



WYOMING FARM BUREAU FEDERATION

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Environmental Quality Council

February 14, 2006

Environmental Quality Council
Mark Gordon, Chairman
Herschler Building, 1st Floor West
Cheyenne, Wyoming 82002

Re: Petition of the Powder River Basin Resource Council to Amend
Wyoming Water Quality Rule, Chapter 2, Appendix H

Dear Mr. Gordon:

INTRODUCTION

The Wyoming Farm Bureau Federation (WyFB) welcomes this opportunity to comment upon and respond to the Petition filed by the Powder River Basin Resource Council (PRBRC) to amend Chapter 2, Appendix H of the Wyoming Water Quality Rules (Petition). It is clear that to amend the Wyoming Water Quality Rules in the manner requested would be to violate the Wyoming Constitution and Wyoming Statutory requirements. For that reason, the PRBRC's Petition for rulemaking should be summarily denied.

The WyFB represents the educational, economic, and social interests of more than 2,800 agricultural producers throughout the State of Wyoming, including many members who reside, farm, and ranch within the Powder River Basin. The WyFB and its members have a substantial interest in ensuring that the regulation of water resources in Wyoming is conducted pursuant to the Wyoming Constitution and proper Statutory authority.

The WyFB is sympathetic to landowners' concerns regarding the impacts of water discharges on the surface estate, and recognizes that there

are potential problems associated with such discharges. The PRBRC's Petition and proposed amendments, however, are both legally and factually insupportable to sustain the dramatic changes that are being proposed. The PRBRC's Petition and proposed amendments are also wrong-headed, and Petitioners have failed to provide sufficient factual or technical support to sustain the proposed rulemaking. In summary, the PRBRC's Petition must be denied for three reasons:

1. The Environmental Quality Council (EQC) lacks the Constitutional and Statutory authority to adopt the proposed amendments as they relate to the beneficial use of water as proposed by Petitioners.
2. The Petition and supporting documents do not provide the necessary scientific and technical data to support such dramatic changes to effluent limits of sulfates, total dissolved solids (TDS) in Chapter 2, Appendix H, nor to establish a limit for barium.
3. The Petition and supporting documents confirm that there is already a process in place to address the Petitioner's alleged concerns.

Each of these reasons are described in greater detail below.

DISCUSSION

1. **The EQC Lacks the Constitutional and Statutory Authority to Grant the Petition or to Adopt the Proposed Amendments**

The Wyoming Constitution clearly places the administration and regulation of water quantity with the State Engineer and the Board of Control. The Wyoming Constitution identifies the State Engineer as the person who is responsible for the "general supervision of the waters of the state." Wyo. Const. Article 8, Section 5. The Constitution also provides that the State Engineer and the Board of Control "shall, under such

regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion.” Wyo. Const. Article 8, Section 2.

Wyoming Statutory law draws a clear line between the jurisdictions of the EQC and the State Engineer. The Environmental Quality Act (EQA or Act) specifically states that nothing in the Act “limits or interferes with the jurisdiction, duties or authority of the state engineer [or] the state board of control.” Wyo.Stat. 35-11-1104(a)(iii).

“Beneficial use” is a term of art in Title 41 of the Wyoming Statutes, and is defined as “the basis, the measure and limit of the right to use water at all times.” Wyo.Stat. 41-3-101. Beneficial use defines the criteria by which the State Engineer permits and administers water rights and water *quantity*. It is not a term used by the EQC or the Department of Environmental Quality (DEQ) in the regulation of water *quality*. That “beneficial use” has no place in the management of water quality is confirmed by the fact that it is not included or defined in the definitions section of the EQA. W.S. 35-11-103.

A similar distinction between regulation of quantity and quality is made in the Clean Water Act, contrary to assertions made by the Petitioners on page 5 of the Petition. Congress specifically addressed this distinction in Section 510 of the Clean Water Act, which states “[e]xcept 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 . . . of such States.” 33 U.S.C. Section 1370(2). In fact, Wyoming’s own Senator Malcolm Wallop successfully proposed an amendment to confirm that water quality regulation doesn’t interfere with state water law determinations. It states, in part “[I]t is the . . . 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. Section 101(g).

Wyoming’s Constitution clearly places the authority to regulate quantities of water and determinations of beneficial use to the State Engineer. The Petition seeks to confer upon the EQC and DEQ authority that they do not have and that they cannot assume without Legislative action.

The Wyoming Constitution and Statutory law prohibit the requested relief. The EQC is created by the Legislature, and, as such, is limited in its authority. It cannot adopt rules that violate the Constitution, and it cannot adopt rules that violate its Statutory mandate. The EQC cannot adopt rules that are addressed to matters outside of its legal purview and jurisdiction. Importantly, the EQC cannot assume the legal authorities and responsibilities that have been granted to sister agencies, in this case the State Engineer.

2. **The Petition Lacks the Necessary Scientific and Technical Support**

The Petitioners have filed a Petition and twenty-three (23) exhibits to support their contention that the DEQ is not properly regulating discharges from coal-bed methane (CBM) development. Neither the Petition nor the supporting exhibits, however, provide the certain, scientific data necessary to establish that the requested amendments are appropriate. We are troubled by the lack of scientific data submitted by the Petitioners to support the dramatic changes requested.

Two of the Petitioners do not claim, and apparently cannot establish, that they are currently affected by discharges from CBM development (Petitioners Mitzel and LaResche). Petition at 2. Of the four Petitioners who allege damage from CBM discharges (Petitioners Barlow, Clabaugh, Rogers and West), they have provided no evidence to support their claims of injury. Petition at 1-2. For example, although Petitioner Barlow claims that "CBM discharge water coming down Dead Horse Creek has already altered the ephemeral nature of the stream, damaged their meadows, and caused foot rot in their cattle," there is no documentation or photographs to support that claim. Petition at 1. While there are similar allegations made by the others who claim damages, they have similarly failed to produce any documentary evidence to support their claims. These Petitioners are in the best position to document any actual damage that they may have suffered and they should be required to do so prior to the EQC considering such broad amendments to Chapter 2, Appendix H.

The Petition proposes to dramatically amend the Rules and to grant to the EQC and DEQ the authority to manage water quantity for the first time

in State history. In arguing for such a dramatic shift in responsibility, Petitioners have been able to muster very little technical support. Rather than providing hard data to support their Petition, they have attached draft reports and non-specific information to support their proposition to radically change the amount of sulfates and total dissolved solids, to request the establishment of a barium standard, and to quantify prospective (and alleged) damage to ephemeral streams and land. For example, Petitioners' Exhibit 2, a study prepared by the Ruckelshaus Institute of Environment and Natural Resources, is offered to support their predictions about undeveloped CBM resources in Wyoming. That study, however, is not only marked as a "DRAFT" on each page, but the title page proclaims: "[p]lease do not cite or distribute." Petition, Exhibit 2, title page.

The Petitioners make numerous statements of fact that are unsupported. For example, the Petition states that "Wyoming CBM production to date is just a fraction of what is to come" and "[w]ater high in TDS or specific conductance will reduce crop production." Petition at 4, 11. Petitioners provided no scientific study or data specific to Wyoming lands that support these claims.

The Petition and supporting documents lack certainty in terms of the assertions being made. Following is a partial list of such uncertain conclusions:

- "Salinity *may also cause* micro-nutrient deficiencies in crop plants." Petition at 11.
- At very high levels, salinity *may cause* direct toxicity to plants." Petition at 11.
- "In a semi-arid climate, regular additions of even small increments of water *may redistribute* natural salinity on the landscape." Petition at 12.
- "The surface disposal of CMB-produced water *may result* in erosion or damage to drainages and associated vegetation within the area." Petition at 14.

- “Some of the ephemeral streams *may be converted* to year around flow and this *may present* a situation where ice damming will cause flooding of land along the stream with undiluted product water.” Petition Exhibit 6 at 1.
- “This study demonstrates the *potential problems* that *might arise* due to land application of saline-sodic CBNG waters.” Petition Exhibit 8 at 10.
- “. . .the way in which irrigation is done *may* have significant effects on crop production.” Petition Exhibit 9 at 3.
- “Changes in the conductivity and sodium absorption ration *may occur* as increased flows move sediment from channel bottoms and increase erosion of floodplains.” Exhibit 15 at 2. (Emphasis added).

The Petitioners propose to reduce the sulfate limit by more than 80%, from 3,000 mg/l to 500 mg/l. To support this drastic reduction, the Petitioners provide Exhibits 19 and 20, which provide little information related to current sulfate limits. The University of Utah Extension fact sheet provides one paragraph as an explanation for its adoption of sulfate limits. Petition Exhibit 19 at 3-4. It is not possible to determine the relevance of Exhibit 20, as it appears to be the results of an individual water test. Petitioners provided no information regarding the location of the test or the sampling methods used. Again, no information or scientific study is included to justify the statements on suitable sulfate levels. Petition Exhibit 20 at 1, 2.

The Petitioners propose to reduce the total dissolved solids limit by 60%, from 5,000 mg/l to 2,000 mg/l. To support this drastic reduction, the Petitioners rely on studies conducted by South Dakota State University Extension Service and the University of Utah. The South Dakota State University Extension Service study concluded that a TDS between 2,000 and 3,000 mg/l *may* reduce performance, and over 3,000 mg/l *may* reduce performance and affect health. Petition at 24, emphasis added. It appears that Exhibit 19 may be one of the studies used to support these assertions. It

is not possible to determine, however, because the study referenced in the Petition is from the University of Utah, while the study attached as Exhibit 19 was conducted by Utah State University Extension. It is unclear whether Exhibit 19 is accurately described as a “study,” as it is entitled an “Animal Health Fact Sheet.” Petition Exhibit 19 at 1. This fact sheet states that the limit for TDS for cattle is 10,000 mg/l, which is more than twice Wyoming’s current limit and which is substantially higher than the TDS limits proposed by Petitioners.

The Petitioners also propose that the EQC adopt a barium limit for CBM discharges. Petitioners’ data to support this new standard is wholly inadequate to provide the necessary foundation for adding such a limit. In fact, the Petitioners have provided the EQC with only two documents to support their contention that the EQC should adopt a barium standard – a definition from the Dictionary of Agricultural Sciences (Petition Exhibit 22) and a one-page website printout that is unidentifiable (Petition Exhibit 23).

It is clear that the Petitioners have failed to provide the necessary scientific information to support the adoption of such drastic changes to the sulfate and TDS limits, let alone adopt a barium limit.

The materials provided by the Petitioners are completely inadequate to support the proposed amendments. They are either in draft form, are clearly outdated, or simply do not address the issues at hand. There is no indication that the “draft” studies have been peer reviewed or, if they have, what those peer reviewers found. The question before the EQC at this point in the proceedings is whether the rulemaking process should proceed. That is a legal issue, with the primary focus being upon whether the EQC has the legal authority to adopt the proposed amendments. As described above, the Wyoming Constitution and Statutory law have not granted to the EQC or the DEQ the authority to manage water quantity in the manner requested by the Petitioners. For that reason, the WyFB does not believe that it is appropriate at this point to fully critique each of the “studies” provided by the Petitioners. The WyFB hereby respectfully reserves the right to provide such a technical analysis if the rule-making proceeds.

3. **The Existing Process is Adequate to Address Petitioners' Concerns**

Four of the Petitioners (Packard, Rowley, Sorenson and Adami) currently have CBM development occurring on their ranches. Petition at 1-2. What the Petition fails to address, however, is any mention of how the existing Surface Use Agreements address discharges. The WyFB believes that the use of Surface Use Agreements provides the most effective means for addressing the manner by which discharges will be made. In other words, these are contractual considerations to be resolved by the landowner and CBM operator. In Use Agreements, the landowner has the ability to negotiate the method and quantity of discharge, whether reinjection is appropriate, or what type of treatment will be required.

When describing alternatives to surface discharge of CBM produced water, the Petitioners admit that “[a]ll of these are being done in Wyoming today, and the technology to do them more and more cost-effectively will certainly develop with demand.” Petition at 20. Those activities are being undertaken pursuant to the Surface Use Agreements that are already in effect. The demand referenced by the Petitioners is more appropriately made at the landowner level, through the use of Surface Use Agreements, which allow the impacted parties to determine how best to deal with produced water. For the EQC to dictate the method for dealing with produced water would be to interfere with one of the most basic property rights that the landowners possess – the right to enter into a contract that benefits their operations so that they may use this additional source of water to their advantage.

The Petitioners admit that “WYPDES permits do in fact contain a limit to the quantity of water discharged under the permits.” Petition at 14. That statement is further supported by Exhibit 4, which is a partial WYPDES permit. Petition, Exhibit 4 at 1. That permit clearly states that “[t]he guideline . . . requires that discharges of produced water be used for agricultural production and/or wildlife propagation.” Id.

Petitioners claim that “the Wyoming DEQ has allowed the unrestrained production” of water being produced with CBM. Petition at 7. This statement is untrue. Exhibit 3 includes a document attached to a letter dated April 25, 2005, from John Corra, the Director of the DEQ, to Stephen Tuber, providing a lengthy history and explanation of the methods used by the DEQ to issue WYPDES permits. Exhibit 3 confirms that the DEQ has developed and implemented a comprehensive procedure that is reviewed and updated based upon experience, as well as an extensive data collection effort. Petition, Exhibit 3 at 1-8.

The DEQ’s diligence in CBM permitting and oversight is further demonstrated by Exhibit 17, which is a letter to the Montana Board of Environmental Review. In that letter, Director Corra states that “[t]he careful management of discharge permits in Wyoming has been successful in protecting and maintaining the water quality standards of both states, including protection of designated uses.” Petition, Exhibit 16 at 1.

In addition to issuance of the WYPDES permits, The Petition Exhibits establish that there is a constant dialogue between the Environmental Protection Agency (“EPA”) and the Wyoming DEQ on these matters. Petition, Exhibits 3 and 5.

It is apparent that after preparing a draft WYPDES permit, there is some ability to comment on draft permits. An example is provided in Petitioners’ Exhibit 15, in which the Wyoming Game & Fish Department (WGFD) took advantage of its opportunity to comment to the DEQ on a pending WYPDES permit. Petition, Exhibit 15 at 1-3. Although Petitioners did not provide the DEQ’s response to the WGFD’s comment, Exhibit 15 demonstrates that there are substantial and numerous “checks and balances” in place to ensure that specific CBM development projects are being permitted in a way that protects livestock and aquatic communities.

If there are federal resources involved in a CBM project, either surface or mineral estates, another layer of analysis and environmental review is conducted related to the quality and quantity of discharges. This additional analysis provides additional opportunities for citizen and

landowner input – after the publication of both a Draft and Final Environmental Impact Statement (EIS). This fact is illustrated in Petitioners' Exhibit 11. In his comment letter to the Bureau of Land Management (BLM), Dr. Munn expressed his concerns regarding the modeling conducted to evaluate the environmental impacts of the proposed project, the amount of water discharged, and impacts to surface water quality in ephemeral streams. Petition, Exhibit 11 at 1-3.

Exhibit 16 provides an additional example of how landowners and concerned citizens may already participate in the regulatory process. Exhibit 16 includes comments made to the BLM on the Power River Basin Oil and Gas Project.

Once the WYPDES permit is issued, the Wyoming DEQ becomes the enforcement agency to ensure that discharge limits are being met and that the project is proceeding as contemplated by the permitting process. The DEQ is obviously investigating and issuing fines for unpermitted discharges of CBM water, as well as for any exceedance of effluent standards. Petition, Exhibit 10 at 1.

CONCLUSION

The Petition at issue is legally insufficient and legally insupportable.

First, the Petitioners are requesting the EQC to undertake an illegal rulemaking – to regulate water quantity and beneficial use. In making such a request, they are asking the EQC to take action that is outside of its statutory authority.

Second, the proposed changes and additions to Chapter 2, Appendix H are substantial. In order to justify such modifications, the Petitioners must meet their burden of providing a solid and scientific basis for the amendments. They have utterly failed to meet that burden. The Petitioners' "supporting" documents are in draft form, are unsigned, are out of date, and fail to address the specifics of Wyoming CBM development.

Finally, the Petitioners have failed to demonstrate that the processes currently in place are insufficient to protect Wyoming's resources. It is not possible to determine whether Petitioners have entered into Surface Use Agreements that they now wish to rewrite, with the aid of the EQC, or whether they have failed to take advantage of the existing process, whether they have failed to participate in the permitting processes and are now seeking a "do over", or whether they are claiming that the DEQ's enforcement efforts are insufficient.

The process dictating CBM development in Wyoming certainly is not perfect. Some amendment and fine tuning of Chapter 2, Appendix H may be necessary to ensure protection, but such drastic changes as the ones proposed here cannot be made without a valid and defensible scientific foundation. When considering potential amendment of rules and regulations, the EQC must insist that they be provided the most recent, accurate scientific data available to best inform its decisions and to carry out its statutory duties.

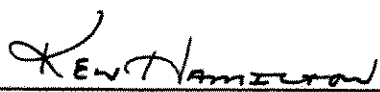
As in most cases, the "one size fits all approach" that Petitioners are advocating is neither appropriate nor legally supportable in the context of amending Chapter 2, Appendix H of the Wyoming Water Quality Rules. The overwhelming impact that such changes would have on CBM development within the Powder River Basin, as well as on other areas of the State have simply not been adequately addressed.

For the foregoing reasons, the EQC should deny the Petition to Amend Wyoming Water Quality Rule, Chapter 2, Appendix H.

Thank you for your consideration.

Sincerely,

WYOMING FARM BUREAU FEDERATION



Ken Hamilton, Executive Vice President

