



August 26, 2008

David Waterstreet
Environmental Program Supervisor
DEQ/Water Quality Division
122 West 25th Street
Herschler Building, 4th Floor-West
Cheyenne, WY 82001

Re: Proposed Revision of Chapter 1, Water Quality Rules and Regulations
Chapter 1, Appendix H and Agricultural Use Protection Policy

Dear Mr. Waterstreet:

Devon Energy Production Company, L.P. (Devon) produces oil and natural gas in many areas of the state and we hold a number of WYPDES permits for the surface discharge of water produced in association with our production. We have participated in the water quality rulemaking procedures under Chapter 1 and Chapter 2, as well as administrative review of the Agricultural Use Protection Policy (Ag Use Policy) promulgated under Chapter 1, Section 20. To that end, we submitted numerous written comments and presented information and testimony to the Department of Environmental Quality (Department), Water and Waste Advisory Board (WWAB), and Environmental Quality Council (EQC). Please find attached copies of our prior comments.

Background:

Although prior draft rules and policies considered by the WWAB and EQC differed somewhat, they all involved proposed changes to the water quality standards for ground water produced in association with oil and gas operations and discharged to the surface under WYPDES permits (produced water). The issue is the protection of water quality in the receiving stream for agricultural water uses (irrigation and livestock watering). Chapter 1, Section 20 sets out the state's narrative standard for the protection of water quality for these agricultural uses. Under this rule, the natural water quality in a receiving stream may be degraded but not to the extent that it causes a measurable decrease in crop or livestock production. In other words, water quality standards (effluent limits) have been established to prevent a measurable decrease in the actual production of crops and livestock.

Although the types of livestock and irrigated crops produced in agricultural operations are similar across the state, there is significant variability in livestock and crop production. The production rates for livestock and crops in Wyoming are much different than in other states. Even within the state, crop production is highly variable due to numerous factors including topography, soils, climate, the quantity and quality of water, weed and pest infestations, and management practices. Livestock production in the state is also highly variable, depending on

the species and breeds, age, climate (temperatures, precipitation, and drought), forage quantity and quality, water quantity and quality, diseases, predation, and management practices.

Surface water quality also varies widely within drainage basins and across the state. Also, the quality of the ground water produced from landowners' stock water wells varies significantly. For some constituents, natural surface water and water from landowners' stock wells far exceeds the State's water quality standards, as well as those recommended by Dr. Raisbeck et. al. With regard to livestock production, stock is often fenced off from perennial streams, as well as ephemeral streams with reasonably predictable flows, so the water quality in these streams may not be representative of the water that stock actually uses. Despite the wide variations in natural water quality in surface supplies and stock wells, the Department employs a "one size fits all" standard for the entire state for produced water.

The discharge of produced water is not a waste of water. This water is put to a wide variety of beneficial uses, including stock watering, irrigation, dust mitigation, wildlife watering, and the creation and maintenance of wildlife habitats. Wildlife thrives on produced water and the habitat it creates including, but not limited to, sage grouse, partridge, chukar, turkey, pheasant, goose, duck, heron, eagle, hawk, falcon, vulture, owl, deer, antelope, elk, and raccoon. Produced water is extremely important to agricultural producers and wildlife populations—even more so in periods of drought.

Pre-1978 Discharges vs. Post-1978 Produced Water Discharges:

Produced water from "conventional" oil and gas operations has been discharged in the Big Horn Basin (BHB) and Powder River Basin (PRB) for decades. In fact, produced water was discharged for many years before the Environmental Quality Act was enacted in 1973. Conventional produced water has been used successfully in agricultural operations for decades and, as so many landowners have said, it is essential to their crop and livestock production. In 1998, the volume of produced water discharged from coalbed natural gas (CBNG) operations in the PRB began to increase. Since then, environmental groups have demanded more stringent water quality standards and effluent limits under WYPDES permits. They claim new standards are necessary because too much poor quality water is discharged from CBNG operations.

Significantly more, poorer quality water is and has been discharged from conventional operations in the BHB than from CBNG operations in the PRB. For example, in 2005 approximately 150 million barrels more produced water was discharged in the BHB and it contained significantly higher levels of total dissolved solids (TDS) and sodium than discharges from CBNG operations in the PRB. (*See, Wyoming Oil & Gas Conservation Commission data*). Thus, there is no factual basis for the claim that too much produced water is discharged by CBNG operators in the PRB, or that its quality is poor and thus unsuitable for agricultural use.

In the proposed draft, all produced water discharges prior to January 1, 1998 are exempt from the Chapter 1, Appendix H rule. We agree it is reasonable and proper to assume that discharges prior to January 1, 1998 have had no adverse effect on agricultural production. However, there is no scientific basis for regulating pre-1978 discharges differently from post-1978 discharges. There is no evidence of adverse effects on crop or livestock production from *any* existing

produced water discharges. Since CBNG operations discharge less produced water and it is of higher quality than conventional discharges in the BHB, it makes no sense to require more stringent water quality standards for post-1978 discharges to protect the same agricultural uses.

Also, the proposed draft would prohibit new discharges in the BHB even though the water quality is similar to pre-1978 discharges that have been used in agricultural operations for decades. This ban on new discharges with similar water quality is unreasonable.

Livestock Watering:

We support the WWAB's recommendation that the current livestock watering standards (5,000 mg/L TDS, 3,000 mg/L Sulfate, and 2000 mg/L Chloride) be retained in the Chapter 1, Appendix H rule. The evidence clearly shows that discharges under the current livestock watering standards have not caused a measurable decrease in crop or livestock production. In fact, the evidence demonstrates that agricultural production has increased due to the availability of produced water under the current standards and landowner waivers. Landowners using produced water for stock watering have provided overwhelming evidence that the current standards provide adequate protection. We agree with the WWAB that only the current livestock watering standards should be included in the Chapter 1, Appendix H (b) rule.

The WWAB recommended that the exceptions to the livestock watering standards (the provisions related to background water quality and landowner waiver) apply to the current standards as well as the new metals constituents. There was no suggestion by the WWAB that these exceptions should apply only to the metals constituents in the Ag Use Policy. The exceptions to the livestock watering standards are extremely important as they assure that effluent limits will not be more stringent than background water quality, and they allow livestock producers the flexibility to make sound management decisions. We propose the following revision:

Add to Chapter 1, Appendix H(b):

When background water quality is demonstrated to be of poorer quality than the limits listed in Section (b)(i) above, effluent limits will be set to background water quality. In drainages where there were pre-1998 discharges, background will be considered to be the pre-1998 effluent limits or background water quality, whichever is poorer.

Livestock watering waiver – An exception to the limits above will be made whenever the background water quality of the receiving water is of poorer quality than the value listed for the associated pollutant or a landowner or livestock producer provides a written statement accepting the potential risk to his livestock and no other landowner or livestock producer who is reasonably expected to have direct flow from the discharge submits a written objection providing evidence demonstrating probable harm to his livestock.

Note that Chapter 2, Appendix H, Sections (c)(ii) and (d)(ii) provide exceptions to the livestock watering standards where a landowner waiver is submitted. Thus, it is appropriate to include the background exception and livestock watering waiver in both the Chapter 1, Appendix H rule and the Ag Use Policy.

We request that Chapter 1, Appendix H (b) be amended to clarify that, in drainages where there were pre-1998 discharges, background be considered to be the pre-1998 effluent limits or background water quality, whichever is poorer. The evidence clearly supports the assumption that discharges prior to January 1, 1998 have had no adverse effect on agricultural production. Therefore, in those drainages with pre-1998 discharges, background should be identified as the poorer of the pre-1998 effluent limits or background water quality. This language is included in the foregoing amendment, as follows: "In drainages where there were pre-1998 discharges, background will be considered to be the pre-1998 effluent limits or background water quality, whichever is poorer."

We believe that, if a landowner or livestock producer requests a waiver of the livestock watering effluent limits, the Department should be required to grant the waiver—unless other landowners or livestock producers through whose lands the discharge is reasonably expected to flow (when not mixed with runoff) submit written objections and provide evidence demonstrating that the discharge will cause harm to their livestock. This would assure that frivolous objections do not block the discharge of water a landowner wants to use.

We oppose any provision that would allow a landowner to block the flow of produced water when it meets livestock watering standards. By supplementing the surface water supply, produced water makes good water available to livestock and wildlife in drainages that seldom have flow. This allows livestock and wildlife to disperse across the range and decreases overgrazing. It also serves to improve the condition of riparian areas and wildlife habitat, increasing wildlife populations. When produced water meets livestock watering standards and is discharged, it becomes a water of the state and may flow down the state's watercourse easement for use by livestock and wildlife as well as existing or new water users.

The Clean Water Act and the NPDES program acknowledge the beneficial value of the surface discharge of produced water in high plain, semi-arid states like Wyoming. The source and supply of surface water are extremely scarce and in many areas of the state produced water is vital to wildlife and livestock. The agricultural and environmental benefits from the flow of stock water far outweigh any potential harm to vegetation in the stream channel. The imposition of crop effluent limits for "naturally irrigated lands" has the practical effect of prohibiting the discharge of water that meets livestock standards.

We oppose any new livestock watering standards or effluent limits, whether by rule or policy. The Department acknowledges that there has been overwhelming public comment asking that the current water quality standards be left unchanged, and admits that leaving the criteria unchanged would not have particularly significant adverse environmental effects. (*Wagner letter to WWAB 3/10/08*). In fact, the Department told the WWAB that they have been perfectly satisfied with the current standards for thirty years and they don't see any significant environmental affects from using them. [*WWAB Hearing Transcript 3/28/08, pg 40*]. We object to including the list of new metal constituents and effluent limits in the Ag Use Policy. The Department lacks sufficient data to say with certainty whether existing produced water discharges comply with these standards. While the Department suggests that these standards will not significantly impact existing discharges, they admit they have no data on at least half of the existing conventional discharges. [*WWAB Hearing Transcript 3/28/08, pg 4*]. It is unclear what data, if any, the

Department has on existing CBNG discharges. However, there is no evidence that any of the new constituents in the Ag Use Policy have or will cause a measurable decrease in livestock production. In fact, there is no evidence that any of these constituents have or will cause any harm to livestock. Therefore, the adoption of the new standards in the Ag Use Policy is unwarranted and may have a significant impact on existing and future produced water discharges.

If the Ag Use Policy is adopted, then effluent limits for the new constituents should not be imposed unless there is reason to believe they will cause a measurable decrease in livestock production and no livestock watering waiver has been submitted. Therefore, in Chapter 1, Appendix H (b), the following revision should be made:

In addition to the basic effluent limitations above, the Agricultural Use Protection Policy includes additional limits for livestock protection which may be incorporated into WYPDES permits in drainages where there were no pre-1998 discharges when there is reason to believe they may be associated with a discharge and will cause a measurable decrease in livestock production, and no livestock watering waiver has been submitted.

Also, if the Ag Use Policy is adopted, the following revisions should be incorporated so it is consistent with the Chapter 1, Appendix H rule:

Amend lines 11-13:

In addition to the basic effluent limitations for livestock watering in Chapter 1, Appendix H and Chapter 2, the following limits for livestock protection may be incorporated into WYPDES permits in drainages where there were no pre-1998 discharges when there is reason to believe they may be associated with a discharge and will cause a measurable decrease in livestock production, and no livestock watering waiver has been submitted.

Amend lines 15-16:

When ~~ambient~~ background water quality is demonstrated to be above of poorer quality than the limits listed above, effluent limits ~~may will~~ be set to ~~that ambient~~ background water quality. In drainages where there were pre-1998 discharges, background will be considered to be the pre-1998 effluent limits or background water quality, whichever is poorer.

Amend lines 18-20:

Livestock watering waiver – An exception to the limits above ~~may will~~ be made whenever the background water quality of the receiving water is of poorer quality than the value listed for the associated pollutant ~~and the landowner requests use of the water and thereby accepts any~~ or a landowner or livestock producer provides a written statement accepting the potential risk to his livestock and no other landowner or livestock producer who is reasonably expected to have direct flow from the discharge submits a written objection providing evidence demonstrating probable harm to his livestock.

We also oppose any new water quality standards or effluent limits for sodium, whether by rule or policy. The scientific literature is clear that a threshold of 3,500 mg/L sodium is protective of livestock production. We believe the current standard of 2,000 mg/L chloride adequately protects against a measurable decrease in livestock production. In fact, the evidence is clear that landowners using produced water for stock water believe the current standards are protective and they oppose any new standards. Further, the Department acknowledges that leaving the current criteria unchanged will not result in adverse effects.

We do not believe the Chapter 2, Appendix H livestock watering standards supersede or control the limits in the proposed Chapter 1, Appendix H(b) or the Ag Use Policy. In fact, additional limits are imposed under Chapter 2, Appendix H only when they are required to assure compliance with the Chapter 1 rules. Chapter 2, Appendix H, Section (b)(vii) states:

The following effluent limitations are protective for stock and wildlife consumption. Limitations on additional parameters or limitations more stringent will be imposed when such limitations are necessary to assure compliance with Wyoming Water Quality Rules and Regulations, Chapter 1.

The Ag Use Policy is intended to implement the Chapter 1, Section 20 rule. Therefore, we request that all references to Chapter 2 be deleted from the Ag Use Policy.

Irrigation:

We oppose the imposition of water quality standards for naturally irrigated lands. Chapter 1, Section 20 specifically refers to "crop" production and we believe this includes only tilled, mechanically irrigated, and harvested crops. "Naturally irrigated lands" do not produce a "crop", and therefore they are beyond the scope of the Section 20 rule as well as the Environmental Quality Act. Crop production requires irrigation under an appropriated water right issued by the State Engineer's office or, at the very least, an irrigation diversion structure or mechanism that pre-existed oil and gas development and is currently capable of diverting water from the channel. "Naturally irrigated lands" are inadvertent, naturally occurring stretches along ephemeral channels that may appear and disappear from season to season and over time.

Chapter 1, Appendix H does not identify or quantify the "enhanced vegetative production" associated with naturally irrigated lands. Depending on precipitation, erosion, water table level, and landowner activity (including grazing practices), noxious and invasive weeds and other undesirable plant species often grow in and along ephemeral stream channels. Maps don't distinguish between undesirable plant types and those that are valuable livestock forage. In fact, the highest quality livestock feed is more likely to be found on higher ground than in ephemeral stream channels, and the concentration of cattle in riparian zones is due to the proximity to water rather than the high quality of forage. Thus, any potential change in vegetation species from the flow of stock water is more than offset by the benefits of increased livestock production as well as increases in forage production due to dispersion of livestock and wildlife over the range.

The Tier 1 default EC and SAR limits are based on a 100% yield threshold values for soil EC and thus contradict the site-specific narrative standard in the Chapter 1, Section 20 rule. It is widely recognized that land in Wyoming does not produce a 100% yield, which is why

agricultural land sales and leases are based on animal unit carrying capacity. The Chapter 1, Section 20 rule protects against a measurable decrease in actual, existing crop production. This site-specific standard requires consideration of actual, site-specific crop production and management practices. It clearly does not require protection based on “a theoretical 100% yield” as reported by the USDA Agriculture Research Service Salt Tolerance Database. The plant species identified on a map as “enhanced vegetative production” may in fact be Canada or Scotch thistle, quackgrass, knapweed, or other noxious species. These species certainly don’t deserve protection under the Tier 1 default limits, which will be applied if the landowner denies access for Tier 2 or 3 studies. There is no practical or scientific basis for protecting a “theoretical 100% yield”, and the Tier 1 default limits for EC and SAR are unreasonable, technically impracticable, and represent a complete departure from the site-specific narrative standard in Section 20.

We believe the identification of “naturally irrigated lands” from infra-red aerial imagery, surficial geologic maps, and wetland mapping will prevail over a landowner’s statement that the land doesn’t have “enhanced vegetative production”. Even if the Department and the landowner agree that there are no naturally irrigated lands, third parties may appeal the permit on the grounds that a map showed “naturally irrigated lands”. If a landowner tells the Department he does *not* have “naturally irrigated lands”, the Department should be required to accept the landowner’s statement. Also, if a landowner wishes to waive the irrigation effluent limits for EC and SAR, then the Department should be required to grant the waiver. Therefore, we request that the irrigation waiver provision in Chapter 1, Appendix H(c) be amended to say that a waiver *shall* be granted when the affected landowner requests use of the water, as follows:

(vii) Irrigation Waiver. An exception to EC or SAR limits established under the Tier 1, 2 or 3 procedures ~~may~~ will be made when affected landowners request use of the water and thereby accept any potential risk to crop production on their lands. Irrigation waivers will be granted only in association with an irrigation management plan that provides reasonable assurance that the lower quality water will be confined to targeted lands.

The practical effect of the protection of “naturally irrigated lands” as agricultural crops is to allow individual riparian landowners and special interest groups whose goal is to block mineral development to prohibit the discharge and flow of stock water down the drainage. We believe the protection of “naturally irrigated lands” will have far-reaching adverse impacts to agriculture, wildlife, wildlife habitat, water rights, the environment, and the oil and gas industry.

Risk-Management Decision-Making

It is the Department’s responsibility to manage risks to the production of crops and livestock, not to attempt to eliminate all risk. Crop and livestock production are high risk enterprises, and agricultural producers regularly manage a wide variety of risks, many of which are outside the producer’s control. These risks include climate, precipitation, loss of water supplies, changes in forage quality and quantity, disease, predation, and markets. Also, agricultural producers have numerous and differing goals or values, and they routinely balance risks and benefits to achieve as many of their goals as possible. For example, a rancher may balance the risk to his stock of

using poor quality water with the benefit of dispersing the stock over a broader area and utilizing forage where there is no other water supply. He may balance the risk of using poor quality water with the benefit of protecting riparian areas from overgrazing and related impacts to natural water quality, as recommended in the Department's *Grazing Best Management Practices* guidelines. Or, he may balance the risk of using poor quality water to irrigate with the benefit of being able to irrigate once or more during the growing season. In any event, it is common practice in agricultural production to balance risks and the producer's goal is not to eliminate all risk, but rather to minimize risk while maximizing benefits.

Chapter 1, Section 20 recognizes this concept and requires the Department to prevent only those risks from the discharge of produced water that will cause a *measurable* decrease in crop or livestock production. If the Department assumes that *any* potential negative impact to livestock, no matter how minor, outweighs the benefits of having supplemental water supplies available in areas where there is little or no natural water, it will significantly affect the outcome of the risk analysis. Likewise, if the Department assumes the crop or livestock production yield in Wyoming is the same as in states having significantly different climates, precipitation, forage conditions, topography, elevation, etc., the outcome of the risk assessment will be changed.

Whenever a standard or rule is being considered the Department is obligated to complete comprehensive risk management decision-making which involves the rigorous collection of data, a detailed analysis of risks, and a comprehensive evaluation of alternatives. The risk management decision-making process has five steps: (#1 identify the potential problem; #2 collect data; #3 assess risk; #4 evaluate alternatives, and #5 select the alternative). In this case, the Department has not identified and documented a problem. In fact, the evidence clearly shows that the discharge of produced water under the current standards has not decreased crop or livestock production; rather, it has increased production and delivered a net environmental benefit. Also, the Department must follow a rigorous protocol to assess the range of risks associated with each constituent at various levels of concentration, and calculate the probability of risk. In order to have a meaningful opportunity to comment interested parties have a right to know the assumptions and decisions the Department made in selecting the standards and requirements in Chapter 1, Appendix H and the Agricultural Use Policy. That it requires hard work and resources is no excuse for failing to complete the risk management decision-making process. These standards apply statewide and will affect many people and their businesses.

Mandatory Balancing Criteria:

Chapter 1, Appendix H is a rule that establishes water quality standards, while the Ag Use Policy establishes water quality standards for certain constituents and effluent limits for a statewide permit system. Both will be implemented through the issuance of all new, modified, and renewal WYPDES permits for produced water. Therefore, the Water Quality Administrator and the WWAB are required by law to evaluate and consider the reasonableness of the rule and policy, as well as all of their intended and unintended consequences. *At a minimum*, the Department and WWAB must identify, evaluate, and consider the criteria listed in W.S. § 35-11-302(a)(vi):

In recommending any standards, rules, regulations, or permits, the administrator and advisory board shall consider all the facts and circumstances bearing upon the *reasonableness* of the pollution involved including:

- (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
- (B) The social and economic value of the source of pollution;
- (C) The priority of location in the area involved;
- (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
- (E) The effect upon the environment.

[*Emphasis added*].

There is no evidence that either the Administrator or the WWAB have identified, evaluated, or considered these balancing criteria. We believe there is ample evidence that the surface discharge of produced water suitable for livestock has resulted in an environmental gain. In other words, the actual benefits from providing water for livestock and wildlife far outweigh any potential negative impacts to forage in the channel. Clearly, the use of produced water is critical to the economic viability of numerous ranching operations across the state.

Water Rights:

The protection of “naturally irrigated lands” with irrigation water quality standards injures existing water rights and interferes with the state’s right to flow waters down watercourses. The Constitution provides that the State Engineer and Board of Control have the sole authority to regulate the quantity and flow of water. [*Wyo. Const. Art. 1, §31; 8, §1*]. Since statehood, the law and water regulation equally guard all the various interest involved and assume that ephemeral drainages are periodically inundated. The protection of “naturally irrigated lands” blocks the flow of stock water and subordinates the jurisdiction of the State Engineer, Board of Control, and appropriated water rights to the control and demands of riparian landowners. The Constitution abolished riparian rights and the Environmental Quality Act prohibits the Department from limiting or interfering with the jurisdiction, duties, or authority of the State Engineer or the Board of Control. [*W.S. §35-11-1104(a)(iii)*]. The courts are the proper authority to address claims that a use of water causes property damage or constitutes a nuisance to a property owner. We believe the formal opinion issued by the Attorney General on April 12, 2006, as well as the Attorney General’s informal opinion to the Environmental Quality Council dated July 12, 2006, prohibit the protection of “naturally irrigated lands” at the expense of the flow of livestock water.

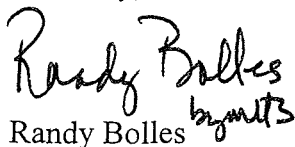
Non-Severability:

We request that a “non-severability” request be made to the U.S. Environmental Protection Agency when the Chapter 1 rules are submitted for final approval. This will ensure that all rule and policy portions of the documents remain intact.

We appreciate the opportunity to provide comments on the Chapter 1, Appendix H rule and the Ag Use Policy. If you have any questions or would like additional information, please don’t hesitate to contact Randy Maxey at (405) 228-8870.

David Waterstreet
August 26, 2008
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Sincerely,

A handwritten signature in cursive script that reads "Randy Bolles". The signature is written in dark ink and is positioned above the printed name.

Randy Bolles
Regulatory Affairs Supervisor

cc: Governor Dave Freudenthal
Environmental Quality Council

1 BEFORE THE WATER AND WASTE ADVISORY BOARD

2 STATE OF WYOMING

3 -----
4 PUBLIC MEETING ON PROPOSED
5 REVISIONS TO THE AGRICULTURAL
6 USE PROTECTION DOCUMENT,
7 2) ADOPTING THE AGRICULTURAL
8 USE PROTECTION DOCUMENT AS A
9 RULE AMENDMENT TO CHAPTER 1
10 OF THE WYOMING WATER QUALITY
11 RULES AND REGULATIONS, AND
12 3) PROPOSED REVISIONS TO
13 CHAPTER 1, SECTION 20
14 -----

15 8:30 a.m., Friday
16 December 7, 2007

17 TRANSCRIPT OF HEARING PROCEEDINGS

18 Transcript of Hearing Proceedings in the above-
19 entitled matter before the Water and Waste Advisory Board,
20 commencing on the 7th day of December, 2007, at the hour
21 of 8:30 a.m., at the Holiday Inn, 115 East Park Street,
22 Thermopolis, Wyoming, before Vice Chairman Bill Welles
23 presiding, with Mr. Joseph Olson and Marjorie Bedessem,
24 Board Members. Mr. John Wagner and Mr. Bill DiRienzo also
25 in attendance.

1 discussed, that they were -- that they were given to the
2 board or that -- that they were given any credence. I
3 just -- I would ask that the division and also the board go
4 back and review this information that we gave you, because
5 I believe it's very good. It's very good stuff. And it
6 may -- it may, it may not change your mind a little bit on
7 a couple of things, but it's very important good
8 information, and it should be reviewed and given the proper
9 level of acceptance.

10 So, you know, we would very much appreciate a
11 redraft of the response to comments with some
12 acknowledgment of these presentations. With that,
13 Mr. Chairman, I'll be quiet so we all can go home.

14 VICE CHAIRMAN WELLES: Thank you, John.

15 And let the record be stated that request of DEQ
16 on those comments. Thank you.

17 Margo Sabec.

18 MS. SABEC: Mr. Chairman and members of the
19 Board. I'm Margo Sabec, S-A-B-E-C, from Casper,
20 representing Devon Energy. I want to speak today
21 specifically to the grandfathering provision that's
22 contained in the current draft, and make it very clear that
23 Devon Energy supports that grandfathering provision. And I
24 think you've heard from the testimony today how important
25 that grandfathering provision is.

1 The reason that we support it is because the
2 agriculture producers who have been using or have been
3 affected by the pre-1998 discharges have testified here and
4 previously that there is no harm to livestock or crop
5 production associated or caused by that produced water.
6 They've not provided any evidence of any decrease in crop
7 or livestock production. In fact, they've testified to an
8 increase in stock and livestock production -- or livestock
9 and crop production, both. And they want to continue to
10 use that water and have that water available for their
11 agricultural operations.

12 The goal of Chapter 1, Section 20, is to protect
13 agriculture production by preventing a degradation of water
14 to the extent that it would cause a measurable decrease in
15 livestock or crop production. And after reviewing all of
16 the evidence that's been presented to this Board and the
17 numerous comments that had been submitted, DEQ properly
18 came to the conclusion that there is no indication of
19 reduced agriculture production associated with those pre-
20 1998 discharges. They concluded that ag producers had been
21 "overwhelmingly in favor" of retaining the use and
22 availability of those discharges for their operations under
23 the current effluent limits.

24 And DEQ also concluded that it is not necessary
25 to modify the pre-1998 discharges, which are the current

1 effluent limits, to achieve the goal of no measurable
2 decrease in crop or livestock production under Chapter 1,
3 Section 20. And those statements are found in their
4 statements of principal reasons.

5 We support grandfathering because we believe
6 there is no evidence of any harm caused by discharges under
7 the current livestock effluent limits. You have 40 to 50
8 years of data in evidence from the Big Horn Basin showing a
9 net benefit from use of this water. And from having it
10 available in those stream channels for both livestock and
11 wildlife.

12 DEQ concluded that the continued use of the
13 existing livestock standards is appropriate and is
14 supported by science and evidence. And they have in their
15 statement of principal reasons documented there is no
16 evidence of harm associated with agriculture uses under the
17 current standards. So why, then, do we think there is a
18 problem with grandfathering? It's because the Chapter 1
19 standards are deemed necessary. Chapter 1 sets water
20 quality standards for the entire state, and they're deemed
21 necessary to protect a class of use of water. The class of
22 use that's being protected here is water for livestock
23 consumption, and there are no differences in the livestock
24 that's raised in the Big Horn Basin versus the Powder River
25 Basin or elsewhere in the state.

1 As Dr. Raisbeck said in his report, he looked at
2 the big three, that's sheep, cattle and horses. And if
3 you're protecting the class of use of livestock
4 consumption, you're looking at the same class of use
5 statewide. There are not differences in that class of use
6 between these two basins. So if the new, more stringent
7 standards that are being proposed are necessary to protect
8 that class of use to protect livestock drinking in one area
9 of the state, then how can the State defend giving and
10 providing less protection for livestock in another area of
11 the state when that is challenged, which I believe it will
12 be.

13 The Wyoming Outdoor Council and the Powder River
14 Basin Resource Council have already appealed a similar
15 grandfathering provision in the new Chapter 1 rules. And
16 they call it an illegitimate way to justify existing
17 pollution discharges. They claim it is arbitrary,
18 capricious and abuse of discretion and not in accordance
19 with state or federal law. So to suggest that
20 grandfathering in this set of Chapter 1 rules will not be
21 challenged I think may be naive.

22 Another concern we have with grandfathering is we
23 have looked at the response to comments prepared by
24 DEQ related to EPA's comments on the Chapter 1 rules,
25 and we conclude from those that EPA does not support

1 grandfathering. That, I believe, is a real concern,
2 because EPA must approve -- these are rules now,
3 they're Chapter 1 rules, and they must be approved by
4 EPA.

5 Granted, EPA does not have rules for livestock
6 watering, but I think the vulnerability of this
7 grandfathering provision is if the state sets stringent
8 standards in one area of the state to protect a class of
9 use, which is livestock drinking and consumption, then why
10 is that standard not necessary to protect that class of use
11 in other parts of the state? And for that reason, I'm
12 concerned that EPA will not approve the grandfathering
13 provision. And if they do not approve it, then in order
14 for the Chapter 1 rules to be finally adopted,
15 grandfathering would have to be stricken from these rules.

16 There is an existing grandfathering provision in
17 Chapter 2 which pertains to effluent limits for NPDES
18 permits. I think that was done in 1978, and I would submit
19 to you that we're in a very different political landscape
20 today than we were in 1978 when that grandfathering was
21 approved by the EPA. And certainly the most recent lawsuit
22 brought challenging grandfathering under the current
23 Chapter 1 rules is an indication that there is a fairly
24 concerted effort out there not to allow grandfathering to
25 stand.

1 With regard to grandfathering, DEQ has selected
2 1998 as the date that demarks historical discharges from
3 new discharges, historical discharges being exempt from
4 these new standards, new discharges, anything post
5 January 1, 1998, being subject to these numerous stringent
6 standards.

7 And they, based on their statement of reasons,
8 they justify that date by reciting the number of outfalls
9 that existed prior to that time versus the number that have
10 come into existence since 1998. I think that using
11 outfalls as a justification for that -- drawing that line
12 in the sand is very misleading, because the number of
13 outfalls does not tell you anything about the quantity of
14 water that's being discharged, nor does it tell you
15 anything about the quality of water that's being
16 discharged.

17 So by saying that problems developed related to
18 produced water in 1998 and subsequently, does -- is -- to
19 me, I believe is a political determination, separate from
20 an examination of a quantity and quality of water that was
21 discharged prior to 1998 versus what's being discharged
22 today. In fact, from our review of the data on quality and
23 quantity of water, comparing the Powder River Basin to the
24 Big Horn Basin, we have found that in those pre-1998
25 outfalls, far more water of far worse quality is being

1 discharged and has been for decades.

2 We concluded that in 2005, in fact, 150 million
3 barrels more water was discharged in the Big Horn Basin,
4 and the electro -- electrical conductivity of that water is
5 two to three times higher than it is in the Powder River
6 Basin. So saying that because there were only 470 outfalls
7 pre-1998 and now there are 8,000 doesn't tell you the
8 picture.

9 You really need to look at the quantity of water
10 being discharged and the quality of that water to
11 understand if there is suddenly something happening in the
12 Powder River Basin that is more threatening to the class of
13 use which is livestock consumption than what was existing
14 prior to that. So I think what is a concern for the
15 grandfathering provision is that DEQ proposes to
16 grandfather those discharges that produce far more water of
17 far worse quality, and that is, I believe, an inherent
18 vulnerability, if you will, to the grandfathering provision
19 if and when that is challenged.

20 So if this Board would recommend adoption of
21 these standards, only because you believe the pre-1998
22 discharges should be grandfathered, I think it poses a
23 significant risk to water standard -- water quality
24 standards for produced water statewide. If the producers
25 have coal-bed methane discharges from the Powder River

1 Basin have better quality and less quantity, why are they
2 not entitled to grandfathering? If coal-bed methane
3 discharges in the Powder River Basin won't be affected by
4 these new standards, and conventional discharges will, but
5 must be grandfathered, then why are the new standards
6 necessary? What is the -- what benefit is to be achieved
7 by these new standards?

8 And I think that what we conclude is that
9 grandfathering is so essential to the protection of these
10 historic discharges, and that grandfathering provision is
11 vulnerable, and, therefore, if you believe that
12 grandfathering is justified by the evidence that you've
13 seen, then I think that that forces you to a conclusion
14 that the new standards are not necessary.

15 With regard to the landowner waiver, just want to
16 draw the dashed line, I think, between what we're looking
17 at here, which is Chapter 1, Appendix H, which applies to
18 livestock, water standards, but really -- and I -- and
19 Mr. Wagner referred to this, the way these livestock
20 standards got in play, if you will, is through Powder River
21 Basin Resource Council petition to the EQC for new -- for
22 rulemaking to change livestock and wildlife, effluent
23 limits, under Chapter 2, Appendix H. So those Chapter 2
24 Appendix H limits, they're effluent limits. They're not
25 standards. Chapter 1 contains standards. Chapter 2 just

1 has effluent limits for NPDES permits. That affects the
2 oil and gas industry in that particular Appendix. Those
3 effluent limits are deemed necessary under those Chapter 2
4 rules necessary for the protection of both livestock and
5 wildlife consumption. That issue is still open before the
6 EQC.

7 And the EQC, my understanding of where they are
8 on that today, is that they are waiting for Dr. Raisbeck's
9 report, and then they will take that issue back up. So I
10 think it's very likely to assume that whatever gets adopted
11 as a Chapter 1 standard, that's more stringent than what we
12 have as a Chapter 2, Appendix H effluent limit will get
13 brought over into Chapter 2, Appendix H, so that there will
14 not be inconsistent effluent limits for permits for
15 protecting the class of use of livestock and in Chapter 2
16 also wildlife.

17 Chapter 2, Appendix H, says that effluent limits
18 under that Appendix for oil and gas discharge permits must
19 be consistent with the Chapter 1 rules. So anything that
20 happens under Chapter 1, Section 20, I think is going to
21 have to be brought into Chapter 2. So I think that with
22 regard to the landowner waiver, the reason that I see that
23 as a -- as also being vulnerable to challenge, is that
24 while a landowner may have the right and the authority to
25 give a waiver to consent to the discharge of water that

1 doesn't meet these new Chapter 1 standards on his property
2 for livestock, I don't believe he has the authority to give
3 that same waiver for the protection of wildlife. So I
4 think that the landowner waiver, while very necessary for
5 agriculture production, has some vulnerabilities because of
6 the Chapter 2 protection of wildlife water as well.

7 So where do we think we should go from here? I
8 think that what we have here is a recommended set of
9 standards that are based on zero risk. And as you have
10 heard from livestock producers over and over, their
11 business is risk tolerant. It is not risk adverse, and
12 they are in the business of raising crops and livestock and
13 they manage those risks and need to be able to manage those
14 risks. And having water is part of that risk management
15 that livestock and crop producers really need. They need
16 that resource and they can manage around that.

17 A zero risk policy is going to take water that
18 livestock producers and agriculture producers could manage
19 around, is going to take it off the landscape. What we
20 would like to see as a next step is for DEQ to identify the
21 actual data on each constituent on its list for livestock
22 standards, and then provide us the data that says how does
23 ambient water compare to that standard, what does that
24 standard mean in relation to ambient water quality? And
25 then in regard to oil and gas discharges and other --

1 because Chapter 1 will apply to all discharges, then
2 what -- how many outfalls are sampled for each constituent,
3 how many outfalls, more importantly, have not been sampled
4 for that constituent, so how reliable is that data with
5 regard to oil and gas data and how many exceedances are
6 there as to each consistent -- constituent?

7 We think there are some in that list for which
8 there is little and maybe no data, both in ambient and oil
9 and gas produced water, and, therefore, it's -- you know,
10 it's hard to assess what is the risk of adopting a standard
11 for which there is no data to tell whether discharges or
12 ambient water quality are going to exceed those standards.

13 So I think the representation that 90 -- over
14 99 percent of coal-bed discharges would not be affected by
15 these standards may not be accurate because we're aware of
16 some constituents on that list for which there is no or
17 almost no data from the coal-bed discharges. Importantly,
18 being on that list molybdenum, which is now one that would
19 have a livestock drinking water standard.

20 Secondly, we would like the DEQ to identify and
21 report on the actual water quantities and compare. The
22 actual water quantities discharged pre-1998 to post-1998,
23 and the actual water qualities pre-1998 to post-1998, so
24 that it's clear that -- and more clear and more
25 understandable what does that 1998 date mean and how

1 vulnerable, then, is grandfathering and landowner waivers,
2 those concepts that would create exemptions to these new
3 standards.

4 Thank you for your time and I'd be happy to
5 answer any questions.

6 VICE CHAIRMAN WELLES: Thank you very much,
7 Margo.

8 And, Kathy, you can take a break here. I'd like
9 to say something that doesn't need to be recorded.

10 (Off-the-record discussion.)

11 VICE CHAIRMAN WELLES: Thank you, Margo.

12 Next is Joe Dennis.

13 MR. DENNIS: Yes, I'm Joe Dennis. I farm
14 in the Pavillion area and I ranch over east of Thermopolis,
15 and the Murphy Dome oil field sits on part of my ranch. I
16 have no love for the oil companies. In particular, they're
17 a pain in the butt, but I love that water they produce and
18 I need that water they produce. For many of my pastures
19 it's the only source of water.

20 And I guess I just have to go why are we
21 changing, or why we changing now? Your own people have
22 said there have been no problems reported. I'm not aware
23 of any ranchers that have low conception rates. I'm not
24 aware of anybody reporting fish die-offs. I don't think
25 anybody's said wildlife has been damaged by this water.



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September 14, 2007

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Water and Waste Advisory Board
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Cheyenne, Wyoming 82002

**RE: Comments, Raisbeck et. al. *Water Quality for Wyoming Livestock & Wildlife*
Water Quality Rules, Chapter 1, Appendix H, Agricultural Use Protection**

We at Devon Energy Production Company, L.P. (Devon) appreciate the opportunity to comment on the report *Water Quality for Wyoming Livestock & Wildlife* prepared by Raisbeck et. al. (Raisbeck Report), the Department of Environmental Quality's evaluation of the Raisbeck Report, and any potential revisions of the current water quality standards for livestock and wildlife under Chapter 1, Appendix H, Agricultural Use Protection. Devon produces oil and natural gas in many areas of the state. We hold a number of WYPDES permits for the surface discharge of water produced in association with our production and we will be directly affected by the Agriculture Use Protection rule or policy, as well as any revisions of the current water quality standards for livestock and wildlife. Devon hereby incorporates the comments it previously submitted to the Advisory Board and to the Environmental Quality Council (EQC) regarding the various drafts of the Agricultural Use Protection standards, as they were published in policy and rule forms. In addition, we ask the Department of Environmental Quality (DEQ) and the Advisory Board to consider the following comments.

ENVIRONMENTAL QUALITY COUNCIL'S REMAND

At its February 16, 2007 meeting, the EQC found that the format and language of the proposed Appendix H would not clarify the way in which DEQ administers Chapter 1, Section 20. (See Excerpts from Transcript of February 16, 2007, EQC Meeting, attached as Appendix A). The EQC directed DEQ to remove the livestock and wildlife watering issues from the policy, and start from scratch, writing a rule limited to the protection of irrigation and agricultural lands, and obtaining the Advisory Board's input. Further, the EQC told DEQ to bring back a tight, focused regulation that is supported by good science. (See, App. A, p. 15, l. 7-11). DEQ has not complied with the EQC's order; instead, they started with the policy that was presented to the EQC in February with only minor modifications, and failed to clarify any provisions. DEQ failed to remove the water quality standards for livestock and wildlife and has not provided additional scientific evidence to support the Agricultural Use policy/rule.

RISK MANAGEMENT PROCESS

We believe that, to evaluate the current livestock water quality standards or consider changes to those standards, DEQ must complete a comprehensive risk management decision-making process. This same risk management process should be implemented whenever a rule or standard is being considered, including the proposed Agricultural Use Protection rule/policy. The risk management process DEQ should use has five steps:

- Step 1: Identify the Potential Problem.
- Step 2: Collect Data
- Step 3: Assess Risk
- Step 4: Evaluate Alternatives
- Step 5: Select the alternative

Documentation by DEQ of *each step* of the risk management process is essential to providing interested parties and the public a meaningful opportunity to provide comment. It is equally essential to provide the Advisory Board sufficient information upon which a well-reasoned and balanced recommendation may be made to the EQC. The livestock and wildlife water quality standards apply statewide and they directly affect many people and their businesses. If the oil and gas industry and/or livestock producers are negatively affected, other businesses and local governments will also be impacted. Therefore, the evaluation of the livestock water quality standards and the Raisbeck Report demands a rigorous collection of data, the detailed analysis of risk, and a comprehensive evaluation of alternatives. We ask the Advisory Board to require DEQ to complete and provide a detailed report on each step of the risk management process.

In the evaluation of all aspects of the Chapter 1, Section 20 Agricultural Use Protection policy/rule, including the livestock and wildlife water quality standards, each of the five steps of the risk management process will provide valuable and relevant information that should be considered prior to making a recommendation or decision. In each step of the process, DEQ and the Advisory Board must make assumptions and decisions. These assumptions and decisions significantly affect the outcome of the process, as they may involve the scope of DEQ's investigation of reports of decreases in livestock production, data collection, identification of other factors that affect stock production, the social and economic impacts, etc. For example, if DEQ assumes that *any* negative impact to livestock, no matter how minor, outweighs the benefits of having supplemental water supplies available in areas where little or no natural water exists, it will significantly affect the outcome of the risk analysis. Likewise, if DEQ assumes the background livestock production yield in Wyoming is the same as in states having significantly different climates, precipitation, forage conditions, topography, elevation, etc., it will significantly affect the outcome of the risk assessment. Similarly, if DEQ assumes the causal relationship between sulfate levels in water and weight gain for cattle in a confined feeding operation in another state is the same as on the open range in Wyoming, the risk assessment will deliver a very different outcome than if DEQ evaluates the background or naturally existing causal relationship on the open range in Wyoming. DEQ should identify and report on the basis for each such assumption and decision so interested parties and the public may provide additional information or comments.

DEQ has begun the work of several of the steps in the risk management process. However, we do not believe DEQ has done all of the tasks necessary to complete any of the steps. For example, here are some tasks we think are essential to evaluating the livestock and wildlife water quality standards:

- **Step 1: Identify the Potential Problem**

In this case, the potential problem has been identified only by anecdotal testimony. We are not aware of any scientific, market, or other data submitted to DEQ that verifies anecdotal allegations of decreases in livestock production caused by the discharge of groundwater produced in association with oil or gas.

Before it can quantify or measure a decrease in livestock production, we believe DEQ must first determine which characteristics or values it considers to be "production" under Chapter 1, Section 20. Not all livestock producers value the same characteristics, so DEQ must identify those production characteristics that can be readily quantified or measured, and that can and should be protected by water quality standards. These determinations will require DEQ to make assumptions and generalizations about livestock production across Wyoming. DEQ should identify and report on the basis for each such assumption and generalization so interested parties and the public have sufficient information upon which to submit information and comments to the Advisory Board.

- **Step 2: Collect Data**

First, DEQ must identify the background or natural conditions for livestock production in the area as well as the natural variability in livestock production in the area and across the state, among species and breeds, among ages, etc. A few of the conditions that may affect livestock production include background water quality (surface and stock water wells), water quantity (the availability of and distance to water supplies), forage quality and quantity, climate (temperature, precipitation, drought), predation, etc. Identification and quantification of this background data is essential to the calculation of a measurable—or quantifiable—decrease in livestock production.

Based on our preliminary review, we believe DEQ would find that agricultural production data shows there is a significant variation in livestock production from state to state, and across Wyoming. We believe livestock production rates in Wyoming vary due to a number of factors or influences, and that livestock production rates in this state are below the rates in some other states. Once DEQ has determined which "production" characteristics are protected under Chapter 1, Section 20, it should identify the background or existing production rates and values across the state and in areas where produced water is or may be discharged.

Based on our preliminary review of surface water quality in the state, we believe DEQ would find that surface water quality varies widely within drainage basins and across the state, and for some constituents natural surface water far exceeds the standards recommended in the Raisbeck Report. Also, we believe DEQ would find that the water from a significant number of landowners' stock water wells exceeds the standards recommended in the Raisbeck Report. DEQ should evaluate existing water quality data for surface water supplies available to livestock and stock water wells, and collect additional data where necessary to be able to thoroughly

characterize background water quality. Livestock is fenced off from many perennial streams, as well as ephemeral streams with reasonably predictable flows, so landowners can utilize those areas for crop production and targeted grazing. Thus, DEQ should first identify which water supplies are actually available to livestock, and then evaluate existing and new water quality data from those water sources.

We understand from the Raisbeck Report that the quality and chemistry of forage (dry matter) may affect standards for some constituents. If dry matter is considered in setting livestock water quality standards, then background conditions for forage quality and chemistry must be identified and quantified. We assume that the effects of dry matter and water quality on certain livestock production characteristics in confined feeding operations are significantly different than in open range conditions like those found throughout the state. It is reasonable to expect that forage conditions in Wyoming are very different than in most other states. We believe DEQ must evaluate background conditions affecting forage quality and quantity in order to put the Raisbeck Report in context for Wyoming, and also to be able to eliminate forage quality and availability as a factor affecting livestock production.

When DEQ has determined the livestock "production" characteristics or values it must protect under Chapter 1, Section 20, and the background or natural conditions and production rates for livestock, then it should investigate and collect actual data related to the anecdotal claims that groundwater produced in association with oil or gas has caused a measurable decrease in livestock production. In so doing, DEQ must identify, evaluate, and eliminate all other potential causes of a decrease in stock production. If DEQ is unable to verify the reports and claims that the discharge of produced water has caused a measurable decrease in stock production, then it should report to the Advisory Board that the current livestock and wildlife water quality standards are adequate. Many oil or gas produced water discharges have been in existence for years, during which time the water has been utilized by livestock. In addition to investigating anecdotal claims of negative impacts to livestock production caused by produced water, DEQ should collect data on stock production rates where produced water has been made available and evaluate the impacts that the discharge of produced water under the current livestock standards has on stock production.

If the Advisory Board determines there is evidence that the discharge of produced water under the current standards has caused a measurable decrease in livestock production, then DEQ should collect data on actual impacts to livestock production due to each constituent. While the Raisbeck Report provides some useful toxicological data, it is not an adequate risk assessment and should not be considered such. Rather, it is simply a review and summary of some of the scientific literature related to water quality for livestock.

As Dr. Raisbeck told the EQC at the January 17, 2007 hearing, the objective of the study was limited to "...a thorough review of the scientific knowledge base regarding water quality for the classes of livestock and wildlife in Wyoming". *Transcript, EQC Hearing, January 17, 2007, p. 13, ln. 1-10, emphasis added.* He explained that his team was comprised of scientists and this was not a regulatory or decision-making project. For example, he said that while he would tell the EQC if the literature says a constituent at a certain concentration or level would kill livestock, that is the end of what he is capable of doing. He assured the EQC that any

decisions related to setting limits or standards rests with them. *Transcript, EQC Hearing, January 17, 2007, p. 13, ln. 1-10.* When asked if he would make recommendations from which the EQC could set livestock and wildlife water quality standards, Dr. Raisbeck responded, "I'm going to waffle on that one. As a taxpayer and a voter, I've got an opinion...[but]... I don't see that as my job as a scientist. ...It's not our intent to produce a...regulation." *Transcript, EQC Hearing, January 17, 2007, p. 23, ln. 18 - p. 24, ln. 12.*

We ask the Advisory Board to direct DEQ to conduct a full risk management process, of which the Raisbeck Report is a small part of data collection.

- **Step 3: Assess Risk**

An evaluation of the current livestock water quality standards and any potential changes to those standards requires a numeric risk assessment. DEQ must follow a rigorous protocol to assess the range of risks associated with each constituent at various levels of concentration, and calculate the probability of risk. However, DEQ must first define what is meant by the risk assessment objective of a "measurable decrease" in livestock production. We believe the term "measurable" means the decrease must be quantifiable with certainty. In other words, it must be both actual and quantifiable. It is not enough that there is a possible, potential, or probable decrease in stock production—the decrease must be so certain that DEQ knows it to be measurable. Section 20 does not require DEQ to eliminate all risk; rather, it is responsible for assessing and managing risks. Clearly, there is a range of risks that are allowed under Section 20. As we understand it, many of the scientific studies reviewed in the Raisbeck Report identified potential risks due to water quality, but the findings were not significantly different than the control. We don't believe those studies are relevant to a risk assessment in which the objective is to identify the range of risks that, given the background conditions, will cause a "measurable" decrease in livestock production. In evaluating scientific data, DEQ must determine its statistical relevance.

To understand the range of risks posed by the discharge of produced water, DEQ must consider background conditions. For example, even if the scientific literature indicates there will be an impact to a production characteristic in a species from ingesting water with a constituent level of 1000 mg/L, if background surface and stock water quality for that constituent is 5000 mg/L, then the discharge of water having less than 5000 mg/L will not cause a measurable decrease in livestock production.

Livestock production in Wyoming is fraught with risk—it is not a business for the risk adverse. Stock producers regularly manage a variety of risks, including those related to climate, precipitation, loss of water supplies, changes in forage quality and quantity, disease, or predation. Many risks to livestock production are unpredictable or outside the control of an individual stock producer, such as market prices. We believe stock producers have numerous and differing goals or values, and routinely balance risks and benefits to achieve as many of these goals as possible. For example, a rancher may balance the risk of using poor quality water with the benefit of dispersing his stock over a broader area and utilizing forage where there is no other water supply. Or, he may balance the risk of using poor quality water with the benefit of protecting riparian areas from overgrazing and related impacts to natural water quality, as recommended in DEQ's

Grazing Best Management Practices guidelines. In any case, the balancing of risks is common practice in livestock production. In balancing risks, the goal is not to eliminate all risk, but rather to minimize risk while maximizing benefits. Chapter 1, Section 20 recognizes this concept and requires DEQ to prevent only those risks from the discharge of produced water that will cause a *measurable* decrease in livestock production.

- **Step 4: Evaluate Alternatives**

In this step of the risk management process, DEQ should first identify the risk management alternatives based on the data collected in Step 2. One alternative should always be “no action”, as it is reasonable to expect that DEQ may conclude that no action—in this case, no change in the current livestock and wildlife water quality standards—is necessary. Then, DEQ must evaluate each alternative using the balancing criteria mandated in W.S. § 35-11-302(a)(vi). These balancing criteria require the collection of data as well as the identification and evaluation of a broad range of impacts, as prescribed by statute:

W.S. § 35-11-302:

(a) The administrator, after receiving public comment and after consultation with the advisory board, shall recommend to the director rules, regulations, standards and permit systems to promote the purposes of this act. Such rules, regulations, standards and permit systems shall prescribe:

(vi) In recommending any standards, rules, regulations, or permits, the administrator and advisory board shall consider all the facts and circumstances bearing upon the reasonableness of the pollution involved including:

- (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
- (B) The social and economic value of the source of pollution;
- (C) The priority of location in the area involved;
- (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
- (E) The effect upon the environment.

DEQ should identify, evaluate, and report on a broad range of potential impacts associated with any proposed change in the current livestock and wildlife water quality standards, including those recommended in the Raisbeck Report. It is not enough to simply publish notice of proposed standards and accept public comment. These are extremely complex technical issues and few people have the technical and scientific expertise to identify and evaluate the potential impacts of a change in standards. Without a comprehensive report from DEQ that explains the risks and benefits that were identified, considered, and how they were balanced, interested parties and the public do not have a meaningful opportunity to provide comment.

- **Step 5: Select the Alternative**

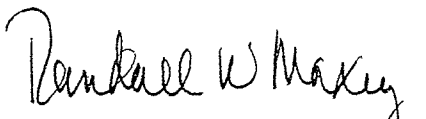
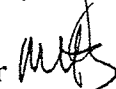
The final step in the risk assessment process is the selection of the most scientifically sound alternative that is reasonable considering the balancing criteria in W.S. § 35-11-302. Prior to making a recommendation to the Advisory Board, DEQ should prepare a report that describes the selected alternative, and provides the scientific and technical basis for the alternative as well as how DEQ identified, evaluated, and implemented the balancing criteria. Then interested parties and the public would have adequate information to be able to provide relevant, helpful comments. Based on its reports and the information generated and comments received at each of Step in the risk management decision-making process, DEQ should recommend an alternative to the Advisory Board. The Advisory Board would then have adequate information on the matter to make a recommendation to the EQC.

We believe public input and comment is an essential part of each step in the risk management process, and that, at each step, DEQ should consider and address public input received in prior steps. However, we do not believe public comment is an adequate substitute for the agency's risk management process. The interested parties and public do not have the relevant data and technical and scientific expertise to perform the risk assessment. We believe DEQ has the burden of conducting a rigorous and thorough risk assessment and, in doing so, the agency must make the risks and benefits, as well as its assumptions and decisions, available to the public so that meaningful comment and input can be provided.

While the Raisbeck Report is a start in data collection, it is not sufficient for the adoption of new water quality standards. As Dr. Raisbeck said, that was not the objective of the project. We believe the Raisbeck Report and recommendations improperly rely on scientific studies in which the results were not significantly different from the control or were not subjected to an appropriate statistical analysis. Also, we do not think the Raisbeck Report identified or considered background livestock water quality or background conditions for livestock production in Wyoming, and therefore is not relevant to a determination of a measurable decrease in stock production or setting water quality standards. We ask the Advisory Board to direct DEQ to initiate a thorough risk management process and provide a detailed report at the conclusion of each step, with notice and an opportunity to provide comments, before proceeding to the next step. DEQ routinely requires this risk assessment process to set water, soil, and air quality standards for the cleanup of a contaminated site, so the agency has expertise in implementing it.

Again, thank you for the opportunity to submit our comments. If you have any questions, please feel free to contact me.

Sincerely,


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Regulatory Advisor 



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June 15, 2007

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Water and Waste Advisory Board
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Cheyenne, Wyoming 82002**

RE: Comments, Water Quality Rules, Chapter 1, Appendix H, Agricultural Use Protection

We at Devon Energy Production Company, L.P. (Devon) appreciate the opportunity to comment on the the Department of Environmental Quality's latest draft of Chapter 1, Appendix H, Agricultural Use Protection. Devon produces oil and natural gas throughout the state of Wyoming, including coal bed natural gas (CBNG) in the Powder River Basin. We hold a number of WYPDES permits for the surface discharge of water produced in association with our production and we will be directly affected by the proposed rule, if implemented.

Devon hereby incorporates the comments it has previously submitted to the Advisory Board and to the Environmental Quality Council (EQC) regarding the various drafts of the Agricultural Use Protection standard, as they were published in policy and rule forms. In addition, we ask the Department of Environmental Quality (DEQ) to consider the following comments.

ENVIRONMENTAL QUALITY COUNCIL'S REMAND

The current draft proposed by DEQ does not meet the parameters of the remand ordered by the EQC at its February 16, 2007 meeting. At that time, the EQC found that the format and language of Appendix H was not appropriate for a rule, that it would not clarify the way in which DEQ administers Chapter 1, Section 20. (See Excerpts from Transcript of February 16, 2007, EQC Meeting, attached as Appendix A). The EQC directed DEQ to remove the livestock and wildlife watering issues from the policy, and start from scratch, writing a rule limited to the protection of irrigation and agricultural lands, and obtaining this Board's input. At a minimum, the EQC instructed, the rule should clarify historical definitions, clarify irrigation, and clarify the default effluent limits for irrigation. Furthermore, the EQC requested that DEQ provide more supporting evidence for the scientific basis of the default effluent limits. (See, App. A, p. 15, l. 7-11). In summary, Council Member Boal, who made the motion to remand, stated, "So we ought to be able to come back with a tight, focused regulation and one that is supported by good science."

DEQ has not followed the EQC's order. Instead, DEQ started with the policy that was presented to the EQC in February, and made minor modifications. It has not clarified any previous provisions; in fact, the modifications only introduce more uncertainty and confusion as to how the rule would be applied.

June 15, 2007
Devon Energy Production Company, L.P.
Re: Draft Agricultural Use Policy
Page 2 of 8

DEQ has not provided any scientific evidence to support the default effluent limits for irrigation, and failed to remove the water quality standards for livestock and wildlife.

DEQ has further failed to provide any scientific basis or any other justification for applying different irrigation protection standards to discharges based on whether they began after January 1, 1997. It is well known that, in Wyoming's semi-arid climate, many and varied uses develop quickly around new water sources. By establishing a date more than ten (10) years in the past, DEQ fails to protect the livestock watering, irrigation, and other agricultural uses that have developed in areas where water discharges commenced during the past ten (10) years. This is an obvious attempt to regulate CBNG produced water discharges in the Powder River Basin differently from other discharges. However, this rule would apply statewide and DEQ has provided no justification for such an arbitrary and capricious standard exclusion of the agricultural uses that have developed around produced water.

NATURALLY IRRIGATED LANDS

We disagree with the provisions in the proposed rule that include "naturally irrigated lands" as protected agricultural uses. The restrictions on water discharges contemplated for the protection of such lands necessarily involve the regulation of the quantity of water discharged, regardless of quality. In addition, such restrictions fail to account for the state's easement in all watercourses, thereby limiting the ability of downstream landowners to utilize the water for its highest preferred use under Wyoming law: drinking water for both man and beast. *See*, WYO. STAT. § 41-3-102(b)(i).

The state has a watercourse easement across private and governmental lands in the state for the purpose of flowing and managing the waters of the state. The state's right of way for its water to flow through watercourses is essential to our water law system of prior appropriation. The scope of the watercourse easement includes waters augmenting natural flow, whether it comes from oil and gas development or otherwise. The easement extends to all seasons and it is only because the state has the easement that water users can count on water flowing down the watercourse. *The PeeGee Ranch v. Devon Energy Production Co., L.P.*, 6th Judicial District, Civil Case No. 26607, 4/13/07.

Because the surface estate is burdened by the state's easement to flow waters of the state, a landowner does not have exclusive possession of the land or rights to its physical condition. Therefore, the landowner has no claim for trespass, interference, or damages associated with the flow of the state's waters. The land is also burdened by an easement held by downstream water users. A valid appropriation of water from a natural stream constitutes an easement in the stream; therefore, when a person acquires the right to a certain amount of water in a stream, he also acquired the right to have that water flow in the natural stream and over the lands of others to the point of diversion. *The PeeGee Ranch v. Devon Energy Production Co., L.P.*, 6th Judicial District, Civil Case No. 26607, 4/13/07.

To say that an ephemeral stream or a stream having stretches without a defined channel, bed and banks is not a natural watercourse would call into question the administration and enforcement of water rights throughout the entire state, and would be directly contrary to the Constitution, statutes, and established

case law precedent. Further, it would invalidate all adjudicated water rights and deny downstream users the right to call flows through upstream lands to their points of diversion. *The PeeGee Ranch v. Devon Energy Production Co., L.P.*, 6th Judicial District, Civil Case No. 26607, 4/13/07.

Water that is subject to appropriation is water of the state. The State Engineer has designated the production of water for purposes of producing coalbed natural gas a beneficial use of groundwater, for which a permit to appropriate groundwater is required and a water right is appropriated. When produced water is legally discharged into the watercourse, it is the property of the state, not the discharger, and is subject to the state's watercourse easement to flow such water through and across downstream lands. *The PeeGee Ranch v. Devon Energy Production Co., L.P.*, 6th Judicial District, Civil Case No. 26607, 4/13/07.

Wyoming law defines the preferred uses of water, and establishes an order of preference for them. The highest preferred use of water in the state is "water for drinking purposes for both man and beast". Water rights that are not preferred may be condemned to supply water for preferred uses. WYO. STAT. § 41-3-102(b)(i). The surface discharge of groundwater that meets water quality standards for livestock and wildlife is a preferred use of the water. Therefore, neither DEQ nor a landowner have the right to prevent the flow of drinking water for livestock and wildlife in the state's easement through and across downstream lands, nor does a landowner have a claim for trespass, interference, or damages—including a potential decrease in crop production—associated with the flow of such water.

Section (a) of DEQ's proposed rule defines "irrigation" as "a substantial acreage of naturally sub-irrigated pasture within a stream floodplain." The stream floodplain is within the state's watercourse easement and is used for the flow of the waters of the state. Therefore, any rights of a landowner to produce crops in the floodplain are subordinate to the state's right to flow water through and across the land. DEQ defines "naturally irrigated lands" as those "along stream channels". Again, these lands are within, and burdened by, the state's watercourse easement. The landowner does not have exclusive possession of the land or its physical condition. Were that not the case, landowners whose land and improvements are damaged by floods would have valid claims against the state for compensation.

Water rights to underground water are administered through permits on wells withdrawing the water for beneficial purposes. The law protects rights to the volume of groundwater withdrawn by a well only if the well was adequately developed. WYO. STAT. § 41-3-911(a). To acquire a water right to spring water, a landowner must apply for a groundwater permit. WYO. STAT. § 41-3-902. The use of groundwater in sub-irrigation is opportunistic, is not recognized as a beneficial use of water, and no water rights are granted for such a use. Even if the state did grant water rights for the passive use of groundwater in sub-irrigation, it would not be a preferred use of water and, as such, may be condemned and changed to a preferred use. WYO. STAT. § 41-3-906.

DEQ must recognize the state's watercourse easement and that the highest preferred use of the state's water is drinking water for livestock and wildlife. Where produced water meets quality standards for livestock and wildlife use, DEQ must allow it to flow through and across the lands within the state's

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watercourse easement to supply drinking water for livestock and wildlife. The naturally irrigated lands DEQ seeks to protect are within and burdened by the watercourse easement. The use and management of the watercourse easement lies within the jurisdiction of the State Engineer, and the law expressly prohibits DEQ from taking any action which would limit or interfere with the jurisdiction, duties, and authority of the State Engineer and Board of Control. WYO. STAT. § 35-11-1104(a)(iii). Therefore, the provisions in Appendix H related to naturally sub-irrigated pasture and naturally irrigated lands exceed DEQ's authority, frustrate the highest preferred use of water in the state, and should be deleted.

Recognizing the highest preferred use of water is drinking water for livestock and wildlife and the state's watercourse easement for the flow of such water, the State Engineer recently proposed new legislation for consideration by the CBM Water Task Force. The State Engineer's draft bill limits the discharge of produced water from coalbed natural gas operations to the downstream carrying capacity of the channel and provides that, where the carrying capacity of the channel is diminished, the State Engineer may order the channel capacity to be restored. While we believe the State Engineer already has the authority to require the channel capacity to be restored, this legislation would lay to rest any doubt that the state has an easement where the carrying capacity of the channel is diminished for any reason. The provisions in Appendix H related to naturally sub-irrigated pasture and naturally irrigated lands conflict with the State Engineer's authority and proposed legislation, and should be deleted.

RULEMAKING STANDARDS

The Advisory Board should not vote on or recommend the proposed rule because neither DEQ nor the Advisory Board has conducted the balancing review required by the Environmental Quality Act (EQA). Recognizing that environmental rules, standards, and permit systems can significantly and adversely impact other interests in the state, the Wyoming Legislature expressly required consideration of the *reasonableness* and all of the intended—as well as unintended—consequences. The law requires a “reasonableness” test, or a balancing of interests and values, and the Legislature prescribed some of the facts and circumstances that must be evaluated and considered. Clearly, the Legislature intended the reasonableness test to apply in a situation such as this, where a statewide rule is being considered that has the potential of significantly and adversely affecting many other interests in the state.

DEQ has not identified, evaluated, or presented evidence of any facts or circumstances that bear upon the reasonableness of the proposed rule. The first balancing criterion DEQ and the Advisory Board must evaluate and consider is “...the character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected[.]” WYO. STAT. ANN. §35-11-302(a)(vi)(A) (Lexis 2005). While the Advisory Board previously heard some testimony and will take comments from people who might be positively or negatively affected by the proposed rule, nothing has been done to compile this information to adequately evaluate, analyze, or quantify the true character and degree of alleged injuries. DEQ has not adequately considered the impacts to wildlife and its habitat, nor has it considered, quantified, or otherwise evaluated the environmental *loss* that would result from implementation of the proposed rule. Clearly, prohibiting the flow of water that is suitable for wildlife in ephemeral drainages will result in an injury to wildlife health. Similarly, DEQ has not

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quantified or otherwise evaluated the degree of injury to or interference with the wellbeing of livestock that depend upon the flow of produced water in ephemeral streams for survival. Also, the flow and use of produced water in ephemeral drainages is critical to the economic viability of many ranching operations across the state, and DEQ must quantify and evaluate the character and degree of injury to or interference with the wellbeing of those people. The testimony received in previous hearings from ranchers confirms that they highly value the flow of water for livestock and wildlife through their properties, and that the benefits from such flows far outweigh any potential negative impacts.

According to the Wyoming Department of Agriculture, many landowners want to use produced water and have acquired water rights in it. By July 2006, landowners in the Powder River Basin had acquired 13,741 stock water permits, 3,491 stock reservoir permits, and 61 irrigation permits to use CBNG water. See, Presentation to CBM Task Force, Grant Stumbough, Dept. Agriculture, July 2006 at http://cbm.moose.wy.gov/Information_Presented_to_the_Task_Force.htm. Landowners benefit from the installation of water pipelines, stock tanks, and reservoirs that improve the distribution of livestock over range lands and increase stock productivity. Produced water improves the health of livestock as well as wildlife, and improves habitat by increasing forage production, reducing overgrazing, and enhancing riparian areas and wetlands. If this analysis were performed, DEQ would find that the surface discharge of oil and gas produced water results in a net environmental benefit.

Other potential injuries and adverse consequences that must be identified, evaluated, and considered include:

- ***Injury to and interference with*** landowners' existing water rights in wells, reservoirs, and stock tanks; landowners' need for the flow of produced water in the channel for stock and wildlife; the needs of downstream landowners to use the flow of produced water for stock water and irrigation; and the state's right to flow waters of the state down its watercourse easements.
- ***Injury*** to mineral owners resulting from increased oil and gas production costs that reduce royalties and may render leases uneconomic. This includes the state of Wyoming, which receives mineral royalties from state and federal mineral lands.
- ***Injury*** to oil and gas operators resulting from increased production costs and the loss of capital investments.

The second balancing criterion requires the evaluation and consideration of "the social and economic value of the source of pollution", which includes social values associated with jobs, agriculture, and wildlife, and economic values of state and private royalties, state and local taxes, salaries, and increases in agriculture production. WYO. STAT. ANN. §35-11-302(a)(vi)(B) (Lexis 2005). In the recent EQC rulemaking, a report was provided that describes some of these factors, including the impact on agricultural producers if produced water could no longer be discharged to the surface from oil and gas operations and, thus, cease to be, or never becomes, available for agricultural use. See Water Quality Effects and Beneficial Uses of Wyoming Coal Bed Natural Gas Produced Water Surface Discharges, by

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Geomega Inc., (Submitted to EQC January 17, 2007). Additionally, mineral taxes and royalty payments provide unique socioeconomic benefits to the state which will not be realized if development of oil and gas is curtailed by the implementation of Appendix H. Mineral taxes and royalties allow Wyoming to rank first in the nation in federal revenues, first in non-property tax revenues, second in general revenue and interest income, fourth in tax revenues, and fourth in sales tax revenues. Were it not for the taxes paid on minerals, Wyoming would rank 48th in property tax revenues; instead, it ranks tenth. Wyoming Taxpayers Association, *How Wyoming Compares*, 2006 ed., FY2004.

Oil and gas production provides tremendous benefits to counties. For example, in 2006 coalbed natural gas producers paid 62% of the property taxes in Johnson and Sheridan Counties, while agriculture accounted for only 3% of the taxable valuation in Johnson County, and 1% in Sheridan County. The taxable value of minerals increased by 1559% in Sheridan County since 1999, and by 1329% in Johnson County since 1998. Also, oil and gas producers paid an average of nearly half (48.26 %) of the property taxes paid in 2005 in the counties where CBNG is produced. Kerns, *Coalbed Natural Gas*, presentation to EQC, January 18, 2006. The proposed rule has the potential to adversely affect oil and gas operations throughout the state, and DEQ should consider and evaluate the beneficial socioeconomic impacts of the oil and gas industry as a whole. Oil and gas production provides tremendous social and economic value to the state, as well as to counties and local production areas:

- In 2005, Wyoming ranked third in the nation in natural gas production (2 trillion cubic feet) and seventh in crude oil production (51.6 million barrels). Campbell County led the state in crude oil production, followed by Park County. Campbell County was the second highest in natural gas production. Petroleum Association of Wyoming, *Oil & Gas Facts*, 2006 ed.
- There are 523 companies engaged in the production of crude oil and natural gas in the state, and 48 companies operating petroleum pipelines. In 2005, there were 45 operating gas plants and four crude oil refineries. Oil and gas companies in the state directly employ approximately 20,000 people with an annual payroll of over \$950 million. Petroleum Association of Wyoming, *Oil & Gas Facts*, 2006 ed.
- In 2005, the total taxes and royalties paid by oil and gas producers in the state was \$1.693 billion, which constitutes a direct payment of nearly \$3,257 for each person living in Wyoming. Oil and gas producers pay royalties and lease bonuses to the state and federal government, and the state receives half of the royalties paid to the federal government. In 2005, oil and gas producers paid \$422 million in federal royalties and \$101 million in state royalties. In 2004, the state received approximately \$554 million in federal mineral royalties and lease bonus payments. Petroleum Association of Wyoming, *Oil & Gas Facts*, 2006 ed.
- In 2004, oil and gas companies paid over \$540 million in property tax revenues to the state, of which nearly \$434 million was paid on natural gas. Oil and gas producers paid over 52% of the total property taxes paid in the state (more than 79% of the property taxes paid on all minerals). Minerals are the only class of property in the state that is taxed at 100% of their value, as well as

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the only class that is required to pay two direct taxes (property and severance). In contrast, only 4% of the state's revenue was paid by other property taxpayers, including agriculture and residential and commercial property owners. Also, oil and gas producers paid \$497 million in severance taxes, of which \$408 million was paid on natural gas. And, in addition to property and severance taxes, oil and gas companies paid \$129 million in sales and use taxes, and \$5 million under the conservation mill levy, in 2005. Petroleum Association of Wyoming, *Oil & Gas Facts*, 2006 ed.

- In the counties where conventional oil and gas operators produce water that is discharged under WYPDES permits, oil and gas producers paid an average of 58.4% of the property taxes paid in 2005 (Petroleum Association of Wyoming, *Oil & Gas Facts*, 2006 ed.):
 - Big Horn 46.73%
 - Fremont 79.82%
 - Hot Springs 78.23%
 - Natrona 48.10%
 - Park 57.20%
 - Washakie 40.56%

The third balancing criterion requires DEQ to evaluate and consider “the priority of location of the area involved[.]” WYO. STAT. ANN. §35-11-302(a)(vi)(C) (Lexis 2005). The proposed rule will affect the discharge of produced water in all areas of the state, including existing and future discharges of water produced in association with oil and gas operations statewide, including the Big Horn Basin. The Advisory Board should not recommend a rule for the entire state based on the complaints from a few landowners in the Powder River Basin.

The fourth balancing criterion requires DEQ to evaluate and consider “the technical practicability and economic reasonableness of reducing or eliminating the source of pollution[.]” WYO. STAT. ANN. §35-11-302(a)(vi)(D) (Lexis 2005). DEQ has not submitted relevant or reliable scientific evidence to demonstrate that the proposed rule is necessary, let alone technically practical or economically reasonable. The natural water quality in most ephemeral drainages does not meet the default effluent limits proposed by DEQ, particularly in gaining stretches where water from the shallow water table pools and stagnates, and in low-flow runoff events. Also, DEQ should consider comments and data it has received regarding the technical impracticability of alternative means of water disposal, including the geological impracticability of reinjection in most areas of the Powder River Basin, the prohibitive costs of water treatment, and the additional environmental costs of alternative measures. *See, e.g.*, Comments submitted by Merit Energy Company (February 14, 2006), Presentation by Williams Production RMT Company (February 16, 2006), Presentation by Anadarko Petroleum Company (February 16, 2006).

The fifth balancing criterion requires DEQ to evaluate and consider “the effect upon the environment.” WYO. STAT. ANN. §35-11-302(a)(vi)(E) (Lexis 2005). Appendix H will have a negative effect upon the

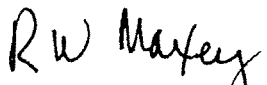
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environment because it will limit the amount of water that would otherwise be available to livestock and wildlife and other agricultural uses. DEQ has received numerous comments explaining that the surface discharge of water produced in association with oil and gas operations results in a net environmental gain and provides a vital resource to wildlife, livestock, and other agricultural uses. *See, e.g.*, Comments submitted by Hot Springs County Commissioners (February 14, 2006), Benefits to Wildlife from the Application of Water Produced by Coal Bed Natural Gas Development, by Larry Hayden-Wing, Ph.D., submitted by Yates Petroleum (February 13, 2006), Presentation by Larry Hayden-Wing, Ph.D. and Benjamin Parkhurst, Ph.D. (February 16, 2006), Presentation by Bjorn Bjorkman (February 16, 2006). The discharge of produced water suitable for wildlife sustains populations and enhances habitat, including endangered and threatened species, big game, birds, rodents, etc. In high plains, semi-arid desert areas where surface water sources and supplies are very scarce, produced water is extremely beneficial to the environment, sustains livestock, and reduces overgrazing of riparian areas and rangeland. Reducing the availability of produced water will harm wildlife and livestock, and promote overgrazing. The potential harm from prohibiting the flow of produced water down ephemeral drainages is exacerbated by a prolonged drought. DEQ and the Advisory Board must consider and quantify these facts before moving forward with a statewide rule that would deprive the environment of these benefits. Therefore, the Advisory Board should not recommend the rule until all of the balancing criteria have been fully identified, evaluated and made available for public comment.

CONCLUSION

Again, thank you for the opportunity to submit our comments. We request that the Board carefully consider all comments and advise DEQ to issue another draft of the rule, in compliance with the EQC's order, for public review and comment. If you have any questions regarding our comments, please feel free to contact me.

Sincerely,



Randall W. Maxey
Regulatory Advisor

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

Docket No. 06-3819

CHAPTER 1, SURFACE WATER STANDARDS FOR RULEMAKING

TRANSCRIPT OF MEETING PROCEEDINGS

PURSUANT TO NOTICE duly given to all parties in interest, this matter came on for meeting on the 16th day of February, 2007, at the hour of 10:03 a.m., at the Bighorn Meeting Room, Holiday Inn, 204 West Fox Farm Road, Cheyenne, Wyoming, before the Wyoming Environmental Quality Council, Chairman Mark Gordon presiding, with Mr. John Morris, Ms. Wendy Hutchinson, Mr. Jon Brady, Mr. Richard Moore, Ms. Sara Flitner and Mr. Dennis Boal, Council Members.

Ms. Terri Lorenzon, Executive Director to the Council and Bridget Hill, Assistant Attorney General, also in attendance.

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1 PROCEEDINGS
 2 (Meeting proceedings commenced
 3 10:03 a.m., February 16, 2007.)
 4 CHAIRMAN GORDON: It is a long process and
 5 I understand it's a complicated one. I want to thank
 6 everybody again.
 7 I'm going to call our meeting to order. We're
 8 running about an hour late. It's 10:00 by my watch. I'm
 9 going to suggest that we move the election of officers
 10 further down so that we can get straight to -- straight to
 11 the business at hand.
 12 Does that sit with the Council?
 13 MS. HUTCHINSON: Yes.
 14 MR. BRADY: Yes.
 15 CHAIRMAN GORDON: Okay. So the next item
 16 of business would be the decision on Chapter 2, Appendix H.
 17 MR. MOORE: Mr. Chairman, I think we need
 18 to decide how we're going to proceed on Chapter 1 first.
 19 MR. BRADY: Okay.
 20 MR. MOORE: Whether we're to try to make a
 21 decision today or make a decision at a future meeting is
 22 the first question, so I ask the pleasure of Council on
 23 that question.
 24 CHAIRMAN GORDON: Is that the pleasure of
 25 the Council?

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1 MS. HUTCHINSON: I think this would be a
 2 good idea to determine which way we're going to go right
 3 now.
 4 CHAIRMAN GORDON: Okay. I hear a decided
 5 consensus to do that, so we will do that.
 6 I will open the floor to the Council to make
 7 comments.
 8 MS. HUTCHINSON: I think our first decision
 9 I would recommend we discuss the rule versus policy issue,
 10 because I think if we choose to move forward as a rule,
 11 then I am not prepared to make a decision today.
 12 MR. MORRIS: Mr. Chairman, I'd like to make
 13 a motion.
 14 MS. HUTCHINSON: Hang on a minute, I'm
 15 talking.
 16 And otherwise if we're going to move forward as a
 17 policy, then I think I'm prepared to make a decision on
 18 remaining part of the Chapter today.
 19 Go ahead, John. Your turn.
 20 MR. MORRIS: I'd like to make a motion that
 21 we make this a rule instead of a policy, then we can open
 22 it up for discussion.
 23 CHAIRMAN GORDON: Okay.
 24 MR. BRADY: I'll second it.
 25 CHAIRMAN GORDON: It's been moved and

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1 seconded. To put the proposed rule Chapter 1 -- I'm
 2 working off the December 2005 draft; is that the correct
 3 one?
 4 MS. HUTCHINSON: Yes.
 5 CHAIRMAN GORDON: All in favor?
 6 MR. MOORE: Wait a minute.
 7 MS. HUTCHINSON: Open it for discussion.
 8 CHAIRMAN GORDON: I just wanted to make
 9 sure we were putting it on the table.
 10 MR. MOORE: You have a motion on the table,
 11 which is to consider it a rule, not a policy, as I
 12 understood it.
 13 MS. HUTCHINSON: Yes.
 14 MR. MOORE: I think first we need to decide
 15 whether we're going to decide today or not.
 16 CHAIRMAN GORDON: Right. That's the
 17 discussion item, the motion was to put these --
 18 MR. MOORE: The motion --
 19 CHAIRMAN GORDON: The motion Mr. Morris
 20 made moved to package rules, and seconded by Jon. Now we
 21 have discussion about the rule versus policy.
 22 MS. HUTCHINSON: John's motion was
 23 essentially to keep Appendix H.
 24 MR. MOORE: I think we're talking about two
 25 different motions.

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1 MS. HUTCHINSON: I don't think we are.
 2 MR. MOORE: I think John's motion was to
 3 make Appendix H a rule, not a policy. And I think Mark was
 4 understanding it was a motion to consider it as a --
 5 consider whether or not we act on the rule package today in
 6 its entirety.
 7 MS. HUTCHINSON: No, I don't think so. I
 8 think John is starting the discussion on is it a rule or
 9 policy.
 10 MS. FLITNER: How about John tells us --
 11 CHAIRMAN GORDON: Yeah, would you clarify
 12 your motion? I took it to mean you were moving the whole
 13 package as is.
 14 MR. MORRIS: That we devote this is -- or
 15 have a discussion whether this will be a rule or a policy.
 16 MS. FLITNER: As is?
 17 MS. HUTCHINSON: As it is.
 18 CHAIRMAN GORDON: The whole package as it
 19 is as --
 20 MS. HUTCHINSON: No, Appendix H --
 21 THE REPORTER: You're going to have to go
 22 one at a time, please.
 23 CHAIRMAN GORDON: What John has proposed,
 24 if I'm understanding correctly, is that he would like to
 25 move Appendix H --

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1 MR. MORRIS: H.
 2 CHAIRMAN GORDON: -- as a rule.
 3 It's been seconded by Jon Brady. I'm going to
 4 ask if that is correct.
 5 MR. MORRIS: That is correct.
 6 MR. MOORE: Thank you.
 7 CHAIRMAN GORDON: So just for clarification
 8 purposes, we could vote down Chapter 1 and have a rule of
 9 Appendix H; is that --
 10 MS. HUTCHINSON: No. All John is saying
 11 let's have the discussion we want Appendix H to be the rule
 12 or policy. And then if that -- he's saying make it a rule.
 13 If that fails, then we need another motion to discuss the
 14 rest of Chapter 1.
 15 CHAIRMAN GORDON: Okay. Is that clear to
 16 everyone?
 17 Okay. Thank you.
 18 MR. MORRIS: Is there an opinion from the
 19 Attorney General's Office?
 20 MS. HUTCHINSON: Yes, that would be great.
 21 Bridget, go ahead.
 22 MS. HILL: An opinion as to what? John
 23 just likes to give me a hard time. I don't have an opinion
 24 at this time.
 25 MS. FLITNER: I think that what we need to

1 decide is whether or not we want the policy specific to the
 2 last conversation to be a rule or not. We further need to
 3 decide if we go forward with rulemaking instead of the less
 4 formal policy, how we treat the concerns about public
 5 notice, you know, we thought we were responding to a
 6 policy, we don't -- you know, we've heard comments on
 7 specific considerations, if this became a rule, not a
 8 policy.
 9 So for purposes of clarification, including my
 10 own, I want to know how we can move forward with that
 11 discussion. I am not prepared to say -- you know, I like
 12 the predictability. I don't like the idea of lots more
 13 contested cases.
 14 MS. HUTCHINSON: Here's what I think --
 15 MS. FLITNER: Yes.
 16 MR. CORRA: Mr. Chairman, may I be
 17 allowed to --
 18 CHAIRMAN GORDON: I'm going to make a
 19 recommendation. It's going to be called a consideration as
 20 a rule, does that help clarify this? So comments in our
 21 discussion at this point --
 22 MR. MORRIS: No, there's a motion out
 23 there. Let's vote on it.
 24 CHAIRMAN GORDON: All right. Go ahead.
 25 MS. HUTCHINSON: Okay. John Corra would

1 like to speak. Should we let him?
 2 MR. CORRA: Mr. Chairman, may -- I know
 3 you're in deliberation. May I offer a suggestion?
 4 MR. GIRARDIN: You need to get closer to
 5 the mike.
 6 CHAIRMAN GORDON: Yes, John, go ahead.
 7 MR. CORRA: It may or may not be helpful,
 8 and by no means attempt to interfere with the motion or
 9 anything else of that sort. It has been presented to you
 10 as a rule, the whole thing, Chapter 1, in its entirety.
 11 You may -- and follow your own instincts -- you may want
 12 to entertain a motion to pass the entire rule and
 13 discussion -- amend that motion to decide whether or not
 14 you want to include the Appendix H as a rule or a policy.
 15 CHAIRMAN GORDON: That was where I was
 16 trying to go, John, and I appreciate that.
 17 MR. CORRA: I thought that might be it, but
 18 I just wanted to offer that as an alternative, but thank
 19 you for your allowing me to do that.
 20 CHAIRMAN GORDON: That's not what we have
 21 before us.
 22 Mr. Moore.
 23 MR. MOORE: Let me follow up on Mr. Corra's
 24 comment. And that's exactly where I was trying to get to
 25 when I was questioning what Mr. Morris' motion is.

1 And it seems to me what we need to do is put the
 2 entire rule package on the table with a motion to approve
 3 or disapprove. We can then consider, for example, as the
 4 First Amendment to that motion, whether or not Appendix H
 5 should be considered as a rule or a policy. If the
 6 Appendix H is determined that we're going to have to
 7 receive that as a policy, rather than a rule, then we could
 8 go ahead with discussion of other components of the rule
 9 package and attempt to adopt the entire rule package today.
 10 If we decided Appendix H should be a part of the
 11 rulemaking, I think Miss Hutchinson's comment that she
 12 thinks we need a little more time should be taken into
 13 consideration, and at that point a member of the Council
 14 could move to postpone consideration to a later date. And
 15 that would keep us, in my mind, very straight procedurally.
 16 Put the motion -- put the whole rule package on the table
 17 to start with, deal with the question of Appendix H. Once
 18 we've dealt with that, whether it's a rule or policy, then
 19 we can decide whether we want to postpone action on the
 20 entire package to a later date or move forward at this
 21 time. I think that would be the cleanest way to deal with
 22 it.
 23 MS. HUTCHINSON: I don't like that. I like
 24 John's way to do it, but whatever the Council wants to do.
 25 CHAIRMAN GORDON: I'm struggling with this,

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1 because there are so many wise people on this Council, but
2 I'm going to rule the motion out of order.
3 MS. HUTCHINSON: Wise guys?
4 CHAIRMAN GORDON: Wise people.
5 So I'm going to rule the motion out of order. I
6 would entertain a substitute.
7 MR. MOORE: Mr. Chairman, I move that we
8 adopt Chapter 1 Surface Water Standards, Docket Number
9 06-3819, as proposed in the December 2005 EQC draft from
10 the Department of Environmental Quality.
11 CHAIRMAN GORDON: Is there a second?
12 MR. BRADY: I'll second it.
13 CHAIRMAN GORDON: It's been seconded.
14 Is there discussion?
15 MR. MOORE: Mr. Chairman, I would yield to
16 Mr. Morris to make a motion about Appendix H.
17 MS. HUTCHINSON: Well, don't -- okay. Now
18 I'm confused. We don't have to because John's motion was
19 to make it part of the rule, which you just did.
20 MR. MOORE: Now he can make it a motion to
21 make it policy or keep it as a rule.
22 MS. HUTCHINSON: Do we want that --
23 THE REPORTER: One at a time, please.
24 MR. MOORE: If someone wanted to rule --
25 I'll take care of it.

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1 MS. HUTCHINSON: Go ahead.
2 CHAIRMAN GORDON: Hold on, what I'm going
3 to do is start recognizing people one at a time.
4 I've got Rick, I've got Wendy, then I've got
5 Sara.
6 MR. MOORE: Mr. Chairman, I move we remove
7 Appendix H from the rule package and leave it as a policy.
8 MS. HUTCHINSON: I'll second that.
9 CHAIRMAN GORDON: It's been seconded.
10 MS. HUTCHINSON: So now we're voting on --
11 if you vote yes, you're making it a policy. If you vote
12 no, you're making it a rule.
13 CHAIRMAN GORDON: We're now at a point of
14 discussion about whether it's a policy.
15 MR. MOORE: Thank you. Mr. Chairman,
16 speaking in favor of my motion, I would say that I respect
17 Mr. Corra's recommendation that we leave it as a policy for
18 now. And if we leave it as a policy, I would expect
19 Mr. Corra to look seriously at problems that have been
20 identified, including the uncertainty that a policy
21 provides, and decide whether to bring it back to us in a
22 revised form of a rule at a future date.
23 CHAIRMAN GORDON: Thank you.
24 Wendy, I have you recognized.
25 MS. HUTCHINSON: I guess I would actually

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1 also speak in favor of the motion for the same reasons. I
2 think that -- I wish that it was ready to go to rule, but
3 at this point in time, I understand why some of the
4 language is as it is, because it was policy. I do think
5 that -- I think everybody has stated very clearly that what
6 they would like is certainty, and I think there are some
7 elements in the ag use section here that make a lot of
8 uncertainty, especially for those people who are current
9 permit holders. That needs to definitely be clarified.
10 CHAIRMAN GORDON: Sara, I have you
11 recognized.
12 MS. FLITNER: It's the only time you
13 recognized me when I didn't actually raise my hand, but I
14 can think of something.
15 I'm not prepared to -- I don't know what I'm
16 going to do yet. I have heard a desire for certainty and I
17 don't think a policy provides certainty. I do think that
18 this policy has substance that does provide clarity, which
19 was lacking before. So, you know, I'm just struggling with
20 how we're putting off a decision sort of with this -- I
21 mean, I don't -- I'm grappling with that. If this doesn't
22 work because of the additional clarity, then where are we
23 as opposed -- are we going to have this conversation again
24 a year from now?
25 CHAIRMAN GORDON: John Morris.

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1 MR. MORRIS: Go ahead, Jon Brady.
2 CHAIRMAN GORDON: Brady.
3 MR. BRADY: I want certainty and I would
4 vote against having Appendix H go as a policy. And by
5 focusing upon this rule package as it has come to us,
6 proceed posthaste and come back 10 -- 10 to 30 days, and
7 not later than that, with the revised and clarified rules
8 before the Council.
9 CHAIRMAN GORDON: So you're speaking
10 against?
11 MR. BRADY: I'm against.
12 CHAIRMAN GORDON: Okay. Thank you.
13 Did you want to, Dennis?
14 MR. BOAL: I've been -- you know, this has
15 been an interesting one for us, because -- and you've heard
16 me say it a couple of times -- it's a policy that everybody
17 hates, but nobody wants to -- nobody wants to do the work
18 to make it a rule. And so what I would like to do,
19 Mr. Chairman, is I want to make it a rule, but I recognize
20 that it needs some work.
21 The criticisms about not having appropriate
22 definitions are correct; the observations that it actually
23 refers to itself as a policy is correct; some of the other
24 language that it uses, you know, really isn't appropriate
25 for a policy, so I don't see how we can adopt it as a rule

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1 today. But I believe it's better for everyone if we have a
2 rule that is based on good science, which gives everybody a
3 chance to talk about it in open forum and debate it, and
4 the problem with the policy is those things don't happen.
5 They happen within the confines of DEQ and within the
6 offices of maybe the license holder, the permittee, and
7 other affected landowners find out about it after it's too
8 late.

9 So I -- and then we get the litigation, and, you
10 know, litigation is fun for lawyers. We love it. But I
11 think most people would say that that's not an efficient
12 way for society to deal with problems, particularly
13 problems that can be prevented beforehand with a rule. So
14 I would like a rule.

15 And, you know, one of the things Miss Fox said at
16 the end kind of rang a bell with me, is I don't need -- I
17 don't think we need to deal with the livestock watering
18 part of the policy at this point in time. We're going to
19 do this study, which looks at the appropriate -- which
20 looks at the appropriate levels of those kinds of
21 constituents for livestock. And so, you know, so when
22 somebody says to me don't make that a rule yet because
23 those things may change, that makes sense to me. So what
24 I've been toying with is some sort of motion which remands
25 this to DEQ, with input from the advisory board, to take

1 as a rule. That's how I would have liked to have
2 proceeded. And so I think that means I vote against this
3 motion.

4 CHAIRMAN GORDON: Okay. John.

5 MR. MORRIS: Well, I concur with Mr. Boal.

6 I definitely think it should be a rule. I think everyone
7 should know where they stand. A rule can be changed, too.
8 Policies can be changed much, much easier. It can be
9 changed at a whim or political pressure or whatever, but a
10 rule, when a rule is changed, everyone knows about it. You
11 have to have a hearing, so everyone will know about a rule.

12 It was stated earlier a policy can change, no one
13 will know about it until it affects them. So I think
14 it's -- I think this is one of the reasons that we're here
15 today is because of some policies. So I would like to see
16 this a rule.

17 And that doesn't mean the rule can't be changed.
18 They can be. That's the only way it will ever get to this
19 Council if it is a rule. If it's policies, we'll probably
20 never know about it. So I think for everyone's protection
21 and for the state, good of the state, this should be put
22 into a rule. So I oppose the motion.

23 CHAIRMAN GORDON: Wendy.

24 MS. HUTCHINSON: I'd just like to ask some
25 clarifying things about Dennis's proposal procedurally. So

1 that part of this proposed policy which deals with
2 protection of irrigation and agricultural lands and put it
3 in a rule form, ask that they look at the comments we
4 receive from a lot of folks as to what appropriate
5 definitions should be and add those to the policy and put
6 it in rule form.

7 And then it would be good to have another hearing
8 and it would be nice to actually hear testimony about the
9 science supporting the default rate for SAR and you know,
10 the formulation of the EC value. That would -- that would
11 be -- that would be helpful for me.

12 I just think, as hard as it is for us -- and I
13 know this is as much fun for you guys as it is for me -- I
14 just think we need to go forward through the hard work of
15 hammering out a rule, and if there are some parts of it
16 that are just too amorphous -- that's become a word -- for
17 us to deal with, then let's take them out, but at least we
18 ought to nail down in a rule the default, the default SAR
19 cap and how we're going to develop the default EC value.
20 At the very least we ought to do that. That's my feeling.

21 And the science is out there, which I -- sounds
22 to me like would enable us to do that. So that would have
23 been my preferred approach is to remand it to DEQ, to put
24 the policy in a -- in a rule form, to address the
25 definitions that need to be addressed and then we hear it

1 let's pretend for a second everybody wants to do what
2 Dennis just said, and I'm just wondering how that would
3 work through. So would that mean we have to vote no on the
4 motion -- let me go forward for a second, Rick, and you
5 help me. We would then be voting no on the motion, which
6 means we want to keep it a rule, but then that Dennis would
7 have to propose another motion to remand this part of the
8 rule to DEQ?

9 Go ahead, Rick, if you --

10 MR. MOORE: Mr. Chairman.

11 CHAIRMAN GORDON: Yes.

12 MR. MOORE: Miss Hutchinson, that's exactly
13 correct. Let me state one thing, maybe out there in the
14 open and clear. I made my motion because I want specific
15 guidance from this Council on whether it's a policy or a
16 rule. With that question settled, if my motion fails, then
17 I would request that Mr. Boal make his motion to remove
18 Section H from the rule package today and remand it back to
19 DEQ for rulemaking for the expectation it comes back to us
20 at a time certain.

21 MS. HUTCHINSON: Okay.

22 MR. MOORE: That's my intended approach if
23 my motion fails.

24 MS. HUTCHINSON: I just wanted to make sure
25 it's clear where we're going.

1 MR. MOORE: Key thing is I want it clear on
2 record that this Council makes it clear to DEQ and all the
3 parties whether we're looking at this being a rule or a
4 policy.

5 MS. HUTCHINSON: I'm going to make one more
6 argument in favor of the motion. And that is I do think
7 that there are issues that come up as you go along with
8 working with a new policy, or whatever it is, that it's
9 useful to have it in policy for a certain amount of time,
10 one year perhaps, perhaps two, that the DEQ and the
11 regulated community can work through and say now that we're
12 really actually using it, this is not working or this is
13 working, and in a policy they can make those changes and
14 then ultimately bring us a better rule.

15 So in my mind I would prefer that it stay a
16 policy so that those sort of kinks can get worked out. So
17 that being said, have at it.

18 CHAIRMAN GORDON: Are there any further
19 comments from the Council? Would you like to proceed to
20 vote on the amendment?

21 MR. MOORE: Go for it.

22 CHAIRMAN GORDON: My count showed I'll have
23 to probably vote on this, so I'm just going to go with a
24 roll call. And I'm going to start with --

25 MR. MOORE: Refresh our memory on the yes

1 vote is to make Appendix H a policy and a no vote is to
2 keep it a rule?

3 CHAIRMAN GORDON: That is correct.

4 MR. MOORE: Thank you.

5 CHAIRMAN GORDON: So I'm going to start
6 from the inside out. I'm going to start with Mr. Moore.

7 MR. MOORE: Yes.

8 CHAIRMAN GORDON: Yes.

9 Mr. Brady.

10 MR. BRADY: No.

11 CHAIRMAN GORDON: Mr. Brady no.

12 Ms. Flitner.

13 MS. FLITNER: No.

14 CHAIRMAN GORDON: Ms. Hutchinson.

15 MS. HUTCHINSON: Yes.

16 CHAIRMAN GORDON: Mr. Boal.

17 MR. BOAL: I will vote no.

18 CHAIRMAN GORDON: Mr. Morris.

19 MR. MORRIS: I vote no on the motion.

20 CHAIRMAN GORDON: Okay. Motion fails.

21 MS. HUTCHINSON: Well, you vote anyway.

22 MR. MOORE: He doesn't have to.

23 CHAIRMAN GORDON: For this -- I am torn by
24 this. This -- you know, everyone's comments are quite
25 correct. This is not ready for rule form. I'm amused that

1 what I used to hear about policies being altogether too
2 flexible and nobody having any idea what they meant now
3 seems to be a benefit, but that's just for irony, I guess.

4 I do think it makes sense to have a rule, but
5 this is not -- this is not -- to quote my good friend
6 Keith, not this rule -- or Mr. Isaac (sic), I guess. So I
7 will vote -- I will vote yes.

8 MS. HUTCHINSON: All right.

9 CHAIRMAN GORDON: Okay. Now, I will
10 entertain any other motions. I would particularly
11 entertain a motion that had something to do with the
12 default values.

13 MS. HUTCHINSON: I would like Mr. Boal to
14 make a motion.

15 MR. BOAL: Your Honor, if I may. I would
16 move that Appendix H to Section 20 be remanded to DEQ and
17 that they be requested to place this rule -- or this policy
18 in rule form and that at a minimum the rule deal with the
19 protection of irrigation uses, and at a minimum the rule
20 sets forth some sort of default standard with regard to SAR
21 and EC. There are a number of other things in the rule
22 that I think recommend themselves and should be seriously
23 considered, but at a minimum, that's what I would request
24 the revised rule deal with. And then I would ask that --

25 CHAIRMAN GORDON: You got --

1 MR. BOAL: -- the proposed rule be shared
2 with the advisory board --

3 CHAIRMAN GORDON: Use the microphone.

4 MR. BOAL: -- be shared with the advisory
5 board and we receive their input.

6 And, Your Honor, I was thinking of asking that we
7 set some sort of time line to get at least a status report
8 on the progress on this so that we don't lose track of it.
9 And so I would ask that we get a status report within 90
10 days.

11 MS. FLITNER: We need a second, correct?

12 CHAIRMAN GORDON: Yes, I do.

13 MS. FLITNER: I will second that motion and
14 I will speak my piece now.

15 I am in favor of the motion for -- I think it --
16 it grabs what we want to make clear clear. I was
17 conferring with Dennis to see if a longer time period --
18 you know, at first it was suggested 10 to 30 days or
19 something. I am interested in what Wendy said and agree
20 with trying to bring some flexibility into this so that we
21 can see what's working and have the benefit of that. It's
22 here we go again with splitting up the baby, but, you know,
23 there are -- we heard a lot of testimony in agreement about
24 where people wanted certainty. That's what we heard.

25 And we're struggling to also not throw away the

1 flexibility when it can result in better decisions by the
2 Department that consider the input as people learn more, so
3 I think that should be obvious, but I wanted you to know
4 why I just did what I did.

5 MR. WAGNER: Mr. Chairman, can we speak
6 just --

7 MR. MORRIS: No, I think we better finish.

8 CHAIRMAN GORDON: I think we better finish.

9 MS. HUTCHINSON: So you seconded the motion
10 and we're discussing it now?

11 MR. FLITNER: Yeah. And I already
12 discussed mine.

13 CHAIRMAN GORDON: Okay.

14 MS. HUTCHINSON: I think the only thing I
15 wanted to comment on is the time frame, and I guess I think
16 it would be best if we didn't get a status report until
17 after the next advisory board meeting, which I imagine
18 isn't going to be for another 90 days, so I don't know how
19 you guys --

20 MS. LORENZON: They meet four times a year.

21 MS. HUTCHINSON: Right. They just met last
22 week, so that would be, you know, if they're meeting
23 quarterly.

24 May I ask -- may I ask John Wagner when he
25 imagines the next advisory board meeting's going to be?

1 CHAIRMAN GORDON: Go ahead.

2 MS. HUTCHINSON: John.

3 MR. WAGNER: Mr. Chairman, Miss Hutchinson,
4 that's what -- I did want to speak to that issue. The
5 conversation I was hearing gave me some concern as far as
6 the time frames go.

7 We would have to first of all go through all the
8 comments that have been received so far, glean out of those
9 what changes need to be made to the -- to the document, go
10 to the advisory board, public notice the advisory board,
11 get the decision of the advisory board, consider all the
12 comments that were made to the advisory board, put together
13 the rule, come back to you.

14 The time frames that I heard like 90 days are not
15 realistic. It takes time to go through all those
16 processes. So --

17 MS. HUTCHINSON: But he's only asking for a
18 status report in 90 days.

19 So I guess my question is, Mr. Boal, do you want
20 the status report before or after they've met with the
21 advisory board or does it matter to you, you just want to
22 know what they're doing 90 days from now?

23 MR. BOAL: Both of those things, Wendy.
24 You know, 90 days, I came out of the air with that. We can
25 go 120. I just don't want it -- I just don't want it to

1 get lost. And the status report would be for the purpose
2 of telling us where it's at and why it's not moving or why
3 it is moving and so if it would help, we could kick the
4 status report for another 30 or 60 days, as far as I'm
5 concerned.

6 But I -- we don't need to spend another two years
7 on this. Let's -- and the other thing about it -- you
8 know, how do you eat an elephant? Well, one bite at a
9 time. And it strikes me let's take the livestock watering
10 out of this issue, let's take the wildlife issue out of it
11 right at this point and let's deal with protection of
12 irrigation lands and let's deal with the default.

13 And if we can deal with other things at the same
14 time, so much the better. So we ought to be able to come
15 back with a tight, focused regulation and one that is
16 supported by good science.

17 MS. HUTCHINSON: Mr. Gordon.

18 CHAIRMAN GORDON: Yes.

19 Dennis, I want a point of clarification. Are we
20 maintaining jurisdiction on this as we remand it?

21 MR. BOAL: Yeah.

22 CHAIRMAN GORDON: Okay. Thank you.

23 MS. HUTCHINSON: I guess just to -- I would
24 like the 90 days changed to 120 after we do that
25 procedurally, but --

1 MS. FLITNER: Friendly amendment.

2 MS. HUTCHINSON: Friendly amendment there?

3 MS. FLITNER: Friendly amendment.

4 MS. HUTCHINSON: Okay. And I would also --
5 when we kick it back, this issue on historic discharges
6 needs to be buttoned up tight, too.

7 MR. BOAL: Correct. I agree.

8 MS. HUTCHINSON: I want to make sure that's
9 addressed.

10 CHAIRMAN GORDON: So that's the friendly
11 amendment that's accepted by Boal?

12 MR. BOAL: It is, Your Honor.

13 CHAIRMAN GORDON: Okay.

14 MR. MOORE: Mr. Chairman.

15 CHAIRMAN GORDON: Yes, Mr. Moore.

16 MR. MOORE: I'm not sure if I need to do
17 this by motion, but I'm going to, so be it. I would move
18 that the motion --

19 MR. MORRIS: We've got a motion on --

20 MR. MOORE: I'm going to move to amend the
21 existing motion, that while we're waiting for rulemaking,
22 that policy be amended to reflect DEQ's recommendations for
23 the SAR value -- default value of 10, and that the EC
24 limits be based on the USDA Agricultural Research Service
25 National Salinity Laboratory publication.

1 CHAIRMAN GORDON: Is that taken as a
 2 friendly amendment?
 3 MR. BOAL: No.
 4 MS. HUTCHINSON: We need vote on that.
 5 MR. BOAL: We need to talk about that.
 6 CHAIRMAN GORDON: Is there a second?
 7 MR. MORRIS: I'll second it.
 8 CHAIRMAN GORDON: John has seconded it.
 9 Thank you, John.
 10 MR. MOORE: Mr. Chairman, speaking for my
 11 motion, I'm concerned that I have heard enough testimony,
 12 both in this hearing and other hearings, for me to feel
 13 very strongly that DEQ is correct in their interpretation
 14 that we should be applying 10 as a maximum default limit,
 15 and that we should be using the USDA ARS National Salinity
 16 Laboratory data rather than the Bridger data for default
 17 values, and, therefore, I think if we're going to not deal
 18 with those issues as a rule, we at least, as remand it back
 19 to become a rule, should at the same time say but the
 20 policy should be changed to reflect what we've heard as
 21 what we think is the best science today.
 22 MS. HUTCHINSON: Question.
 23 CHAIRMAN GORDON: Yes.
 24 MS. HUTCHINSON: I have a question, not
 25 asking for a question. I have a question for Mr. Moore,

1 correct as best we know it today.
 2 MS. HUTCHINSON: I'm going to argue against
 3 the motion. I still believe this is a policy and we are
 4 now -- and it is a policy in place. It's a policy that's
 5 gone through the vetting process in the advisory board, the
 6 advisory board recommended the 16, and I don't feel we have
 7 enough basis at this point to contradict decision of the
 8 advisory board who has sat through two years of the stuff.
 9 MR. BOAL: Your Honor.
 10 CHAIRMAN GORDON: Mr. Boal.
 11 MR. BOAL: Rick, I knew -- I knew you were
 12 going to make that motion, and so I've been talking to
 13 Brenda about it --
 14 MR. MOORE: Bridget.
 15 MR. BOAL: Bridget about it.
 16 MS. HILL: I have a sister named Brenda so
 17 I answer to that name.
 18 MR. BOAL: And my concern is, you know,
 19 what is a motion directing DEQ to have a certain policy?
 20 And, you know, I pulled out the definition of rule under
 21 the APA -- actually Bridget did -- and that sounds to me
 22 like a rule. And if it's their policy, it's their policy.
 23 Okay? I think that's how it sits.
 24 I don't think we can be taking formal action and
 25 telling them here's how your policy is going to be, unless

1 and that is clarification, really. So you're asking at
 2 this point -- in the meantime here, as we are going on
 3 these policies in use, and you're recommending to make the
 4 16, 10, and the ES, other study, got that, okay.
 5 My question is when they kick this -- they take
 6 this thing back through and try tightening this up as a
 7 rule, if there is further evidence that that is what
 8 advisory board comes back with and says, no, we still want
 9 it to be 16 -- I mean, have we shut the door on the changes
 10 of those numbers through the rulemaking, and I'm not
 11 comfortable with that if I think we are doing that.
 12 MR. MOORE: It is not my intention to shut
 13 the door to whatever comes out of the rulemaking process.
 14 It's just my interpretation of what I've heard to date is
 15 that those are the appropriate values to apply as a policy
 16 in the interim, and I would hate to have other values
 17 applied because we deferred rulemaking on it today. So
 18 when it comes back as a proposed rule, if after additional
 19 research and study and testimony, either DEQ says we were
 20 wrong, it should be 16 or we were wrong, it should be 5,
 21 that's part of the rulemaking process that we would
 22 consider.
 23 And then once we adopt it as a rule, if we do
 24 adopt it as a rule, then the policy part of it goes away
 25 but until it's a rule, I want to make sure the policy is

1 we're going to make a rule. That's my horse manure feeling
 2 on it. And so I'm going to vote against the motion,
 3 because I think if it's a policy, it's a policy, and we
 4 don't approve policies. We don't approve any part of them.
 5 We don't disapprove any part of them. We have nothing to
 6 do with it. So for that reason, I'm going to vote against
 7 the motion.
 8 I agree with the sentiments that -- some of the
 9 sentiments you said, but that's my concern about it.
 10 CHAIRMAN GORDON: I'm going to ask
 11 for a point of clarification from, I suppose, probably
 12 John Wagner. John Corra might be -- point of clarification
 13 I have really comes down to three points. One is, as I
 14 understood it, you brought the advisory board
 15 recommendations. As I understand it, you're not bound by
 16 advisory board recommendations. They don't vote on your
 17 policies. They don't -- I mean, they don't have binding
 18 votes on your policies. They don't choose the way you
 19 enforce them or deal with any of that. That sits with this
 20 board.
 21 The question I have, you made the recommendation,
 22 if I heard you correctly, that you wanted to have default
 23 values of 10, because you thought those were more
 24 consistent with a wider range of scientific opinion,
 25 recognizing that there was some science that said 16 might

1 be appropriate. Are you writing permits today -- so
2 there's really three points: one is what is the advisory
3 board, what's the purpose hearing this; the second one is
4 how are you enforcing it; and the third one is, as you --
5 as you considered this -- what I'm worried about is the way
6 this is crafted, when it goes back to the advisory board,
7 this will have the force of a recommendation of 16, which
8 may not be your recommendation and may not be the
9 recommendation of this particular -- and yet may still end
10 up in a rule, and as we've seen this other rule packages,
11 you make a mistake, it can take a very long time to remedy
12 those things.

13 MR. WAGNER: Mr. Chairman, I'll have
14 Mr. Corra help me with all your questions, but we felt that
15 the advisory board took a vote and voted 3 to 2 on that
16 particular issue. We felt obligated to provide you with
17 their recommendation, but we also felt obligated to tell
18 you what our professional opinion was, which was different
19 than what the advisory board said. We, today, are writing
20 discharge permits based on our best judgment, not the
21 advisory board's recommendation.

22 Then there was the third question, which escapes
23 me.

24 MR. CORRA: I'm --

25 CHAIRMAN GORDON: Third one was are you

1 bound by the advisory board recommendations?

2 MR. CORRA: You want to take that?

3 MR. WAGNER: Mr. Chairman, the answer to
4 that question is, no, we are not bound by their
5 recommendations; however, historically, we've paid a great
6 amount of attention and take very seriously what the
7 advisory board says. So I don't want to give the
8 impression that we just pro forma go through a process with
9 them and don't pay any attention, because 95 percent of the
10 time we take their advice and we -- that's what we pass on
11 to you.

12 In this particular case we felt pretty strongly
13 that they were incorrect, and that's why we did it the way
14 we did it.

15 MR. CORRA: Mr. Chairman, may I just to add
16 on that? And I agree with everything Mr. Wagner said. I
17 just feel compelled to add to the last thing Mr. Wagner
18 said.

19 We have high honor for the advisory board
20 process, and we always will. It is a key ingredient in the
21 way in which rules and regulations have been developed and
22 it provides the citizens with a maximum amount of exposure
23 to the process. So Mr. Wagner is correct, but that's why
24 we went back five times, and so --

25 CHAIRMAN GORDON: Right.

1 MR. CORRA: Okay. Maybe enough said.
2 That's probably an editorial you didn't need.

3 CHAIRMAN GORDON: Right.

4 MR. CORRA: I would like to ask, though, if
5 I can take the opportunity very, very quick. On the 10
6 versus the 16, my understanding of the motion was that we
7 would go through the rulemaking process with the advisory
8 board, one step with the time limit, get back to you, and I
9 thought I heard the Council tell us that they wanted
10 special emphasis on three things: clarifying historical
11 definitions, clarifying irrigation and clarifying the
12 default.

13 Now, by necessity -- or, excuse me, by virtue of
14 that, I would go back to the advisory board and have a full
15 scientific discussion again on the default. I -- that's
16 not to say I don't agree with Mr. Wagner on the
17 Department's position about what it ought to be, but you've
18 said, hey, this needs to be discussed as a rule and you
19 ought to focus on that as one of the key pieces, we think
20 that's -- we're good.

21 CHAIRMAN GORDON: Thank you.

22 You understand, Council, my concern here is that
23 by virtue of the fact this is in what we are remanding, it
24 has a force larger than the other number, and maybe that is
25 a policy that we don't want to enforce, so --

1 MR. MOORE: Mr. Chairman, in response to
2 Mr. Boal's comment about sounds like rulemaking, I would
3 refer to the section of the Environmental Quality Act that
4 talks about powers and duties of the Environmental Quality
5 Council. And specifically it states the Council shall
6 approve all rules, regulations, standards or orders of the
7 Department before they become final. It seems to me we're
8 talking about a standard, and, therefore, I'm comfortable
9 saying we ought to approve use of default values in this
10 policy as they go forward.

11 CHAIRMAN GORDON: Wendy, do you --

12 MS. HUTCHINSON: Yeah, I guess I still -- I
13 think Dennis summed it up correctly, we -- the Department
14 brings policies before us as a courtesy, because we have
15 asked them to so that we get a fuller picture of the rule
16 and how it's being implemented. And I have some serious
17 difficulty stating, hey, sorry you got a policy out there,
18 change these numbers because we think so. And although I
19 have to honestly say I'm a little bit perplexed if -- I
20 recognize that you respect the advisory board's opinion,
21 which is fantastic, that's what we're trying to do here
22 today, but I find it a little bit bizarre, quite frankly,
23 that you feel so strongly that the advisory board is wrong,
24 that you put their number in the policy anyway. That just
25 seems strange to me, but -- anyway, that's a little bit off

1 point.
 2 But I agree with Dennis. I don't think it's
 3 proper procedure for the Environmental Quality Council at
 4 this point in time to say we order you to change your
 5 policy. I think that's just bad politics.
 6 MR. MOORE: Mr. Chairman, may I ask one
 7 question of Mr. Wagner for clarification?
 8 CHAIRMAN GORDON: Yes.
 9 MR. MOORE: Mr. Wagner, what we have before
 10 us is your draft rule package. I'm assuming that --
 11 correct me if I'm wrong if that's a bad assumption -- that
 12 based on our action today you'll probably go ahead and
 13 publish a policy that you will implement until we come back
 14 with -- to consider rules. Is that a correct assumption?
 15 MR. WAGNER: Mr. Chairman.
 16 Mr. Moore, yes that's correct.
 17 MR. MOORE: When you publish that policy,
 18 will it be in the same format, as we see it as the draft
 19 rule, with the advisory board's default value and a
 20 footnote saying what you think it ought to be, or will you
 21 put your value in there?
 22 MR. WAGNER: Since we're using our default
 23 value, that's probably the way we would -- that we would
 24 put it out is that's the way we're writing permits. We
 25 probably wouldn't want to confuse the issue.

1 consideration.
 2 MR. BOAL: Oh, I wasn't -- I didn't see
 3 this as remanding a specific number back to them. I
 4 thought Mr. Corra put it pretty well, we're going to come
 5 up with an agricultural protection regulation which
 6 clarifies historic uses, clarifies the definition of
 7 irrigated lands and sets a default limit based on good
 8 science, whatever that may be, and I like that approach.
 9 CHAIRMAN GORDON: So this language does
 10 not -- is not part of that motion?
 11 MR. BOAL: No.
 12 CHAIRMAN GORDON: This language -- this is
 13 just --
 14 MR. BOAL: Right.
 15 CHAIRMAN GORDON: -- in the ether.
 16 MR. BOAL: Right.
 17 CHAIRMAN GORDON: We're starting from
 18 scratch?
 19 MR. BOAL: Right, as far as I'm concerned.
 20 But we're not starting from scratch, because we have a full
 21 numbers of years of experience behind us and we already
 22 have a whole huge amount of information, so we're starting
 23 on top of a mountain and we just need to get to the submit.
 24 Shouldn't take two years. It should be, as far as
 25 rulemaking goes, an expeditious process, in my view.

1 MR. MOORE: But you're saying probably, you
 2 don't know yet.
 3 MR. WAGNER: Well, got to -- you hit me a
 4 little cold here, and -- but I -- just off the top of my
 5 head, I think that's probably the way we would go, yes.
 6 MR. MOORE: Thank you.
 7 CHAIRMAN GORDON: Mr. Boal, I have a
 8 question for you. Considering obviously the conundrum we
 9 have with this particular issue, if this policy had come
 10 with 10, would you have changed it to 16, or do you feel
 11 comfortable with the number that the policy is being
 12 implemented today?
 13 MR. BOAL: Tell me what you're thinking. I
 14 mean, this -- just talk to me, Mark, please. Just tell me
 15 and I'll tell you my honest reaction.
 16 CHAIRMAN GORDON: Well, I guess what I'm
 17 saying is do you -- do you have a problem with amending
 18 your motion so that this remanded document goes back with
 19 10 as a default, with the opportunity to say if there's
 20 better science, it can be 50, it can be 70, it can be 5.
 21 MR. BOAL: The problem I have with it is I
 22 don't think -- I don't think we have -- I don't think we
 23 should be approving or disapproving policies, you know.
 24 CHAIRMAN GORDON: I'm not talking policy,
 25 I'm talking about what we're remanding back for

1 That's how I see it. And so I didn't want to prescribe any
 2 number. I wanted it -- everybody to have their chance to
 3 demonstrate that their number is the right one. That's how
 4 I saw it.
 5 CHAIRMAN GORDON: Okay. You understand my
 6 concern?
 7 MR. BOAL: I do.
 8 CHAIRMAN GORDON: Thank you.
 9 John.
 10 MR. MORRIS: I speak in favor of
 11 Mr. Moore's motion. If that's already the policy that
 12 they're working under now, so what difference is it going
 13 to make? So I speak in favor of the motion. I call for
 14 the question.
 15 CHAIRMAN GORDON: No, don't do that. I'll
 16 just go for the question.
 17 MR. MOORE: Call for the vote.
 18 CHAIRMAN GORDON: Yeah, call for the vote.
 19 Okay. John, you vote in favor?
 20 MR. MOORE: Make sure we know what we're
 21 voting on.
 22 MR. MORRIS: I vote in favor --
 23 MS. FLITNER: On Rick's amendment.
 24 CHAIRMAN GORDON: Rick's amendment.
 25 MS. FLITNER: Or motion.

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1 MR. MOORE: Motion to amend.
 2 CHAIRMAN GORDON: Go ahead and read your
 3 motion to amend.
 4 MR. MOORE: No, I'm not going to.
 5 Everybody knows -- we're moving to direct the Department to
 6 amend the policy to 10 and salinity lab values in their
 7 policy.
 8 CHAIRMAN GORDON: Okay. John votes yes.
 9 MR. MORRIS: Yes.
 10 MS. HUTCHINSON: Wendy votes no.
 11 CHAIRMAN GORDON: Wendy votes no.
 12 Jon Brady.
 13 MR. BRADY: Yes.
 14 CHAIRMAN GORDON: Jon votes yes.
 15 Rick.
 16 MR. MOORE: Yes.
 17 CHAIRMAN GORDON: Sara.
 18 MS. FLITNER: No.
 19 CHAIRMAN GORDON: No.
 20 MR. BOAL: I vote no. Also.
 21 CHAIRMAN GORDON: No? Thank you.
 22 I'm going to vote -- geez, considering it's
 23 what's already been being done, I will vote yes.
 24 MR. MOORE: Now we're back to the main
 25 motion.

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1 MS. HUTCHINSON: So are we back to Dennis'
 2 motion now?
 3 CHAIRMAN GORDON: Yes, we are.
 4 MR. MOORE: Yes.
 5 MR. MORRIS: Question.
 6 CHAIRMAN GORDON: I'm going to say that the
 7 vote's been asked for. Is -- are we ready to go to vote?
 8 MR. MOORE: Yes.
 9 CHAIRMAN GORDON: Okay. Dennis.
 10 MR. BOAL: I vote yes.
 11 CHAIRMAN GORDON: Sara.
 12 MS. FLITNER: I vote yes.
 13 CHAIRMAN GORDON: Rick.
 14 MR. MOORE: Yep.
 15 CHAIRMAN GORDON: Jon.
 16 MR. BRADY: Yes.
 17 CHAIRMAN GORDON: Wendy.
 18 MS. HUTCHINSON: Yes.
 19 MR. MORRIS: Yes.
 20 CHAIRMAN GORDON: Unanimous.
 21 MS. HUTCHINSON: Okay. Now we're
 22 discussing Rick's motion to pass the rest of the rules, is
 23 that what we're doing?
 24 MR. MOORE: Yes.
 25 MS. HUTCHINSON: I have some comment on the

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1 rule itself.
 2 CHAIRMAN GORDON: Okay. Wendy, I'll
 3 recognize you.
 4 MS. HUTCHINSON: Thank you.
 5 I guess it's pretty minor. There's a bunch of
 6 typos in the definitions, so I would like that to be fixed,
 7 whatever we got to do procedurally, but just in Chapter --
 8 just in the definitions, there's a bunch of -- sometimes
 9 you got quotes around the whole word, sometimes you got no
 10 quotes, sometimes you got double quotes, so I would just
 11 like that sort of cleaned up and made consistent, because
 12 there's definitely some missing. So if you could just go
 13 through all the definitions and make sure the quotes are
 14 correct. It's just a typographical thing.
 15 MR. CORRA: We can do that.
 16 MS. HUTCHINSON: That's my only --
 17 MR. MOORE: And Mr. Chairman.
 18 CHAIRMAN GORDON: Yes, Mr. Moore.
 19 MR. MOORE: Also like effluent-dependent
 20 water versus effluent-dominated water, the caps should be
 21 the same, as well as the quotes.
 22 MS. HUTCHINSON: Correct, yeah.
 23 MR. MOORE: And on the same type of vein,
 24 as far as typographical or structural comments, I would
 25 appreciate in the table of contents if the appendix

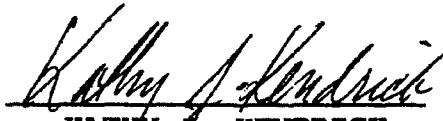
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1 listings include the titles for those appendices.
 2 MS. HUTCHINSON: That would be helpful.
 3 CHAIRMAN GORDON: Any further comments?
 4 MS. HUTCHINSON: I'm looking.
 5 MS. FLITNER: Ready to vote.
 6 CHAIRMAN GORDON: Are we ready to vote?
 7 MS. HUTCHINSON: I have one question. On
 8 page 118, which is Section 20, the added words right now
 9 say the procedures used to implement this section are
 10 described in the, quote, Agricultural Use Protection
 11 Policy. So during this interim period can we still leave
 12 the words the same that say policy, and then when they come
 13 in with a rule change, it would then change to say Appendix
 14 H?
 15 MR. CORRA: Yeah.
 16 MS. HUTCHINSON: Okay. Leave it alone,
 17 then.
 18 MR. CORRA: Mr. Chairman.
 19 CHAIRMAN GORDON: Further comments?
 20 MR. CORRA: Mr. Chairman.
 21 CHAIRMAN GORDON: Yeah, Mr. --
 22 MR. CORRA: May I please -- Bill -- there
 23 is another serious typo.
 24 MS. HUTCHINSON: Okay. Where?
 25 MS. CORRA: Bill, do you want to --

C E R T I F I C A T E

I, KATHY J. KENDRICK, a Registered Professional Reporter, do hereby certify that I reported by machine shorthand the foregoing proceedings contained herein constituting a full, true and correct transcript.

Dated this 9th day of March, 2007.



KATHY J. KENDRICK
Registered Professional Reporter



Devon Energy Production Company, L.P.
20 N. Broadway, Suite 1500
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February 15, 2007

**Mr. Bill DiRienzo
Wyoming Department of Environmental Quality
Water Quality Division
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, Wyoming 82002**

RE: Environmental Quality Council Docket No. 06-3819, Water Quality Rules, Chapter 1

Dear Mr. DiRienzo:

We at Devon Energy Production Company, L.P. (Devon) appreciate the opportunity to comment on the revisions to the DEQ Chapter 1 Water Quality Rules, including the draft Appendix H regarding Agricultural Use Protection ("AUP"). 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, and we hold numerous WYPDES permits for the surface discharge of groundwater produced in association with both our conventional oil and gas and CBNG operations.

We have commented extensively on the AUP as a policy in prior proceedings before the Water and Waste Advisory Board ("WWAB") and incorporate those comments by reference. Devon joins in the comments submitted in this proceeding and to the WWAB by other industry representatives, including the Petroleum Association of Wyoming and its individual members, which urge the Council to not adopt the current AUP as a rule or policy. We would also like to add the following comments regarding AUP.

The DEQ is required, by law, to evaluate all the facts and circumstances bearing upon the reasonableness of the pollution involved including

- (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
- (B) The social and economic value of the source of pollution;
- (C) The priority of location in the area involved;
- (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
- (E) The effect upon the environment.

February 15, 2007

Devon Energy Production Company, L.P.

Re: EQC Docket No. 06-3819, Water Quality Rules, Chapter 1

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Unfortunately, in crafting the AUP, DEQ's purpose has been to establish the most conservative method of ensuring there is no risk to small areas of land along the stream channel. To do this, they propose to impose effluent limits based upon studies developed in much warmer climates with vastly better growing conditions. Yet, water discharges that utilize the state's easement to flow water in the watercourse are not proven to adversely effect agricultural production. In fact, livestock quality water in the watercourse provides a significant benefit to agricultural production all over the state. This has been proven by the overwhelming testimony given in EQC Docket No. 05-3102, the Powder River Basin Resource Council Rulemaking Petition.

Devon requests the Council take judicial notice of the landowner testimony presented in that matter. There are many ways in which water from oil and gas production is used and the testimony has demonstrated that water is extremely important to those operations. Attached are charts comparing produced water volumes and salinity in CBNG discharges in the Powder River Basin and conventional discharges in the Big Horn Basin. As you can see, significantly more produced water is discharged in the Big Horn Basin, and it is higher in salinity. There is no evidence to support the contention that too much CBNG water is discharged in the PRB or that it is harmful to agriculture uses. In fact, the evidence in the record of the AUP and in the PRBRC rulemaking clearly shows that produced water is an asset to agriculture operations and provides a benefit to the environment.

We appreciate the opportunity to provide written and oral comments on the AUP and we ask the Council not to approve it. However, we ask the Administrator and the Board to approve the revised Chapter 1 Water Quality Rules without the proposed Appendix H and forward them to the Council for consideration.

Sincerely,

Randall W. Maxey
Senior Regulatory Specialist



Devon Energy Production Company, L.P.
20 N. Broadway, Suite 1500
Oklahoma City, OK 73102

Sent via Facsimile (307) 777-6134

FILED

JAN 29 2007

January 29, 2007

**Ms. Sara Flitner
Hearing Officer, Environmental Quality Council
122 West 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, Wyoming 82002**

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

RE: Docket No. 05-3102: Rulemaking, Chapter 2 Appendix H

Dear Ms. Flitner:

Devon Energy Production Company, L.P. ("Devon") appreciates the opportunity to comment on the amendments proposed to the Department of Environmental Quality ("DEQ") Water Quality Rules, Chapter 2, Appendix H. 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.

Devon is a participant in the INDUSTRY RESPONDENTS COMMENTS TO PETITIONERS' PROPOSED APPENDICES "H" AND "I" AS PUBLIC NOTICED FOR THE JANUARY 17-18, 2007 RULEMAKING HEARING and the INDUSTRY RESPONDENTS' SUPPLEMENTAL COMMENTS TO RECORD JANUARY 17-18, 2007 RULEMAKING HEARING filed by a group of interested Wyoming oil and gas producers. Devon is also a member of the Petroleum Association of Wyoming ("PAW"). By these comments, we join in the comments and presentations submitted by both groups and wholly incorporate them here, as well as Devon's previous comments in this matter. In addition, Devon asks the Council to consider the following comments and requests that they be made a part of the record in this matter.

I. The proposed rules, as written, ban all discharges

Despite the Petitioners' claims to the contrary, the current version of the proposed rules prohibit CBNG water discharges. This is because the rules prevent DEQ from issuing any permits for the discharge of water from CBNG production unless an applicant can prove that the discharge does not meet the statutory definition of "pollution," which has been inserted in the proposed rules at Appendix I, Section (a)(iii). However, DEQ and the Petitioners contend that water discharges do meet the definition of pollution in all circumstances except where the water is distilled. Consequently, the rules require CBNG producers to prove a regulatory impossibility.

In fact, if the water being discharged was distilled to the point of purity -- containing no chemical or chemical compound -- a discharge permit would not be necessary. Under Wyoming's Environmental Quality Act ("EQA"), if produced water could meet the standards set out in Appendix I, Section (a)(iii),

January 29, 2007

Devon Energy Production Company, L.P.

Re: Docket No. 05-3102: Rulemaking, Chapter 2 Appendix H

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CBNG producers could arguably discharge as much water as the waters of the state could carry *without* a permit. This is because the EQA does not prohibits the discharge of *pollution* without a permit, not the discharge of pure water. WYO. STAT. § 35-11-301.

We realize that the EQC has heard hours of testimony and read hundreds of comments from individuals, including landowners and oil and gas company employees, consultants, and attorneys, who are concerned about the devastating impact these rules would have. We also recognize that some members of the council have stated that it is not their intent to shut down the industry. However, DEQ, the agency who would be charged with administering this rule, believes that the language must be read to prohibit all discharges. The Petitioners have provided nothing to alleviate the fears of those who testified at the hearing and submitted written comments.

II. The credible data standard is not appropriate

The EQA specifically defines the term “credible data” to be “scientifically valid chemical, physical and biological monitoring data collected under an accepted sampling and analysis plan, including quality control, quality assurance procedures and available historical data.” WYO. STAT. § 35-11-103(c)(xix). The only place where the EQA provides that credible data must be used is in WYO. STAT. § 35-11-302(b). This statute specifically recognizes that obtaining “credible data” in ephemeral or intermittent watercourses is difficult, if not impossible.

The administrator, after receiving public comment and after consultation with the advisory board, shall recommend to the director rules, regulations and standards to promote the purposes of this act. The rules, regulations and standards shall prescribe:

(i) **A schedule for the use of credible data in designating uses of surface water** consistent with the requirements of the Federal Water Pollution Control Act (33 U.S.C. sections 1251 through 1387). **The use of credible data shall include consideration of soils, geology, hydrology, geomorphology, climate, stream succession and human influence on the environment. The exception to the use of credible data may be in instances of ephemeral or intermittent water bodies where chemical or biological sampling is not practical or feasible;**

(ii) The use of credible data in determining water body's attainment of designated uses. **The exception to the use of credible data may be in instances where numeric standards are exceeded, or in ephemeral or intermittent water bodies where chemical or biological sampling is not practical or feasible.**

The “credible data” standard does not apply in any other context than in stream classification, as DEQ representatives testified on January 18, 2007. Several EQC members also expressed concern. Even Petitioners acknowledge that a full set of data may not be possible, saying “granted they don’t have to use a complete set of data. But not using a complete set of data doesn’t mean using no data.” Unedited Realtime Rough Draft Transcript, EQC Hearing, January 18, 2007. Yet, the petitioners use a term

January 29, 2007

Devon Energy Production Company, L.P.

Re: Docket No. 05-3102: Rulemaking, Chapter 2 Appendix H

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which again takes the extreme, requiring the a full set of data necessary for *stream classification*, rather than defining the partial set of data that they may be demanding.¹

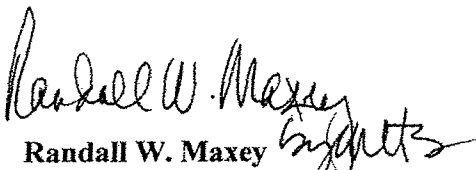
Furthermore, not only does this new "credible data" standard apply to determining the amorphous "unacceptable" impacts to water quality, it also requires proof of the water's use in agriculture or wildlife propagation. Here, the petitioners also claim that the rule does not really mean what it says, but that they are just looking for a landowner to say they are using the water. Such a statement, however, does not meet the definition of "credible data." Rather, to meet the "credible data" standard would require a significant intrusion into the privacy of landowners who use the water. We do not believe our landowners would want to disclose the location and quantity of wildlife that are using the water from the streams and reservoirs located on their property.

CONCLUSION

In conclusion, Devon urges the Council to summarily reject the rules proposed by the Petitioners. The rules propose to ban all CBNG water discharges in the state, which is certainly not the appropriate response to the complaints of the Petitioners. Despite the Petitioners latest claims that this is not their intent, they have failed identify language that would actually address their issues without harming the thousands of individuals who benefit from the water discharges and natural gas production. As was stated in testimony at the January 17 and 18 hearing: the Petitioners have a remedy if they or their property have been damaged. However, those that would be hurt by this rule do not have a remedy for the loss of benefits they will experience if this rule is enacted.

Thank you for the opportunity to submit our comments. Please do not hesitate to contact me should you have questions or require additional information.

Sincerely,


Randall W. Maxey
Senior Regulatory Specialist

¹ In addition, this comment implies that DEQ makes permitting decisions without any data, which is simply not true.



Devon Energy Production Company, L.P.
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Delivered Via Facsimile: (307) 777-5973

September 13, 2006

**Mr. Bill DiRienzo
Wyoming Department of Environmental Quality
Water Quality Division
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, Wyoming 82002**

RE: Supplemental Comments, Draft Agricultural Use Policy (Chapter 1, Section 20)

Dear Mr. DiRienzo:

Devon Energy Production Company, L.P. (Devon) submitted written comments on August 23, 2006, a copy of which is attached, regarding the draft Agricultural Use Protection Policy (Section 20 Policy). At the subsequent public meeting in Worland, the Department of Environmental Quality (Department) further explained the Section 20 Policy and how it will be implemented. The Department's statements at that meeting raised new questions and concerns that we feel merit supplemental comments.

The Section 20 standards are intended to protect agricultural uses—stock watering and irrigation—of the stream channel that receives discharges of ground water produced in association with oil and gas operations (produced water). The livestock and irrigated crops produced in agricultural operations are similar across the state, and the constituents in produced water that are regulated to protect stock watering and irrigation are the same. Produced water has been used successfully for stock watering and irrigation for decades in Wyoming, and is a valuable asset to the agricultural community.

At the meeting in Worland, the Department said the proposed Section 20 Policy is driven by coalbed natural gas (CBNG) development in the Powder River Basin (PRB), due to concerns that too much produced water is being discharged and it is generally of poor quality. According to the Wyoming Oil and Gas Conservation Commission (WOGCC) records, significantly more produced water is discharged to the surface in the Big Horn Basin (BHB) than in the PRB and it is of poorer quality. In 2005 alone, approximately 150 million barrels more produced water was discharged in the BHB than from CBNG operations in the PRB. Also, the WOGCC data shows that produced water in the BHB generally contains significantly higher levels of total dissolved solids (TDS) and sodium than water from CBNG operations in the PRB. There is no factual basis for the notion that too much produced water is discharged in the PRB, or that its quality is unsuitable for agricultural use. In fact, significantly more produced water of lesser quality has been discharged for decades in the BHB, where it has provided economic benefits to agricultural operations and the state's economy, as well as environmental benefits

to wildlife. Similar environmental and economic benefits are achieved through the surface discharge of produced water from CBNG operations in the PRB.

The Department said it will implement the Chapter 1 rules and the Section 20 Policy differently for produced water in the BHB than in the PRB, by characterizing BHB discharges as “existing” and PRB discharges as “new”. The Department stated that an “existing” discharge is one to an ephemeral drainage for which one or more WYPDES permits were previously issued, and that the effluent limits in those permits will be used to establish the baseline water quality for the drainage. We agree that these drainages are properly characterized as “effluent dependent”, and that the effluent limits of prior permits should establish the baseline water quality. Also, we agree it is proper to use the “net environmental benefit” approach in regulating produced water discharges to these drainages.

However, we do not agree that, under the Chapter 1 rules or the Section 20 standard, there is any scientific basis for regulating produced water discharges in the PRB differently from those in the BHB, or for characterizing them as “new”. In most of the ephemeral drainages in the PRB where Devon operates, WYPDES permits were previously issued and many have been renewed. Also, the Section 20 Policy does not define “existing” or “new” discharges. For example, it does not specify whether “existing” discharges will include adding a new well or production zone to a WYPDES permit, or allow any deviation from historic averages of produced water quality and quantity. We do not believe the Department has authority to characterize existing produced water discharges differently in the BHB than in the PRB. We believe these flaws in the Section 20 Policy will prevent future development of oil and gas produced water resources even in areas where there are existing discharges and uses.

The Department said that, if a landowner does not want produced water to flow in the channel through his property then, as a matter of private property rights, the Department must accommodate the individual’s wishes. We do not believe the Department has the authority to intervene in or resolve property right conflicts, nor does it have the authority to base its regulatory policies or decisions on the wishes of individual property owners. When produced water is discharged under a WYPDES permit, it becomes water of the state and can flow in the state’s easement down ephemeral channels and other watercourses. If the Department accommodates an individual landowner’s demand by preventing the flow of the state’s water in the channel, it denies downstream landowners the right to appropriate and use the water and interferes with the state’s easement.

It was suggested that, where Use Attainability Analyses (UAAs) have been issued, the Section 20 Policy will not apply or prevent the flow of existing discharges. It is our understanding that most UAAs apply to aquatic standards that are intended to protect aquatic uses of the receiving waters. However, we do not believe they establish an exception to the Section 20 standard to protect *agricultural* uses. Thus, the Section 20 standard, and the Section 20 Policy, if adopted, will apply to drainages where there is an existing UAA.

We believe the Department lacks statutory authority to protect stock watering and irrigation uses by applying different water quality standards and regulations across the state (BHB vs. PRB, and/or existing vs. new discharges), and the proposed Section 20 Policy is arbitrary and capricious. The Clean Water Act and the NPDES program expressly acknowledge the beneficial value of produced water

Mr. Bill DiRienzo
September 13, 2006
Page 3 of 3

discharges in states like Wyoming. Produced water is vital to the existence of wildlife and agriculture in Wyoming, and the Department should not deny this source of good water—and at time, the only water—to many landowners in an effort to accommodate the wishes of a few. The Section 20 Policy would injure water rights and interfere with the state's right to flow waters down watercourses.

We appreciate the opportunity to provide written and oral comments on the Section 20 Policy, and we ask the Administrator and Board not to approve it or forward it to the Environmental Quality Council for further action. However, we ask the Administrator and the Board to approve the revised Chapter 1 Water Quality Rules and forward them to the Council for consideration.

Sincerely,

Randall W. Maxey
Senior Regulatory Specialist



Devon Energy Production Company, L.P.
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Oklahoma City, OK 73102

Delivered Via Facsimile: (307) 684-1122

August 22, 2006

Mr. Bill DiRienzo
Wyoming Department of Environmental Quality
Water Quality Division
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122 West 25th Street
Cheyenne, Wyoming 82002

RE: Comments, Draft Agricultural Use Policy (Chapter 1, Section 20)

Dear Mr. DiRienzo:

We at Devon Energy Production Company, L.P. (Devon) appreciate the opportunity to comment on the draft Agricultural Use Protection Policy (Section 20 Policy). 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, and we hold numerous WYPDES permits for the surface discharge of groundwater produced in association with both our conventional oil and gas and CBNG operations.

We believe the Clean Water Act and the NPDES program acknowledge the beneficial value of the surface discharge of groundwater produced in association with oil and gas in high plain, semi-arid states like Wyoming. The source and supply of surface water are extremely scarce, and in many areas of the state produced water is vital to wildlife and livestock. We agree with the agricultural producers from across the state who testified to the Waste and Water Advisory Board ("Board") that the value of produced water flowing in the channel for livestock and wildlife far outweighs any potential negative impact to "naturally irrigated lands" along ephemeral channels.

We believe the identification of "naturally irrigated lands" on infra-red aerial photography, surficial geologic maps, and wetland mapping will prevail over a landowner's statement that the land doesn't have "enhanced productivity of agriculturally significant plants". Even if DEQ and the landowner agree when the permit is issued that the land doesn't have enhanced productivity of agriculturally significant plants, third parties may appeal the permit on the grounds that a map identified "naturally irrigated lands" and that identification cannot be negated by agricultural practices or landowner opinion. In other words, we believe the default for identifying "naturally irrigated lands" will become a landowner's claim that there are "enhanced productivity of agriculturally significant plans" or, in the absence of a landowner's claim, maps that don't identify whether the plants have any agricultural significance. The practical effect of the draft Section 20 policy is to allow individual riparian landowners, and special interest groups whose goal is to block mineral development, to prohibit the flow of surface water suitable for wildlife and livestock down ephemeral drainages. We believe the draft Section 20 policy

will have far-reaching adverse impacts to wildlife, wildlife habitat, agriculture, the environment, and the oil and gas industry.

We do not believe the Department has the authority to regulate existing discharges differently from new discharges (i.e. "grandfathering"), nor can it regulate discharges in one area of the state differently from others (e.g. Big Horn Basin vs. Powder River Basin). Likewise, we do not believe the Department has the authority to apply Section 20 to regulate water produced in association with CBNG differently from conventional oil and gas. We do not think such regulatory schemes will survive legal challenges on environmental grounds, since the Section 20 policy is intended to protect a class of use (agricultural) statewide. Also, if the Department applies Section 20 differently to discharges from conventional production versus CBNG, or applies it differently in WYPDES permits issued in the Big Horn Basin versus the Powder River Basin, then oil and gas operators may challenge it on the grounds of equal protection.

We do not believe "naturally irrigated lands" produce 'crops', and therefore they are beyond the scope of the Section 20 standard as well as the Environmental Quality Act. Crop production requires irrigation under an appropriated water right issued by the State Engineer's office or, at the very least, an irrigation structure or mechanism that pre-existed oil and gas development and is currently capable of diverting water from the channel.

"Naturally irrigated lands" are inadvertent, naturally occurring stretches along ephemeral channels that may appear and disappear from season to season and over time. Depending on precipitation, erosion, water table level, and landowner activity (including grazing practices), these stretches may in fact produce noxious weeds and other undesirable plant species—and yet a landowner may claim the forage is significant to his agricultural operation, and a map cannot distinguish between plant types or predict their significance to agriculture. One significant problem with the policy is that it doesn't quantify "enhanced productivity" or define "agriculturally significant plants". We do not believe the Department has the authority to decide which plants are "agriculturally significant", nor is it appropriate for the Department to abdicate that decision to interested landowners or third parties. The highest quality livestock feed is more likely to be found on higher ground than in ephemeral stream channels, and the concentration of cattle in riparian zones is due to the proximity to water rather than the high quality of forage (Holechek et al., 2001). Thus, changes in vegetation species resulting from an increase in the frequency and quantity of stream flow is more than offset by the benefits of increased livestock production (sale weights) and crop production (reduction in overgrazing due to dispersion of livestock and wildlife).

We believe the draft Section 20 policy is a statewide permit system that will be implemented through the issuance of all new, modified, and renewal WYPDES permits for water produced in association with conventional oil and gas and CBNG operations. The Water Quality Administrator and the Board are required by law to evaluate and consider the reasonableness of the policy, as well as all of its intended and unintended consequences. *At a minimum*, they must identify, evaluate, and consider the criteria listed in W.S. § 35-11-302(a)(vi):

In recommending any standards, rules, regulations, or *permits*, the administrator and advisory board shall consider all the facts and circumstances bearing upon the *reasonableness* of the pollution involved including:

- (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
- (B) The social and economic value of the source of pollution;
- (C) The priority of location in the area involved;
- (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
- (E) The effect upon the environment.

[Emphasis added].

Neither the Administrator nor the Board have presented any evidence that they have identified, evaluated, and considered these balancing criteria. We believe there is ample evidence that the surface discharge of produced water suitable for wildlife and livestock into ephemeral channels will result in an environmental gain. In other words, the benefits from providing water for livestock and wildlife far outweigh any potential negative impacts to forage in or along the channel. Clearly, the use of produced water is critical to the economic viability of numerous ranching operations across the state. Furthermore, the draft Section 20 policy will injure mineral owners (including the State), local economies, and the oil and gas industry.

We believe the numeric default value based on a 100% yield of crops in the draft policy contradicts the narrative standard in Section 20. Agricultural producers recognize that land in Wyoming does not produce a 100% yield, which is why agricultural land sales and leases are based on animal unit carrying capacity. The use of a numeric default value based on a 100% yield of crops is unreasonable, technically impracticable, and represents a complete departure from the site-specific narrative standard in Section 20.

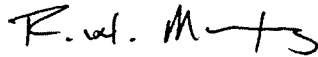
The draft Section 20 policy will injure water rights and interfere with the state's right to flow waters down watercourses. The Constitution provides that the State Engineer and Board of Control have the sole authority to regulate the quantity and flow of water. [Wyo. Const. Art. 1, §31; 8, §1]. Contrary to law and water regulation since statehood, which "equally guard[s] all the various interest involved" and assumes that ephemeral drainages are periodically inundated, the Section 20 policy would subordinate the jurisdiction of the State Engineer, Board of Control, and appropriated water rights to the control and demands of riparian landowners. [Wyo. Const. Art. 1, §31]. The Constitution abolished riparian rights and the law prohibits the Department from limiting or interfering with the jurisdiction, duties, or authority of the State Engineer or the Board of Control. [W.S. §35-11-1104(a)(iii)]. The courts are the proper authority to address claims that a use of water causes property damage or constitutes a nuisance to a property owner. We believe the formal opinion issued by the Attorney General on April 12, 2006, as well as the Attorney General's informal opinion to the Environmental Quality Council dated July 12, 2006, confirm that the Department lacks the authority to recommend, adopt, or implement the draft Section 20 policy.

Mr. Bill DiRienzo
August 22, 2006
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We believe the Department should allow for site-specific, flexible decision-making under the Section 20 standard. The draft Section 20 policy, which has the effect of a statewide permit system, will be integral to the Department's implementation and enforcement of the NPDES program. Therefore, the Administrator and Board must comply with W.S. 35-11-1104(a)(iii), demonstrating the reasonableness of the proposed policy by identifying, evaluating, and balancing all interests and values that may be affected by its adoption and implementation. It is clear that the surface discharge of water produced in association with oil and gas results in a net environmental benefit, and is vital to wildlife, livestock, and other agricultural uses. We believe the draft Section 20 policy will reduce or eliminate the availability of produced water, harming many people, animals, and the environment. Therefore, we ask the Administrator and Board not to approve it.

Devon incorporates by reference the written comments submitted by the Petroleum Association of Wyoming (PAW), as well as those of Kevin C. Harvey, KC Harvey LLC, dated May 4, 2006 regarding the proposed default electrical conductivity and sodium absorption ratio effluent limits.

Sincerely,



Randall W. Maxey
Senior Regulatory Specialist



Devon Energy Production Company, L.P.
20 N. Broadway, Suite 1500
Oklahoma City, OK 73102

Sent via Facsimile (307) 777-6134

June 16, 2006

Ms. Sara Flitner
Hearing Officer, Environmental Quality Council
122 West 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, Wyoming 82002

FILED

JUN 16 2006

Terri A. Lorenzon, Director
Environmental Quality Council

RE: Docket No. 05-3102: Petitioner's First Status Report

Dear Ms. Flitner:

Devon Energy Production Company, L.P. ("Devon") appreciates the opportunity to comment on the PETITIONERS' FIRST STATUS REPORT regarding the Petition to Amend Water Quality Rule, Chapter 2, Appendix H ("STATUS REPORT").

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.

Devon is a participant in the JOINT RESPONSE TO PETITIONERS' FIRST STATUS REPORT filed by a group of interested Wyoming oil and gas producers and a member of the Petroleum Association of Wyoming ("PAW"), which has also submitted comments to the STATUS REPORT. By these comments, we join in the responses submitted by both groups and wholly incorporate them here, as well as Devon's previous comments in this matter. In addition, Devon asks the Council to consider the following comments and requests that they be made a part of the record in this matter.

It is difficult to craft a response to Petitioners' allegations because their assertions have been inconsistent and even contradictory. In their original petition, they proposed water treatment as a method of meeting their demands, yet they also asked that the Department of Environmental Quality Water Quality Division ("DEQ/WQD") be allowed to regulate the quantity of water discharged, even if the water was distilled. In their recent STATUS REPORT, Petitioners now cite low flow conditions as a problem and ask that the DEQ/WQD be allowed to regulate water discharges in a manner so as to prevent virtually *any* effect on the environment. Furthermore, the primary complaint expressed during testimony by the Petitioners at the February 16, 2006 was that they did not want CBNG produced water to flow in the ephemeral and intermittent streams that cross the Petitioners' property.

Taken together, it appears that the Petitioners' main purpose is to prevent any CBNG produced water from being discharged into the ephemeral stream channels that cross their lands. Such a prohibition would, however, render an absurd result. All stream channels throughout the state, the Powder River

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Basin, and across the Petitioners' lands, are water courses and surface waters of the state and the WYPDES system exists entirely to *permit discharges into surface waters of the state*. See generally, Wyoming Water Quality Rules and Regulations ("WQRR") Ch. 2.

A review of the Environmental Quality Act ("EQA") and associated rules confirms that these stream channels are waters of the state. WYO. STAT. § 35-11-101, *et seq.* The EQA defines "waters of the state" to mean "all surface and groundwater, including waters associated with wetlands, within Wyoming[.]" WYO. STAT. § 35-11-103(c)(vi). WQRR define "Surface waters of the state" to mean "all perennial, *intermittent and ephemeral defined drainages*, lakes, reservoirs, and wetlands which are not man-made retention ponds used for the treatment of municipal, agricultural or industrial waste; and all other bodies of surface water, either public or private which are wholly or partially within the boundaries of the state[.]" WQRR Ch. 1 § 2(b)(xiv) (emphasis added). Therefore, "waters of the state" include the intermittent and ephemeral streams that cross Petitioners' lands. If they were not waters of the state, CBNG producers would not be required to obtain WYPDES permits for their water discharge.

This Council is powerless to grant Petitioners' request. No landowner has the right to prevent water from flowing in a stream channel or other water course that crosses his land. The Wyoming Supreme Court has ruled that the state holds an easement to flow water in stream channels, even if the stream is non-navigable. *Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961). While riparian owners have title to the bed and channel of the river, that title is subject to an easement for a right of way of the state's waters in their natural channel through, over and across those lands. This easement is absolutely necessary for the most efficient use and distribution of the State's waters. To be sure, no person has a right to simply flood a neighbor's lands outside of the stream channel; such action is a nuisance for which a landowner can obtain redress in court. However, a landowner cannot void the State's easement by damaging or destroying the stream channel, be it by the landowner's purposeful flooding of his lands or otherwise.

Waters produced in CBNG production are also waters of the state. Producers obtain a permit for groundwater appropriation from the Wyoming State Engineer's Office ("SEO"), which recognizes the production of the water as a beneficial use. When the unaltered groundwater is discharged into a stream channel under a valid WYPDES permit, it becomes water of the state again, just as does water from irrigation or livestock watering wells when it is discharged into a stream channel. These groundwater discharges are return flows – water that has been beneficially used and then returned to waters of the state. As waters of the state, the supervision and control of CBNG return flows is in the State Engineer and Board of Control, which will further appropriate the water for beneficial use downstream. WYO. CONST. art. 8 § 5. Nothing in the EQA allows the DEQ to limit or interfere with that jurisdiction. WYO. STAT. § 35-11-1104 (a)(iii).

While Petitioners have claimed they are willing to allow others to beneficially use water produced in association with oil and gas, their STATUS REPORT makes it evident that this is simply not true. Petitioners' third set of proposed rules are more restrictive than their predecessors and would result on a complete prohibition on produced water discharges. Furthermore, even if this was not their intent, Petitioners have made it clear that they do not want the natural stream channels that cross their land to be used to convey water to water rights holders downstream.

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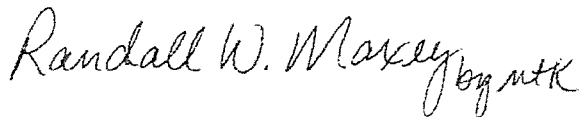
Finally, it is simply illogical to impose differing standards, whether they be quality or quantity, on certain produced water simply because it is produced from a coal seam. Natural gas wells exist in other areas of the state that produce from non-coal formations using methods similar to those employed on the CBNG wells in the Powder River Basin. Furthermore, the quality of water produced in association with CBNG is such that it is used to improve many agricultural and livestock operations throughout the Powder River Basin. In general, oil and gas produced water has been used throughout the state for decades to allow for and sustain ranching operations in places where water was otherwise unavailable or in short supply. Those agricultural producers should not be deprived of these benefits simply because a handful of landowners do not want to allow that water to be conveyed down the stream channels that cross their land.

CONCLUSION

In conclusion, Devon urges the Council to summarily dismiss all three of the Petitioners' requests for rulemaking. The rules proposed in the PETITION, AMENDED PETITION, and STATUS REPORT render the WYPDES program moot and represent an unconstitutional interference with the authority of the State Engineer and Board of Control. More importantly, such rules would prevent efficient use and reuse of Wyoming's water by those who have been able to grow their agricultural operations by utilizing water produced in association with oil and gas. 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 have the possibility of jeopardizing the water uses of hundreds of other citizens in the state.

Thank you for the opportunity to submit our comments. Please do not hesitate to contact me should you have questions or require additional information.

Sincerely,

Handwritten signature of Randall W. Maxey in cursive script, with the initials 'RWM' and 'JK' visible at the end.

Randall W. Maxey
Senior Regulatory Specialist



Devon Energy Production Company, L.P.
20 N. Broadway, Suite 1500
Oklahoma City, OK 73102

Delivered Via Facsimile: (307) 777-5973 and U.S. Mail

May 8, 2006

**Mr. Bill DiRienzo
Wyoming Department of Environmental Quality
Water Quality Division
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, Wyoming 82002**

RE: Comments, Draft Agricultural Use Policy (Chapter 1, Section 20)

Dear Mr. DiRienzo:

We at Devon Energy Production Company, L.P. (Devon) appreciate the opportunity to comment on the fourth draft of the Agricultural Use Protection Policy (Section 20 Policy). 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 hold a number of WYPDES permits for the surface discharge of water produced in association with our production and we will be directly affected by the Section 20 Policy, if implemented.

Devon hereby incorporates and submits by reference those comments submitted by Kevin C. Harvey, M.Sc., CPSSc., of KC Harvey LLC dated May 4, 2006 regarding the provisions of the draft policy that pertain to effluent limits for electrical conductivity (EC) and sodium absorption ration (SAR). We are also a member of the Petroleum Association of Wyoming (PAW) and incorporate and submit by reference the comments submitted by PAW. In addition, we ask the Department of Environmental Quality (DEQ) to consider the following comments.

NATURALLY IRRIGATED BOTTOMLANDS

We disagree with the proposed revisions to the Section 20 Policy that categorize “naturally irrigated bottomlands” among protected agricultural uses. The restrictions on water discharges contemplated for the protection of bottomland forage necessarily involve the regulation of the quantity of water discharged, regardless of quality. However, the DEQ clearly lacks the authority to regulate water quantity.

The legislature intended to limit the authority of DEQ to regulate water quantity by WYO. STAT. § 35-11-1104, which states in part: “nothing in this act...limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control[.]” The regulation of the volume of flows,

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impoundments and diversions is specifically within the jurisdiction of the State Engineer and Board of Control. DEQ's authority is limited to regulating only the quality of the water at the discharge point or at the end of the mixing zone, not the quantity of flow. The proposed policy exceeds the DEQ's authority because it would interfere with the State Engineer's authority under Article 8 of the Wyoming Constitution and Wyoming Statutes.

Section IV of the third draft of the Section 20 Policy appropriately described the DEQ's jurisdiction as being limited to the quality parameters of water discharges. As the DEQ notes in its *Summary of Amendments to the Agricultural Use Policy* (Summary), the removal of this section in the fourth draft was the result of the Environmental Quality Council's (EQC) favorable vote on a petition to allow the DEQ to regulate the volume of water discharges. However, the formal opinion issued by the Attorney General on April 12, 2006 correctly found that the rules proposed in the petition exceed the statutory authority of the EQC and DEQ.

Furthermore, we believe it would be bad public policy to manipulate water quality standards in such a way that would require the preservation of natural flow regimes. Cropland irrigation could probably not occur under such standards since irrigation projects, by their very nature, are built to modify natural flow regimes. This is why the authority to regulate water quantity was omitted from the Wyoming Environmental Quality Act and the Clean Water Act. We also do not believe it is appropriate to characterize the vegetation that occurs in or adjacent to stream channels under natural flow regimes to be "irrigated crops", or the stream channels and naturally irrigated lands to be "irrigated lands" protected under Section 20. There is no history or precedence for doing so and it would be a very small step in logic to go from that point to an argument that there is also a "natural" irrigation right, which there is not. Surface water irrigation water rights all require a point of diversion and are all regulated by the State Engineer. We respectfully request that the DEQ protect legally sanctioned irrigation, i.e. only those irrigation structures permitted for beneficial use by the Wyoming State Engineer's Office. For DEQ's policy to be workable, there must be a current irrigation structure or mechanism in place for diverting water from the stream channel for which a water right was appropriated by the State Engineer.

We also request that the references to Bottomland Forage be revised to recognize that the highest quality livestock forage (high protein content) is more likely to be found on benches and higher ground than in ephemeral stream channels. Cattle concentrate in riparian zones due to the proximity to water rather than the quality of stream channel forage (Holechek et al., 2001). Furthermore, any changes in vegetation species in the channel due to an increase in the frequency and quantity of stream flow is more than offset by the benefits of increased livestock production (sale weights and pregnancy rates) and crop production (dispersion of livestock and wildlife that reduces overgrazing).

RULEMAKING STANDARDS

As written, the draft Section 20 Policy is a major revision to the Wyoming Surface Water Quality Standards contained in Chapter 1 of the DEQ's Water Quality Rules and Regulations, especially where it translates narrative standards into numeric water quality limits. The draft policy constitutes de facto

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“rules” as defined by the Wyoming Administrative Procedures Act (WAPA) because it is an “agency statement of general applicability that implements, interprets and prescribes law, policy...procedures, or practice requirements” of the agency. WYO. STAT. § 16-3-101. As such, the DEQ must follow the procedures for rulemaking specified by the WAPA in WYO. STAT. § 16-3-102 through 105 prior to adopting the draft Section 20 policy.

Furthermore, whenever the DEQ recommends any standards, rules or regulations such as those included in the draft policy, it is obligated by statute to consider all facts and circumstances bearing upon the reasonableness of the rules, including:

- (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
- (B) The social and economic value of the source of pollution;
- (C) The priority of location in the area involved;
- (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
- (E) The effect upon the environment.

WYO. STAT. § 35-11-302(a)(vi). These requirements are in addition to those requirements stated in the WAPA and apply regardless of whether DEQ implements rulemaking procedures.

In this fourth draft of the Section 20 Policy, DEQ has presented no evidence that these important statutory considerations were taken into account. Specifically, the DEQ has not considered the technical practicability or economic reasonableness of protecting “naturally irrigated bottom lands.” Nor has it considered the social and economic impacts of the policy. For example, the DEQ has not considered the social and economic impacts that will result from this governmental “taking” of water to which landowners have valid appropriated water rights. We believe the DEQ should consider all relevant facts and circumstances reasonably bearing on the implementation of Section 20. Such circumstances include the impacts that the draft policy would have on agricultural producers whose operations rely on water produced in association with oil and gas. The negative social and economic consequences that the loss of water would have on these operations are in addition to the adverse economic impacts that oil and gas producers will experience.

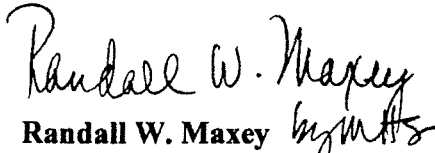
LANDOWNER ACCESS

We support the provision of the draft policy that implements any irrigation protection requirements only where the surface landowners grant access to obtain the soil, water, and other data necessary to determine the appropriate effluent limitations.

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Again, thank you for the opportunity to submit our comments. We also request that the DEQ carefully consider all comments and issue another draft of the proposed Section 20 Policy for public review and comment prior to implementation. If you have any questions regarding our comments, please feel free to contact me.

Sincerely,


Randall W. Maxey
Senior Regulatory Specialist



Devon Energy Production Company, L.P.
20 N. Broadway, Suite 1500
Oklahoma City, OK 73102

February 16, 2006

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).

February 16, 2006

Devon Energy Production Company, L.P.

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

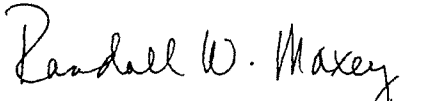
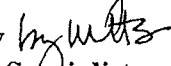
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CONCLUSION

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 
Senior Regulatory Specialist



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March 4, 2005

Mr. John Wagner
Administrator, Water Quality Division
Department of Environmental Quality
122 West 25th Street
Cheyenne, Wyoming 82002

RE: Chapter 1 Proposed Rulemaking

Dear Mr. Wagner:

We at Devon Energy Production Company, L.P. (Devon) appreciate the opportunity to comment on the proposed revisions to the Chapter 1 Rules, Wyoming Surface Water Quality Standards. Devon holds a number of WPDES permits for the surface discharge of groundwater produced in association with our coalbed natural gas production.

- 1) Page 1-4, lines 14 through 20. **Definition of Effluent Dependant Waters and Effluent Dominated Waters.** While we support the addition of definitions for Effluent Dependant and Effluent Dominated waters, we request that additional revisions be made throughout the Chapter 1 rules to insert "effluent dominated waters" in each applicable provision.
- 2) Page 1-6, lines 36 through 42. **Definition of Net Environmental Benefit (NEB).** We believe the discharge of groundwater produced in association with our coalbed natural gas production provides significant benefits for crop and livestock production, as well as wildlife. However, the definition is restricted to loss of a permitted effluent rather than the change in status of a reach. There can be Net Environmental Benefits from adding effluent to a reach, and Devon requests that this concept be incorporated into all references to effluent dominated waters. This would result in changes to the following selections of text at a minimum:
 - a) Page 33, line 44. There is a credible threat to ~~remove~~ *change* the discharge.
 - b) Page 39, lines 8-10. The specific rationale is that effluent dependant waters create environmental benefits that would ~~be lost~~ *not be attained* if the discharge status is ~~discontinued~~.
 - c) Page 39, lines 26 and 27. This part includes a demonstration that there is an environmental benefit associated with the discharge, and a credible threat to ~~remove~~ *change* the discharge.
 - d) Page 40, line 13. There is also a requirement to show a credible threat to ~~remove~~ *change* the discharge *status*.

We support the definition of Net Environmental Benefit, which appropriately incorporates into the Chapter 1 rules risk/benefit analysis and site-specific decision-making.

- 3) Page 1-11, lines 37 through 44. **Class 2D** / Page 1-12, lines 31 through 36 **Class 3D**. We support these revisions to surface water classifications, as we believe they will reduce the loss of habitat for aquatic species. Again, Devon requests that this definition be amended to state that a change in flow status, rather than a demonstration focused on “removing” a flow, is used.
- 4) Page 1-13, lines 11 through 17. **Class 4C**. We believe water in off-channel reservoirs should be classified as waters of the state, and that these revisions are appropriate. It is important to assure that groundwater produced in association with coalbed natural gas can be discharged to off-channel reservoirs. There are a number of streams which recently were designated as 4C at great expense to the companies preparing the designation. We encourage the Department to include language that would allow permits written for 4C criteria to run the full permit term before requiring re-opening and modification.
- 5) Page 1-27, lines 2 through 40. **Section 36. Effluent Dependant Criteria**. We support the change of classification based on the proposed UAA criteria. However, it will be very difficult for laboratories to measure the compounds or elements listed in Appendix B. We believe the proposed rules should be revised to state that DEQ will accept the data and it will not constitute a violation if a laboratory reports a value below its detection limit, or if a value higher than that listed is reported due to technical problems. Also, with regard to the gathering criteria for aquatic life tissue, we don’t believe the Department should interpret or apply the data because there will be an insufficient data set.
- 6) **Chloride Standards for Class 2C waters**. We request that chloride standards not be applied to Class 2C waters. Other states do not apply chloride criteria to similar waters. However, we support elimination of the chloride standards for Class 3 waters.
- 7) **Water Column Sampling**. We request that the term “water column” be defined and/or it be clarified what is required for data collection and interpretation of the data.
- 8) **Section 20, Implementation Policies**. We request that the Chapter 1 rules be revised to expressly require the Department to rely on *existing site-specific* ambient water quality, soil and climate conditions, agricultural practices, and locally adapted strains of agricultural crops. We further request that the Chapter 1 rules be revised to provide that the Department will rely on qualified local agronomists to help establish adequate Section 20 protections under existing site-specific conditions.

We believe the primary factors to be considered under Section 20 are ambient water quality, existing site-specific soil and climate conditions, and existing site-specific agricultural practices for crop and livestock production. Due to natural soil and climate conditions, and well as ambient water quality, agricultural lands in much of Wyoming produce a relatively low yield. Thus, it is unreasonable for the Department to base water quality decisions on the concept of 100% productivity. Under the Implementation Policies for Agricultural Use Protection, the proposed



regulatory goal is “to maintain surface water quality at a level that will continue to support the local agricultural uses that have developed around it.” Even within a small area, “local agricultural practices” vary significantly from one landowner’s operation to the next. While one landowner may have only native pasture grasses, his neighbor may cultivate locally adapted strains of forage species such as alfalfa. Professional agronomists recognize that certain strains of agricultural crops (including alfalfa) are planted and maintained in site-specific crop rotations because they have demonstrated hardiness under site-specific conditions. Also, a strain that can be grown in some areas of Wyoming often is not suitable in others. Some locally adapted strains have very different salinity tolerances (relative to negative effects on 100% productivity under local conditions) compared to species-specific tolerance values for *common strains* studied by the U.S. Department of Agriculture, which are representative of broad regional agricultural practices and usually are not adapted to or appropriate for conditions in Wyoming.

We request that the Use Protection Policy be revised to allow the Department to rely on locally adapted strains of agricultural crops that are grown on a site-specific basis, rather than on published tolerance values (salinity and SAR) for the most sensitive agricultural crop grown.

We believe the use of tolerance values published by federal agencies such as the U.S. Department of Agriculture for common strains of crops grown in broad regional areas ignores actual ambient water quality and existing, site-specific agricultural practices for crop and livestock production. Further, use of these regional tolerance values will result in overly conservative standards for water used for irrigation, denying the benefit of increased supplies of irrigation water to local agricultural producers.

We request that the section on Bottomland Forage be revised to recognize that the highest quality livestock feed (high protein content) is more likely to be found on benches and higher ground than in ephemeral stream channels. If cattle concentrate in riparian zones it is due to the proximity to water rather than the high quality of forage (Holechek et al., 2001). Any changes in vegetation species in the channel due to an increase in the frequency and quantity of stream flow is more than offset by the benefits of increased livestock production (sale weights) and crop production (dispersion of livestock and wildlife that reduces overgrazing).

- 9) Devon requests the following specific changes to the Agricultural Use Policy:
 - a) Page 43, lines 22-29. We recommend that clarification of the analytical techniques associated with the screening of metals be clarified to indicate that these metals would be analyzed in their bioreactive, dissolved form, to reiterate that analyses are being performed to address aquatic life standards.



- b) Page 44, lines 31 and 32. Many ephemeral and intermittent streams do not have flows once a month, and effluent dominated streams may not as well. Development of ambient-based criteria will be difficult enough if the Department does not accept monitoring which does not include at least twelve monthly samples. Devon recommends the phrase be revised as follows:

The background concentration shall be the highest concentration recorded over the course of a one year period where ~~samples have been taken~~ *sampling has been attempted* at least once in each month.

- c) Page 50, line 14. We strongly support the allowance to have the Water Quality Division be able to make site-specific changes in water quality criteria **administratively** on effluent dependent waters. This allowance acknowledges the work the Water Quality Division would have to do to evaluate the demonstration and make recommendations to the Environmental Quality Council (EQC), and would not materially affect the outcome of the implementation of such criteria in front of the EQC. Furthermore, any permits written with the revised water quality criteria would be available for public review in the public notice process. This change, to allow the administrative designation of water quality criteria, would streamline the process for both the agency and dischargers.
- d) Pages 51 through 55. Agricultural Use Protection Policy. We support the institution of supplemental guidelines on Section 20 of Chapter 1, the Agricultural Use Protection Policy. However, the rules fail to acknowledge the relationship between the salinity of water and the sodium adsorption ratio (SAR) and the influence on soils. We strongly recommend that the US Salinity Laboratory's critical publication, USDA "Agricultural Salinity and Drainage" handbook, ed. by Hanson et al., 1999 revision be cited and used to refine applicable agricultural use criteria. We request the following revisions:

Page 51, lines 42 and 43. The determination of what is acceptable water quality for irrigation must necessarily involve an evaluation of local agricultural practices, ~~and~~ background water quality conditions, *and the documented relationship between electrical conductivity and SAR and its impacts on site-specific soils (Hanson et al 1999).*

- e) Pages 51-52, with particular emphasis on page 52. The proposed requirements for determining suitability of a water for livestock watering points out the very real differences in water quality criteria between livestock water and irrigation water. The Department differentiates between the salinity criteria for TDS in Chapter 8 of the groundwater regulations, specifying that 2000 mg/L is suitable for irrigation while 5000 mg/L is suitable for livestock. Irrigation is practiced in only limited areas of Wyoming due to the limited availability of surface water and its elevated salinity. We strongly recommend that the Department differentiate between the two agricultural uses in the use classifications, and then correctly classify that all classes of water should be able to support livestock watering, but that only selected classes of water (Class 2A and Class 2B?) could support irrigation.

- f) Page 52, line 6 and 7. We respectfully request that the Department protect legally sanctioned irrigation, i.e. only those irrigation structures permitted for beneficial use by the Wyoming State Engineer's Office (WSEO). We request the following modification:

For irrigation purposes, there needs to be a current *state permitted* irrigation structure or mechanism in place for diverting water from the stream channel.

- g) Page 53, line 24. Many coalbed natural gas producers utilize channel infiltration as a method of managing their produced water. Water balance calculations project the anticipated infiltration under various storm events within a reservoir as well as within the channel. We recommend that additional clarification be provided in the direction to identify whether effluent from a proposed discharge could reach a pre-existing irrigation diversion by specifying flows from a typical annual storm. We request the following modification:

Will the effluent from a permitted discharge reach a pre-existing irrigation diversion *following a 2-year 24-hour storm*?

- h) Page 54, lines 1 and 5. The availability of irrigation water in the semi-arid Powder River Basin, even in the short-term, can cause some landowners to consider other crops. We believe the Department should consider only the most sensitive **existing** crops when considering agricultural use, and thus suggests the following changes:

Line 1. Published tolerance values for the most sensitive *existing* crop;

Line 5. ...effluent limits for EC and SAR will be based upon the published tolerance values for the most sensitive *existing* crop.

We request that the Department carefully consider comments and issue another draft of the proposed Chapter 1 rules for public review and comment prior to implementation.

Sincerely,

Linda Guthrie
Senior Regulatory Specialist