

**BEFORE THE WYOMING ENVIRONMENTAL QUALITY COUNCIL**

PETITION TO AMEND WYOMING )  
WATER QUALITY RULE, CHAPTER 2, ) 05-3102  
APPENDIX H )

**RESPONSE OF WYOMING OUTDOOR COUNCIL TO  
ATTORNEY GENERAL OPINION NO. 2006-01**

This Response is submitted, pursuant to the Public Notice of the Environmental Quality Council dated May 19, 2006, allowing for public comments relating to the Petitioner's First Status Report. That Report addresses Opinion No. 2006-01 from Patrick J. Crank, Wyoming Attorney General (hereinafter "AG Opinion"). This Response, submitted by the Wyoming Outdoor Council, is intended as a reply to, and additional comments on, the AG Opinion.

The question posed by the Attorney General was: "Whether the Wyoming Environmental Quality Act (EQA) grants authority to regulate water quantity to ensure that all produced water from coalbed methane (CBM) production is at all times actually used for wildlife or livestock watering or other agricultural uses." The Attorney General answered the question as follows: "the EQA allows regulation of the quantity of water if the quantity has an unacceptable effect on the quality of the water."

This Response will argue that the EQA grants authority to the Department of Environmental Quality (DEQ), Water Quality Division (WQD) to regulate the quantity of pollution discharged to waters of the state, including produced water from CBM production wells.

**Background**

Rapidly expanding CBM development threatens to flood Wyoming's historically

arid short-grass steppe with immense quantities of water heavily loaded with salts and ions.<sup>1</sup> On average, each Wyoming well releases 17,000 to 22,000 gallons of byproduct water each day during the initial years of production.<sup>2</sup> In 1997, there were 360 producing wells in Wyoming's Powder River Basin (PRB).<sup>3</sup> The Bureau of Land Management forecasts 51,000 wells in the PRB operating and producing gas and water by 2010.<sup>4</sup> When they are all producing, these 51,000 wells will draw nearly 700 million gallons from aquifers and discharge it each day.<sup>5</sup> BLM estimates the industry could extract a total of up to 7.5 trillion gallons of coalbed water to produce all recoverable CBM in the PRB.<sup>6</sup>

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<sup>1</sup> Sharon Buccino and Steve Jones, *Controlling Water Pollution From Coalbed Methane Drilling: An Analysis of Discharge Permit Requirements*, 4 Wyo. L. 559, 563 (2004).

<sup>2</sup> *Id.* at 561

<sup>3</sup> Gary Bryner, *Coalbed Methane Development in the Intermountain West: Primer, in Coalbed Methane Development in the Intermountain West 1* (Natural Resources Law Center, University of Colorado School of Law CD-ROM, 2002).

<sup>4</sup> Bureau of Land Management, Final Environmental Impact Statement and the Proposed Plan Amendment for the Powder River Basin Oil and Gas Project (Jan. 2003), available at <http://wy.blm.gov/nepa/prb-feis/index.htm> (last reviewed May 18, 2006)

<sup>5</sup> Thomas F. Darin, Waste or Wasted? – Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains: A Comparative Analysis of Approaches to Coalbed Methane Produced Water Quantity Legal Issues in Utah, New Mexico, Colorado, Montana, and Wyoming, 17 J. Envtl. L. & Litig. 281, 320 (2002).

<sup>6</sup> Dustin Bleizeffer, Salty Big George Water Inspires Innovation, Casper Star Trib., Apr. 4, 2004. The Big George coal seam holds about seventy percent of the Powder River Basin's estimated twenty-five trillion cubic feet of recoverable CBM gas. Dustin Bleizeffer, Big George Lives Up to Name, Casper Star Trib., Jan. 31, 2004. Anadarko Petroleum, Yates Petroleum, Devon Energy, and Williams all have highly productive wells in the area. The Wyoming Oil and Gas Conservation Commission estimates that total gas production from the Big George coal seam is 125 million cubic feet per day. Dustin Bleizeffer, Testing Required for Big George Water, Casper Star Trib., Mar. 7, 2004. Because the Big George is thicker and deeper than originally targeted coals in the basin, it also contains more water. A single Big George well can initially produce between seventy-five and 150 gallons per minute, compared with the average well in the eastern portion of the Powder River Basin outside of the Big George zone. *Id.* Some of the first wells drilled into the Big George produced only water for nine months and more. Bleizeffer, Big George Lives Up to Name, *supra*.

The discharge of CBM produced water directly to the surface, streams and rivers, causes damage to native grass meadows, damage to bottomland meadows, flooding, problems moving cattle, foot rot in cattle, damage to bird and fish habitat, damage to alfalfa meadows and killing trees and vegetation. In the words of Ken Peacock, hydrologist for BLM's Buffalo Field Office, "the problem for plants continues even after the CBM (water) is gone, as the gummy soil acts as a barrier to normal rainfall. The high salinity and sodicity of CBM water and the increased flow in streams it causes can degrade aquatic and riparian habitat. High salt content will affect most vegetative communities, even killing many species."<sup>7</sup>

Reducing the quantity of water discharged is a solution to the problems caused by CBM produced water. The EQA provides ample authority for the DEQ to regulate the quantity of the water produced and discharged because it is "pollution" as defined by the EQA, and therefore is expressly under the jurisdiction of the DEQ.

### **Discussion**

*The EQA explicitly provides authority for the DEQ to regulate the quantity of CBM water discharged from CBM operations. CBM produced water constitutes pollution under the EQA and authority is given to the DEQ to reduce the amount of pollution entering the waters of Wyoming.*

"The intent of the Legislature is to be ascertained, if possible, by the language used, viewed in light of the objects and purposes to be accomplished."<sup>8</sup> The Attorney General contends in his opinion that "[a] reading of the EQA shows a legislative intent to require DEQ to regulate water quantity only if it is directly tied to unacceptable water

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<sup>7</sup> Dustin Bleizeffer, *Bad Water Makes Industry Thirst for Fresh Approach*, Casper Star Trib., Apr. 4, 2004.

<sup>8</sup> *Basin Elec. Power Co-op. v. Bowen*, 979 P.2d. 503, 508 (Wyo. 1999)

quality.”<sup>9</sup>

It would be more accurate to say a reading of the EQA demonstrates a legislative intent to allow the regulation of water quantity to achieve the purposes of the EQA -- to prevent, reduce and eliminate pollution. There is no suggestion in the EQA that there is any limitation upon the DEQ’s ability to regulate water pollution in the environmental arena. While W.S. § 35-11-1104 states, “nothing in the act can be construed to limit the jurisdiction of the State Engineer or the Board of Control,” this provision of the EQA cannot be interpreted to limit DEQ’s ability to regulate water quantity. It could be considered a prohibition against limiting -- or at most, interfering with -- the jurisdiction of the State Engineer (SEO) and the Board of Control (BOC) -- which covers water appropriation, water rights, and the administration of those rights. But both the SEO and DEQ, due to their respective duties, can regulate water quantity. Certainly, it is true that the DEQ’s regulation of water quantity must relate to its overall charge of preventing, reducing and eliminating pollution. In the case of the DEQ’s ability to regulate CBM produced water, DEQ can limit (or even completely ban) the amount of the discharge of CBM produced water pollution, in an effort to control the environmental effects of that pollution. This authority is completely consistent with DEQ’s mission to prevent, reduce and eliminate pollution and does not interfere with the jurisdiction of the SEO or BOC.

As the AG Opinion states, the EQA provides:

Whereas pollution of the air, water and land of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; **it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution**; to preserve, and enhance, the air, water and

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<sup>9</sup> AG Opinion p. 2.

reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state[.]

W. S. § 35-11-102 (emphasis in AG opinion)

A reading of the statute shows the authority given to the DEQ to prevent, reduce or eliminate the amount of pollution to preserve the land and water resources of the state. The term “reduce,” when “viewed in light of the objects and purposes to be accomplished,”<sup>10</sup> demonstrates the intention of the legislature when creating this statute to give DEQ the authority to limit the quantity of pollution discharged into the state’s water.

The water produced from CBM development constitutes pollution under the EQA. Consider the definition of pollution:

"Pollution" means contamination or other alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity or odor of the waters or any discharge of any acid or toxic material, chemical or chemical compound, whether it be liquid, gaseous, solid, radioactive or other substance, **including wastes**, into any waters of the state which creates a nuisance or renders any waters harmful, detrimental or injurious to public health, safety or welfare, to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife or aquatic life, or which degrades the water for its intended use, or adversely affects the environment.

W. S. § 35-11—103(c)(i) (emphasis added).

“Waste” when applied to water quality is defined as:

[S]ewage, **industrial waste** and all other liquid, gaseous, solid, radioactive, or other substances which may pollute the waters of the state

Wyo. Stat. § 35-11-103(c)(ii) (emphasis added).

In *Northern Plains Resource Council v. Fidelity Exploration and Dev. Co.*, 325

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<sup>10</sup> *Basin Elec. Power Co-op. v. Bowen*, 979 P.2d at 508.

F.3d. 1155 (9<sup>th</sup> Cir. 2003), a citizens group (Northern Plains Resource Council) brought suit against CBM producer Fidelity Exploration and Dev. Co. (Fidelity). Fidelity discharged water produced from CBM development into the Tongue River. The citizen group brought the suit on behalf of farmers who use water from the Tongue River for irrigation purposes. “Farmers who use water from the Tongue River for irrigation are concerned with the 'saltiness' and high Sodium Adsorption Ratio (SAR) of CBM water because of the potential hazards these characteristics pose to soil structure.”<sup>11</sup>

The key issue in the case was whether the groundwater derived from CBM extraction is a “pollutant” within the meaning of the CWA.<sup>12</sup>

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

CWA 33 U.S.C. § 1362(6) (emphasis added)

The court held the water discharged from CBM development is “waste” under the definition of pollution. “Because CBM water is an unwanted byproduct of the extraction process, CBM falls squarely within the ordinary meaning of industrial waste.”<sup>13</sup>

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<sup>11</sup> *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d. 1155, 1158 (9<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

<sup>12</sup> *Id.* at 1160.

<sup>13</sup> *Id.* at 1161.

Furthermore, the court stated; “because Fidelity’s discharges of CBM water alter the water quality of the Tongue River, those discharges cause “pollution” as defined by the CWA.”<sup>14</sup> “Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a ‘pollutant,’ even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly “undermine the integrity of [the CWA’s] prohibitions.”<sup>15</sup> Similarly in Wyoming, industrial waste is within the definition of "pollution" under the EQA, making it within the DEQ’s authority to regulate. W. S. 35-11-103(c)(i).

The 5<sup>th</sup> Circuit has held a broad interpretation should be given to pollution under the CWA. In *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co*, a lawsuit was brought against an oil company to prevent discharges of produced water from a waste treatment facility into a bay in the absence of a National Pollution Discharge Elimination System (NPDES) permit.<sup>16</sup> The court concluded, “‘produced water,’ (although not specifically mentioned in the definition of pollution), is encompassed in ‘industrial waste.’”<sup>17</sup> This case did not deal directly with CBM produced water; however, it illustrates the tendency of the courts to interpret pollutant broadly when dealing with the CWA.

In, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484, (2nd Cir. 2001), the city used a tunnel to take water from one source

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<sup>14</sup> *Id.* at 1162.

<sup>15</sup> *Id.* (quoting *APHETI v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002)).

<sup>16</sup> *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5<sup>th</sup> Cir. 1996).

<sup>17</sup> *Id.* at 568.

containing pollutants and sediments and transported the water to another body of water that was out of the natural course of flow.<sup>18</sup> The court held, the CWA "... includes a broad and uncompromising policy of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'"<sup>19</sup> Artificially transferring water and pollutants between watersheds as the City has done here might well interfere with that integrity, as Catskill has alleged.<sup>20</sup> Similarly, the transfer of polluted water from the ground to be discharged to the surface, as part of CBM development, comes squarely within the definition of "pollution," under the EQA and "pollutant" under the CWA. It is precisely why both laws were passed. The DEQ, in administering the Wyoming Pollutant Discharge Elimination System (WYPDES) program, has the authority to regulate the CBM produced water because it is pollution. Even if it is argued that it is merely the artificial transfer of water, (ground to surface), the produced CBM water is, nevertheless, industrial waste and as such constitutes pollution under the EQA.

DEQ has the authority to regulate the quantity of discharged water as part of a WYPDES discharge permit. It has done so since the inception of the EQA. Every discharge permit has a "total flow limit" (TF) specified as one of the permit limitations. Flow volume from each well has been one of the primary elements that a permittee must test for and submit records of, on a regular basis, under all WYPDES permits. The application for a CBM water permit requires applicants to fill out information concerning water volume:

For new facilities, provide the expected (estimated) flow volume from

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<sup>18</sup> *Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484. (C.A.2 (N.Y.), 2001) (citing 33 U.S.C. § 1251(a)).

<sup>19</sup> *Id.* at 494.

<sup>20</sup> *Id.*

each well in gallons per day, and provide the rationale behind the flow volume estimate. For existing facilities, provide actual flow data from all wells within the last six months.<sup>21</sup>

The EQA outlines the DEQ's authority to recommend standards, rules, regulations or permits based on quantity calculations.

- 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:
  - i) water quality standards specifying the maximum short-term and long-term concentrations of pollution, the minimum permissible concentrations of dissolved oxygen and other matter, and the permissible temperatures of the waters of the state.
  - ii) Effluent standards and limitations specifying the maximum amounts of concentrations of pollution and wastes which may be discharged into the waters of the state

W. S. § 35-11-302 (emphasis added)

The EPA website provides an explanation of Water Quality Standards:

Water Quality Standards define the goals for a water body by designating its uses, setting criteria to protect those uses, and establishing provisions to protect water quality from pollutants. A water quality standard consists of four basic elements:

- (1) designated uses of the water body (e.g., recreation, water supply, aquatic life, agriculture),
- (2) water quality criteria to protect designated uses (numeric pollutant concentrations and narrative requirements),
- (3) an antidegradation policy to maintain and protect existing uses and

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<sup>21</sup> NPDES Application for Permit to Surface Discharge Produced Water from Coalbed Methane, New Discharges, renewals or major modifications. pg 5. (available at DEQ website [http://deq.state.wy.us/wqd/WYPDES\\_Permitting/WYPDES\\_cbm/downloads/Revised%20OCBM%20application%2012-19-03.pdf](http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_cbm/downloads/Revised%20OCBM%20application%2012-19-03.pdf))

high quality waters, and

(4) general policies addressing implementation issues (e.g., low flows, variances, mixing zones).<sup>22</sup>

"Effluent limitation" means any restriction established by the state or by the Administrator of the EPA on quantities, rates and/or concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into surface waters of the state.<sup>23</sup>

The EQA clearly gives DEQ the authority to regulate the quantity of pollution. The DEQ uses water quality standards that are set nationally by the EPA, but are often incorporated into state standards as well, and calculates effluent limits for discharge permits, based upon those water quality standards. These limits are calculated by determining what the maximum allowable in-stream concentration can be for a particular constituent based upon the stream classification. The EQA allows the DEQ to regulate the quantity of the pollution entering the water to ensure water quality standards are met. DEQ determines what assimilative capacity a body of water has in order to regulate the total quantity of pollution that is allowed into a water body. Assimilative capacity means the increment of water quality in terms of concentration, during the appropriate critical condition(s), that is better than the applicable numeric criterion.<sup>24</sup> Assimilative capacity describes the ability of a water body to absorb (or "assimilate") a particular pollutant without it causing a violation of water quality standards for that water body. Where there is no assimilative capacity because there is not any dilution available to mix with the discharge, or where background concentrations of specific pollutants in the receiving

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<sup>22</sup> EPA website (available at <http://www.epa.gov/ostwater/standards/about/>)

<sup>23</sup> Wyoming DEQ WQD Rules [what chapter?] Chapter 1 § 2(b)(xi).

<sup>24</sup> *Id.* at § 2(b)(iv).

stream are already at or near the water quality standard for the particular receiving stream in question, then acute and chronic criteria would have to be met in the discharge itself<sup>25</sup> since the stream in such cases would have no assimilative capacity. The former case, where no dilution is available, is often seen in situations involving intermittent or ephemeral streams.

Mixing zones are another example where DEQ must, of necessity, wade into the area of regulating water quantity. A mixing zone is a limited area of a surface water body within which a discharged effluent becomes thoroughly mixed into the receiving water body. Where the establishment of a mixing zone is appropriate, the design is based on 3 concepts: 1) the size and configuration of the mixing zone shall not impair the integrity of the water body as a whole; 2) there shall be no lethality to aquatic organisms through the mixing zone, and 3) there shall be no significant health risks to human populations associated with the mixing zone.<sup>26</sup> The calculations needed to make these determinations are all quantity-based. DEQ could not make these calculations unless it knew the volume of flow of the effluent, and the volume of the receiving water body. It needs to know this in order to regulate the amount of pollution DEQ will allow into the body of water.

Thus, it is apparent that the DEQ already performs quantity calculations when dealing with pollution. CBM water meets the definition of pollution, as set out in the EQA, and is under the authority of the DEQ to regulate. Furthermore, courts have held

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<sup>25</sup> Wyoming Department of Environmental Quality: Wyoming Surface Water Quality Standards Implementation Policies for Antidegradation, Mixing Zones, Turbidity Use Attainability Analysis. p. 15 (Available at <http://deq.state.wy.us/wqd/watershed/surfacestandards/Downloads/Standards/11968-doc.pdf>).

<sup>26</sup> *Id.*

CBM produced water is “waste” under the definition of “pollution” under the CWA. CBM water, furthermore, comes under the broad definition of “pollution” set forth in the EQA as well. Certainly DEQ has regarded it as such, and it is that status (of CBM produced water as pollution) that has given DEQ jurisdictional authority to require discharge permits for the discharge of that produced water. The CWA, as a federal law, controls where there are any conflicts between it and state law. States wanting to assume primacy over the administration certain portions of the CWA, such as the discharge permit program, must establish a program, based upon state law, which is at least as stringent as the federal program. The standards that are set forth by the CWA do not allow for restrictions in state programs that are less than what is required under the CWA.<sup>27</sup> Wyoming statutes explicitly provide DEQ the authority to regulate the quantity of water discharged from CBM development to reduce pollution in Wyoming’s waters, and this authority is clearly necessary for the DEQ to administer the WYPDES program.

***DEQ’s authority to regulate the quantity of water pollution is proper because it does not intrude upon other agency jurisdiction or conflict with existing statutes.***

Agencies involved with CBM permitting and development includes the DEQ, the Wyoming Oil and Gas Conservation Commission, the State Engineer and the Board of Control. In addition, the Game and Fish Department plays a role in recommending measures to mitigate the impact of oil and gas development on wildlife. Additionally, the Bureau of Land Management oversees the development of federally owned minerals.<sup>28</sup>

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<sup>27</sup> 33 U.S.C. § 1342(a)(1). *See also* 33 U.S.C. 1370.

<sup>28</sup> *Water Production from Coalbed Methane Development in Wyoming: A Summary of Quantity, Quality and Management Options*, University of Wyoming Ruckelshaus

The SEO administers the appropriation of water resources of the state through a permit system. The permit application requires that the proposed beneficial use of the water be identified.<sup>29</sup>

With regard to surface water, the SEO administers water rights that are held by individuals, or corporations or municipalities, or state agencies. The precise volume of water that a water rights holder can use is carefully monitored by the SEO, based upon the holder's appropriated right to use the water.<sup>30</sup>

Use of groundwater is less regulated. Prior to drilling a water well for the purpose of extracting methane gas from coalbeds, a groundwater (well) permit, using form U.W. 5 must be obtained from the State Engineer.<sup>31</sup> The volume of water to be withdrawn is generally not restricted as part of such a permit issuance.

A Revised Interim Policy Memo dated April 26, 2004; from the state engineer to the state engineer's office outlines how the office handles CBM water permits.<sup>32</sup> The beneficial use of this water, as stated on the application form, is water produced in the production of coalbed methane gas.<sup>33</sup> Unless specified in the well permit, "there is no other beneficial use of this produced water authorized by the issuance of the well permit."<sup>34</sup> Unless specified in the groundwater permit, "water produced in the production of coalbed methane gas has no other implied use and is considered to be un-appropriated

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Institute of Environment and Natural Resources, December, 2005, p. 33. [Hereinafter "IENR Report."]

<sup>29</sup> Wyo. Stat. §41-3-101.

<sup>30</sup> Wyo. Stat. § 41-3-101.

<sup>31</sup> Memo to the State Engineers Office from Patrick Tyrrell, p. 1 (available at <http://seo.state.wy.us/cbm.aspx> under the link CBM Surface Water Policy) (hereinafter Tyrrell) (attached)

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

waters of the state of Wyoming."<sup>35</sup> Furthermore, "[i]f the CBM-produced water will be discharged and not used for any other beneficial purposes, no further groundwater permitting is required.

A permit is required from the SEO if a reservoir is built to store unappropriated CBM water for beneficial purposes.<sup>36</sup> The state engineer classifies beneficial use of CBM water into two categories: 1) Inactive use of the CBM-produced water due to evaporation and/or infiltration, and, 2) Active use of CBM-produced water by discharging from the reservoir such as land application or in a leach field.<sup>37</sup>

"For use of CBM-produced water under category (2) the operator must specify the points of land application on the map which accompanies the reservoir application. This is accomplished by the use of X's in the appropriate 40 acre subdivisions where water will be applied. The pipeline/nozzle system should be shown in sufficient detail so it is clear where the water will be applied. No water right will be established at the points of land application of CBM-produced water."<sup>38</sup>

The memo continues to emphasize the point that the agency (the SEO) does not create any water rights for the water produced from CBM. The limitations established with regard to reservoir permits illustrate this.

"Nothing herein is intended to create a water right that attaches to the land application or leach field points of use. The points of land application/leach field are shown for informational purposes only."<sup>39</sup>

"For most of the year, this drainage has flow as a result of CBM wells discharging in the area. Therefore, if there is not natural flow available, this water is not subject to a downstream priority call for regulation and, as such, the reservoir is not subject to the

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<sup>35</sup> *Id.*

<sup>36</sup> Wyo. Stat. § 41-3-301

<sup>37</sup> *Tyrell* at 4-5.

<sup>38</sup> *Id.* at 5 (emphasis added).

<sup>39</sup> *Id.*

one-fill rule.”<sup>40</sup>

Thus, the SEO has taken great pains to make it abundantly clear that the "use" of CBM produced water, at the surface, does not and will not be construed to establish a water right of any kind in either the discharger of the produced water or in any potential downstream user.

The EQA illustrates the limitation on the scope of provisions for the DEQ in the act:

Nothing in this act limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control, the director of the Wyoming game and fish department, the state mine inspector, the oil and gas supervisor or the oil and gas conservation commission, or the occupational health and safety commission.

Wyo. Stat. § 35-11-1104.

This is the only limitation that is placed on the jurisdiction of the DEQ. There is no language that limits the authority of the DEQ with regard to water quantity. The authority of the DEQ to regulate the quantity of discharge from CBM development does not interfere with the jurisdiction of the state engineer. The state engineer’s interim memo (supra) established that once the water is used for its “beneficial use,” (to bring the gas to the surface) no rights attach to the water and it is to remain un-appropriated. The discharger has no water right that it is entitled to use. The decision to allow the withdrawal of groundwater in connection with the production of CBM gas does not affect water rights in any way, and the SEO is very careful to make that clear when it issues these groundwater withdrawal permits. The state engineer does not appropriate the water or require more permitting when the water reaches the surface unless the water is stored in a reservoir. However, the state engineer has placed limitations on the use of the water by limiting the control of the water to merely storage. No water rights are created if CBM water is used for other purposes such as irrigation or land application. Further, the

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<sup>40</sup> *Id.*

state engineer requires the water to remain distinguished from the natural and free flowing water of the state and does not allow CBM water to be used to fill downstream appropriations.

The authority that the SEO has exercised over CBM water is to grant permits for the alleged beneficial use of using the water to "free up" or release the CBM gas to the surface and for the beneficial use of the storage of the CBM water.

### **Conclusion**

The DEQ has the authority to regulate the quantity of water that might be discharged as part of the discharge of any WYPDES discharge permit. It has done so since the inception of the EQA. Every discharge permit has a "total daily maximum flow" as one of the permit limitations. CBM produced water is an industrial waste, which is under the definition of pollution in the EQA concerning water quality.<sup>41</sup> Furthermore, courts dealing with the CWA have consistently found CBM water to be a pollutant under the CWA. Wyoming must require CBM water quantity to be regulated by the DEQ in order to ensure that the goals and purposes of the EQA and the CWA are met, as part of the administration of the discharge permit program in Wyoming -- for which Wyoming has been granted primacy to administer by the EPA. The EQA provides that authority by expressly stating the DEQ will have the authority to reduce and eliminate pollution -- which will often, out of necessity, require the reduction or elimination of the quantity of pollution involved in a given discharge.

The authority of the DEQ to regulate quantity will not interfere with the jurisdiction, duties or authority of the SEO or the BOC. The SEO is concerned with the

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<sup>41</sup> Wyo. Stat. § 35-11-103(c)(i).

administration of water rights, and the appropriation of those rights. The DEQ may limit the discharge of CBM water, in order to reduce or eliminate pollution, without interfering with the jurisdiction of the SEO. It is squarely within the sphere of duties of the DEQ, and the purposes and policies of the EQA, to limit quantities of pollution to be discharged. Especially when one considers that the SEO does not even appropriate CBM produced water after it is "used" to bring gas to the surface, the exercise of DEQ's authority to regulate water quantity clearly does not interfere with the SEO's jurisdiction over water rights. As noted above, the authorized withdrawal of groundwater does not affect the water rights of any downstream user, nor, consequently, does it affect the SEO's duties regarding the appropriation of water rights.

Respectfully submitted this 16th day of June 2006.

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