). "Any agency decision that falls outside the confines of the statutory guidelines articulated by the legislature is contrary to law and cannot stand." *LePage*, 18 P.3d at 1180, quoting *Tri County Telephone Assc., Inc. v. Wyoming Public Serv. Com'n.*, 910 P.2d 1359, 1361 (Wyo. 1996). When the Petition before this Council is measured against these fundamental principles of Wyoming law, there is only one conclusion -- -- the proposal is not authorized by law and is beyond the power of the Environmental Quality Council.

A search of the statutes that authorize the Environmental Quality Council, the Department of Environmental Quality, and in the Water Quality Division do not reveal any specific authority for the regulation of water quantity. The authority to regulate water quantity rests solely with the Wyoming State Engineer and the State Board of Control by Constitution. Article 8, §5 of the Wyoming Constitution addresses the powers of the State Engineer, who by Constitution "shall have general supervision of the waters of the state and of the officers connected with its distribution." Article 8, §2 of the

Wyoming Constitution provides that the Board of Control shall "have the supervision of the waters of the state and of their appropriation, distribution, and of the various officers connected therewith." The Board of Control has broad powers, both direct and the implied. *White v. Wheatland Irrigation District*, 413 P.2d 252, 258 (Wyo. 1966).

The determination of beneficial use of water is exclusively within the prerogative of the State Engineer. W.S. §§ 41 - 3 - 931, 41 - 4 - 502. Wyoming Constitution, Article 8, Section 3. In addition, Section 1104 of the existing DEQ regulations acknowledge that beneficial use determinations governing ground water are within the sole province of the State Engineer.

"Section 3. Underground Water Protected.

(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."

The Wyoming Legislature gave specific recognition to the authority of the State Engineer and the Board of Control when it established the Environmental Quality Act by limiting its applicability. W.S. 35-11-1104 provides, in pertinent part:

"(a) Nothing in this act:

(iii) **Limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control***.**" (Emphasis supplied)

The law is crystal clear. The only authority to regulate water quantity lies with the State Engineer and the Board of Control. Any attempt by the Department of Environmental Quality or the Environmental Quality Council to assume power over water quantity or beneficial use is beyond their authority and is unlawful.

The Petition inappropriately seeks a modification of the determination previously made by the State Engineer. The State Engineer has published that "storage of CBNG water is recognized as a beneficial use." See *State Engineer CBNG Surface Water Policy*. The Petition's attempt to limit discharge to the extent "actually used by livestock or wildlife" is directly contrary to the expressed public policy and determination of the State Engineer.

The Petition is also unsupported by the Clean Water Act. Section 5 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). The attempt of the Petition to claim support in the Clean Water Act is unsupported by the law and cannot impair, abrogate, or supersede the power of the one State Engineer over water quantity.

The DEQ and other State agencies addressed the Petitioner's comments on this subject previously in its Response to Comments submitted in connection with the revisions to Chapter 2, WQRR. In pertinent part, the June 2004 response of DEQ concerning Appendix H rejected the claims now being made by the Petitioner:

"40 CFR 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 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.**" (Emphasis supplied)

The matters posed by the Petition have been addressed in detail and rejected. There is no reason to revisit these matters again.

In summary, the Petition is a rehash of matters previously raised and rejected. In addition, it is not authorized by law. It is beyond the scope of authority granted to either the DEQ or the EQC. The authority to regulate water quantity and determine beneficial use is vested with the State Engineer and the Board of Control. The Petitioner's requests should therefore be rejected.

THE PETITION IS ILL ADVISED BECAUSE IT HARMS CONVENTIONAL PRODUCTION AT HAMILTON DOME, IS HARMFUL TO AGRICULTURE, THE ENVIRONMENT, AND THE ECONOMY OF HOT SPRINGS COUNTY

The Petition extends its tentacles beyond CBM, and causes extensive damage to conventional oil production and the resulting benefits from that production. Merit Energy produces crude oil at the Hamilton Dome Field located 25 miles northwest of the Thermopolis, WY, in Hot Springs County, Wyoming. Merit holds two (2) NPDES permits (WY0000175 and WY0000680) to discharge produced water from Hamilton Dome Field into unnamed tributaries that eventually flow into Cottonwood Creek. The data below represents a summary of a Use Attainability Analysis filed by Merit with the

Department of Environmental Quality concerning its Hamilton Dome operations and the impact on the economy and environment. The continual water discharge is estimated at 210,000 barrels of water per day, or 13 cfs. Requiring Merit to treat the water in order to meet the standards proposed in the Petition is not economically feasible and the Field would have to be shut in.¹ The resulting loss to agriculture, wildlife, the environment and Hot Springs County would be devastating.

The agricultural community is largely in agreement that ranching operations along Cottonwood Creek would cease altogether with the closure of the Hamilton Dome Field. Produced water provides late season grass and hay irrigation and year-round livestock watering. The beneficial uses would be otherwise limited to scant resources from natural runoff in the early summer season, and would not viably support ranching operations. Attached to this submission as Appendix A are Landowner Questionnaire Responses and an Affidavit which support the agricultural need for the water. Notable are the comments of Frank Rhodes, a rancher at Cottonwood Creek for 45 years. His Affidavit, under oath, includes the following comments:

"The produced water was extremely valuable to my ranching operations.

¹ The average cost of reinjection is \$200,000 per well, with an initial capital investment of \$14 million. In addition, a disposal facility with storage capacity of 250,000 barrels and a sufficient pump capacity would require an additional \$5 million investment, for a total capital cost of reinjection at Hamilton Dome of \$19 million. Lease operating expense would increase by approximately \$150,000 per month due to increased electrical demands and facility maintenance expense. Because wellbores that would have to be converted are currently producing oil wells, there is an estimated loss of oil production of 600 barrels of oil per day.

Treatment of the water on the surface would require a capital investment of approximately \$500 per gallon per minute of treatment capacity. At the current discharge rate of 210,000 barrels per day, this would result in a \$3 million capital expenditure. More important, the associated increase in operating expenses would be approximately \$250,000 per month.

Neither reinjection nor reverse osmosis treatment of Hamilton Dome produced water is acceptably cost-effective. Merit would shut in and abandon the field.

After produced water was discharged, I witnessed a large increase in the number of ducks, geese, pheasants, and mule and white deer on or around Cottonwood Creek.

The produced water from the Hamilton Dome Oilfield has been invaluable to my ranching operations as well as the other ranches and farms that are along Cottonwood Creek below the confluence (sic) the produced water with Cottonwood Creek, and has created a very beneficial environment for the area's wildlife.

Without the produced water, Cottonwood Creek and the surrounding area would return to the dry, arid condition that existed prior to Cottonwood Creek being a year-round stream due to produced water, and ranchers, farmers, and the wildlife would suffer greatly."

In stark contrast to the Petitioner's theories and models, Landowner Assessments clearly demonstrate that, in real life, there are no adverse health effects on livestock or wildlife from Cottonwood Creek due to the produced water from Hamilton Dome. They show positive impacts, no adverse health effects, and vast improvement of wildlife.

The loss of Hamilton Dome discharge into Cottonwood Creek would result in a corresponding loss of:

1600 acres of irrigated cropland;

4000 tons of annual hay production;

15 to 20% reduction in herd size (about 3200 cows) and eight \$2 million reduction in related sales receipts (based on \$650 per head); and

20 full-time and seasonal jobs in the ranching industry.

Merit has conducted an extensive economic evaluation of the economic significance of the Hamilton Dome Field. It is attached as Appendix B. A summary of the assessment follows.

The IMPLAN model was used to estimate the total economic losses to Hot Springs County, if the Hamilton Dome Field were shut in. Excluding losses from cessation of Merit's Hamilton Dome production operations, Hot Springs County is estimated to lose \$3.3 million in total economic output, a loss of \$645,000 in annual labor income, and a net loss of 32 full and part - time jobs.

Fiscal contributions of Hamilton Dome are significant. Annual crude production from the Hamilton Dome Field averages approximately 1.67 million barrels. Hamilton Dome supports an estimated total of 186 jobs in the State of Wyoming, including 136 jobs in Hot Springs County and 50 jobs elsewhere in Wyoming. The associated Hamilton Dome labor income impact in Hot Springs County totals \$4.07 million and \$2.54 million elsewhere in Wyoming.

Merit Energy is the largest taxpayer in Hot Springs County. Merit Energy is the county's largest source of property tax. The property tax revenue from Hamilton Dome averages 29% of the total property tax revenue of all countywide taxing entities (\$1.9 million). Hamilton Dome accounts for the following revenue contributions to major funds and entities in Hot Springs County:

County General Fund: 9% of total General fund revenues.

Library, fair board, hospital: 27% of the library system's total revenues, 15% of the Fair Board's total revenues, and 2% of the Hot Springs County Memorial Hospital District's total revenues.

Hot Springs County Weed and Pest District. 9% of the District's pest eradication budget and 29% of its mosquito control budget.

Hot Springs County Rural Fire Protection District: 29% of the district's budget.

Hot Springs County School District #1: \$1.4 million annually for school related funds. This loss would increase the school debt service mill levy for other county taxpayers by 2.8 mills, and based upon a five-year average. Assuming no change in enrollment levels, the Wyoming School Foundation Fund would experience a net cost of \$1.235 million from lost revenues and additional entitlement costs.

Hamilton Dome production has provided severance taxes of approximately \$1.8 million annually to the State of Wyoming. Federal mineral royalty payments for Hamilton Dome production average \$4.4 million. Wyoming's share of those royalties averages approximately \$2.2 million annually. Merit pays over \$400,000 in sales and use taxes on the purchase of goods and services for the Hamilton Dome Field. Hamilton Dome's crude production represents approximately 33% of the daily feedstock supply needed to sustain Wyoming's refineries at full production. Hamilton Dome supplies more than 20% of the crude necessary to sustain asphalt and road oil production. Loss of this production would have a direct impact on Wyoming's refineries.

Merit has studied the impact on wetlands caused by the loss of Hamilton Dome produced water. The wetlands were inventoried and mapped. Soils were analyzed. The

study, completed in early 2003, demonstrated that a loss of Hamilton Dome discharge would eliminate approximately 600 acres of high quality wetlands. This totally includes nearly 100 acres supported directly by discharge and another approximately 500 acres along Cottonwood Creek that are indirectly supported by the discharge.

Conversion of Cottonwood Creek from a perennial to an ephemeral stream would impact riparian vegetation, and result in a decline of wildlife population and displacement of wildlife species. Francis Petera, the Director of the Wyoming Game and Fish Department, wrote to John Wagner of the Water Quality Division on June 20, 1990 and commented on produced water from Hamilton Dome:

"Without further evidence that points to harming the wildlife or people in the area, the produced water does provide substantial benefits to the wildlife resource which is using this area."

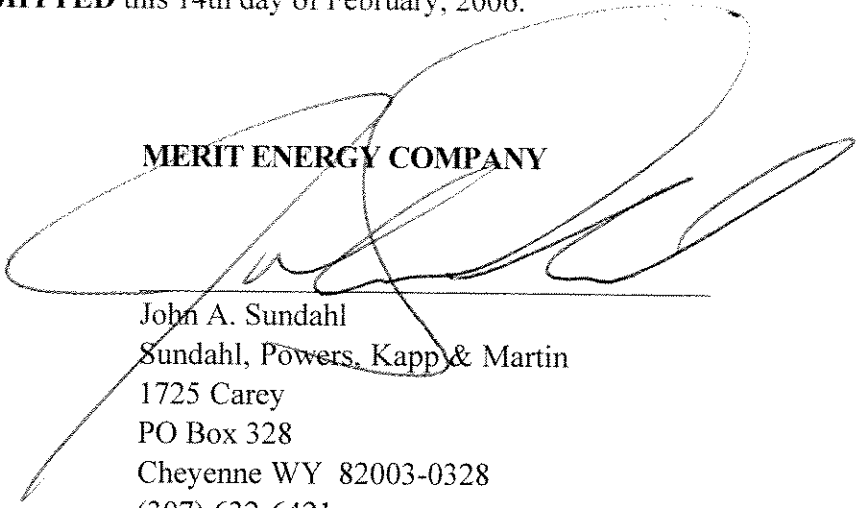
The water produced from the Hamilton Dome Field would not meet the proposed levels suggested in the Petition for Total Dissolved Solids and Sulfates. Discharges have demonstrated the following ranges:

Total Dissolved Solids	2910 – 3670 mg/L
Sulfates	878 – 1300 mg/L

Because the produced water from the Hamilton Dome Field would not meet the proposed standards requested in the Petition, the loss of that produced water would have a devastating impact on the environment, wildlife, the agricultural community, the labor force, and Hot Springs County, in addition to Wyoming's General Fund. For these reasons, Merit Energy Company respectfully urges the Environmental Quality Council to reject the Petition and not proceed with rulemaking.

RESPECTFULLY SUBMITTED this 14th day of February, 2006.

MERIT ENERGY COMPANY



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CERTIFICATE OF SERVICE

I certify the foregoing pleading was served on this 14th day of February, 2006, and that copies were served as follows:

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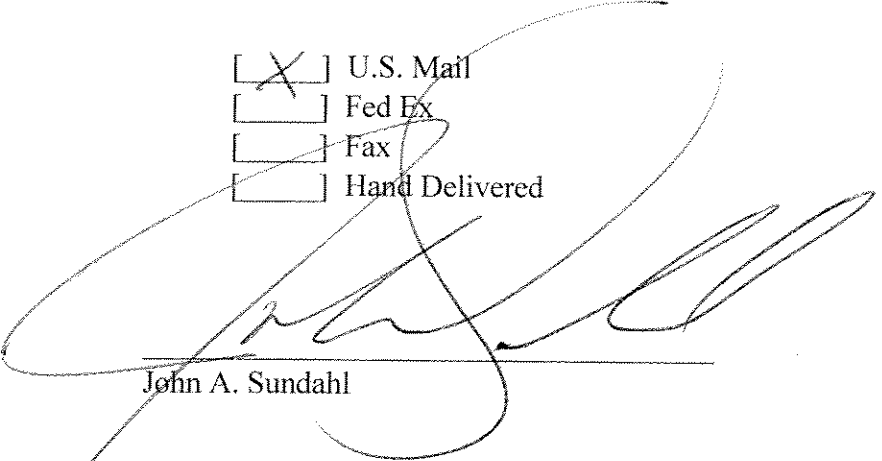
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