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MEMORANDUM

November 6, 2008

RE: POTENTIAL DELETION OF TIER 2 FROM FINAL AGRICULTURAL USE PROTECTION RULE

I. Introduction and Summary

The Environmental Quality Council held hearings in Cheyenne (Oct. 24, 2008) and Gillette (Oct. 28, 2008) on the Department of Environmental Quality's proposed amendment of the Wyoming Water Quality Rules to adopt a new Appendix H implementing the agricultural use protection mandate of Section 20 of the rules. The EQC will hold a third public hearing in Thermopolis on November 6. The EQC received testimony from Dr.'s Munn, Paige and Vance at its October 24 hearings in which all three opposed the provisions in the proposed rule under which effluent limits for discharges to a given drainage would be established based on inferred background irrigation water quality in that drainage, known as "Tier 2." Some Council members asked questions at that hearing which suggested they might recommend that the Council adopt a final Appendix H rule without the Tier 2 provisions. The memorandum explains why the Council could not unilaterally eliminate Tier 2 from the final rule. Such a rule would depart very significantly from the proposed rule that was considered by the Waste and Water Advisory Board and recommended by DEQ, and on which the public commented. At most, the Council could remand the proposed Appendix H rule back to DEQ for further consideration by the Water and Waste Advisory Board and for additional public comment.

The Tier 2 provision allows DEQ, where sufficient data are available and in accordance with the methodology set out in the proposed rule, to set effluent limits for EC and SAR based on the pre-existing background water to which irrigated crops have been exposed.[1] Without this provision, DEQ would have to set WYPDES permit limits based on the Tier 1 "default" limits on EC and on the accompanying SAR "cap." As numerous commenters have pointed out and as Dr. Kevin Harvey has explained in testimony, Tier 1 limits are extremely conservative and well below the background water quality in the great majority of drainages across the State. Alternatively, a permit applicant could seek permit limits based on a Tier 3 "no harm" demonstration, which because it must be site-specific is considerably more restrictive and burdensome than are Tier 2 analyses of background water quality (which are already widely used and accepted by DEQ in issuing permits).

It is important to note how deeply ingrained Tier 2 is in the proposed agricultural use protection rule. For almost three years, DEQ has utilized a "Section 20 policy" document to write permits for CBNG produced water and other discharges in the Powder River Basin and elsewhere. Tier 2 was a key part of the policy from its inception, and numerous "section 20 studies" of background water quality have been conducted and approved by DEQ, and permit limits for EC and SAR written in reliance on Tier 2. When DEQ recommended that the Council adopt the policy as a rule in early 2007, Tier 2 was part of the rule. When the Council remanded the proposed rule in February 2007 for further development of the livestock protection standards and other modifications, the Council gave no hint that Tier 2 should be eliminated from a re-proposed rule. The Advisory Board held four public meetings and received public comment on the proposed rule

[1] *See* App. H(c)(vi)(B).

in 2007 and 2008. While the proposed rule that DEQ presented to the Advisory Board differed in some respects from DEQ's 2007 proposal, the proposed rule at all times included the Tier 2 provisions. The Advisory Board never questioned this provision or considered its deletion, but rather recommended the adoption of the rule in a form that retained Tier 2.

Before recommending adoption of Appendix H, DEQ received public comment on the proposed rule, again with Tier 2 as an integral part of the rule and with no suggestion that the public might wish to comment on a rule from which Tier 2 had been removed. DEQ rejected comments on the proposed rule seeking elimination of Tier 2, explaining:

> DEQ believes the Tier 2 and Tier 3 methods are appropriate for setting effluent limits that reflect background conditions of the target drainages when the produced water is of poorer quality than the calculated Tier 1 levels. These two options were developed with the recognition that surface geology and surface water quality vary throughout the state and that Tier I default limits may be overprotective at many locations.

DEQ, Analysis of Comments (undated), Comment 110 at p. 51.

Clearly, EQC's unilateral adoption of an Appendix H rule that did not include Tier 2 (or Tier 3) would depart dramatically from the rule that the Advisory Board and DEQ considered and recommended. The magnitude of the change could hardly be overstated. Not only would removal of Tier 2 fly in the face of DEQ's determination that relief from overprotective limits is necessary, it would also eviscerate a carefully crafted balance within the proposed rule under which very stringent default limits are mitigated where they don't correspond to real-world water quality. A rule without Tier 2 was not reasonably foreseeable to the interested parties (nor to the Advisory Board) during

the public comment process, and interested parties certainly have not had an opportunity to comment on such a fundamentally different rule prior to the Council's hearings.

For the reasons discussed below, the Council's deletion of the Tier 2 provision from Appendix H would violate the procedural rulemaking requirements the Legislature provided in the Wyoming Administrative Procedure Act ("WAPA") and the Environmental Quality Act ("EQA"). Moreover, the deletion of the Tier 2 provision from Appendix H is not a logical outgrowth of the proposed Appendix H that DEQ and the Board put before the public for notice and comment. Thus, any such action by the Board would violate WAPA's notice and comment provision, as well as the specific rulemaking requirements of the EQA.

II. Discussion

A. Contrary To Statutory Requirements, Interested Parties Have Not Been Given Notice And Opportunity To Comment On Any Version of Appendix H That Lacks the Tier 2 Option.

There can be no doubt that Appendix H is a "rule" because it is a "statement of general applicability that implements, interprets and prescribes law [and] policy . . . ."[2] WAPA provides a clear and careful scheme for agency rulemakings that must be followed for a rule to be valid. Under WAPA, "***[n]o rule*** is valid unless submitted, filed and adopted in substantial compliance with [Section 16-3-103]."[3] Section 16-3-103 contains WAPA's notice and comment requirements that each agency, including the Council, must follow for a rule to be valid:[4]

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[2] W.S. § 16-3-101(ix).

[3] W.S. § 16-3-103(c) (emphasis added); *see In the Matter of Parental Rights of GP, JP, and SP v. Natrona County Dep't of Public Assistance and Social Servs.*, 679 P.2d 967, 996 (Wyo. 1984) ("***all*** administrative rules, other than interpretive rules or

> (a) Prior to an agency's ***adoption, amendment or repeal of all rules*** other than interpretative rules or statements of general policy, the agency shall:
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> (i) Give ***at least forty-five (45) days notice of its intended action.*** . . . The notice shall include:
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> (A) The time when, the place where and the manner in which interested persons may present their views on the intended action;
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> (B) A statement of the terms and substance of the proposed rule or a description of the subjects and issues involved . . . .
>
> (2) Afford all interested persons ***reasonable opportunity*** to submit data, views or arguments, orally or in writing, provided this period shall consist of at least forty-five (45) days from the latter of the dates specified under subparagraph (A) of this paragraph . . . .[5]

The Legislature enacted these requirements as quality-control measures in rulemaking and to ensure due process for those who may be affected by new or amended rules. As the Supreme Court explained in *Laughter v. Board of County Com'rs for Sweetwater County*, 110 P.3d 875 (Wyo. 2005), proper notice of a rule entails notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[6] Procedural due process is satisfied only "if a person is afforded adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner."[7]

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statements of general policy, are to be adopted in accordance with the rulemaking process set out in the Wyoming Administrative Procedure Act") (emphasis added).

[4] The Council is considered an "agency" under the EQA. *See* 35-11-111(a) ("There is created as a separate operating ***agency*** of state government an independent council . . . .") (emphasis added).

[5] W.S. § 16-3-103 (emphasis added).

[6] 110 P.3d at 882 (citing *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 960-61 (Wyo. 1995)).

[7] 110 P.3d at 882. (citing *Pfeil*, 908 P.2d at 960-61; *Amoco Production Co. v. Wyoming State Bd. of Equalization*, 882 P.2d 866, 872 (Wyo. 1994)).

DEQ has previously afforded interested parties significant advance notice of the Appendix H rule and multiple opportunities to submit written comments. Now, however, interested parties have not been given notice and an opportunity to comment on Appendix H without the Tier 2 alternative for setting effluent limits, nor any opportunity, let alone a reasonable opportunity, to submit their data and arguments on this potential action. If the Council were to delete the Tier 2 provision from a final Appendix H rule, it is clear that oil and gas producers, ranchers who use produced water, and local governments will be adversely impacted because produced water discharges, including those already permitted under Tier 2 in DEQ's longstanding policy, could become subject to Tier I default limits. As testimony on behalf of the Petroleum Association of Wyoming at the Gillette hearing indicated, many dischargers could not meet those Tier 1 limits and different water management methods would become necessary. These alternatives would be more costly for producers, requiring centralized treatment or injection. This water would no longer be available for landowner use for livestock watering or other agricultural uses, impacting ranching and local government revenues. Under WAPA, interested persons have a due process right to comment on a rule that is different from the proposed rule and could have these detrimental effects on their particular interests.

B. The Council Has No Statutory Authority To Unilaterally Delete The Tier 2 Provision Where DEQ And The Board Did Not Recommend Or Consider That Deletion.

The EQA builds on WAPA with a carefully delegated scheme for rulemakings, under which the Advisory Board, DEQ and EQC each have specific enumerated duties. The rulemaking process starts with DEQ, which develops the proposed rule and consults with the Board. Only ***after*** DEQ's

Water Quality Division has received public comments and consulted with the Advisory Board can it make a recommendation to the DEQ Director.[8] The consultation between DEQ and the Board is a critical step in the rulemaking process under the EQA because it requires these two bodies to:

> consider all the facts and circumstances bearing upon the reasonableness of the pollution involved including:
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> (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;
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> (B) The social and economic value of the source of pollution;
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> (C) The priority of location in the area involved;
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> (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
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> (E) The effect upon the environment.[9]

After this consultation, the Board "shall recommend to the council through the administrator and director the adoption of rules, regulations and standards . . . ."[10]

The EQA therefore charges DEQ and the Council with obtaining public comments and weighing the technical and economic information necessary to support a proposed rule. The Council, in turn, has specific powers, all of which are contingent on a recommendation from the Board (which further requires a recommendation from DEQ).

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[8] *See* 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") (emphasis added).

[9] *Id.* § 35-11-302(a)(vi).

[10] *Id.* § 35-11-114(b).

Specifically, the Council has the power to "[p]romulgate rules and regulations necessary for the administration of this act, ***after*** recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards."[11] In addition, EQC shall "[c]onduct hearings as required by the Wyoming Administrative Procedure Act [16-3-101 through 16-3-115] for the adoption, amendment or repeal of rules, regulations, standards or orders ***recommended by the advisory boards through the administrators and the director.***" (emphasis added). Thus, the Council's authority to promulgate rules and hold hearings does not exist in a vacuum – the Council can act only ***after*** a recommendation from the Board and DEQ. If the Council were to delete the Tier 2 provision from the proposed rule, it would commandeer the rulemaking process by disregarding the recommendations and public outreach efforts of DEQ and the Advisory Board. To do so also would ignore DEQ's and the Advisory Board's prior consideration of "all the facts and circumstances bearing upon the reasonableness of the pollution," and make it impossible for DEQ and the Board to carry out that statutory function with respect to a new, fundamentally different rule.

Even if the EQA did not impose this very detailed procedure on EQC's rulemakings, such a deviation from the proposed rule would require further public notice and comment under WAPA. Although an agency can "make changes in the proposed rule after the comment period without a new round of hearings[,]" those changes must "be in character with the original scheme and be

[11] *Id.* § 35-11-112(a)(i) (emphasis added).

foreshadowed in proposals and comments advanced during the rulemaking."[12] This principle is known as the "logical outgrowth" doctrine, which numerous courts, including the United States Supreme Court and Tenth Circuit, have developed in considering similar notice and comment requirements under the federal Administrative Procedure Act.

Under this doctrine, "the final rule the agency adopts must be a logical outgrowth of the rule proposed."[13] One of the purposes of the logical outgrowth doctrine is to give effect to the notice and comment requirements for rulemaking. "If a final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."[14] Further, if the final rule gives the public its "first occasion to offer new and different criticisms which the agency might find convincing[,]" then the final rule cannot be said to be a logical outgrowth of the proposal.[15]

Here, the deletion of the Tier 2 provision from Appendix H is a far cry from a logical outgrowth of the proposal; indeed, this would be a drastic deviation from the Appendix H on which the public commented and that DEQ and the Advisory Board held public meetings. Further, interested parties could not reasonably have anticipated this deletion such that they should have filed

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[12] *Beirne v. Sec'y of Dep't. of Ag.*, 645 F.2d 862, 865 (10th Cir. 1981) (citation and internal quotation marks omitted). WAPA's requirement for notice and comment on proposed rulemakings is similar to that found in the federal Administrative Procedure Act. *Compare* W.S. § 16-3-103 *with* 5 U.S.C. § 553.

[13] *Long Island Care at Home v. Coke*, 127 S.Ct. 2339, __ (2007) (citation and internal quotation marks omitted); *see American Mining Congress v. Thomas*, 772 F.2d 617, 639 (10th Cir. 1985) (final guidance standard was not a logical outgrowth from the proposed regulations).

[14] *Nat'l Ass'n of Homebuilders v. United States Army Corps of Eng'rs*, 453 F. Supp.2d 116, 125 (2006) (citation and internal quotation marks omitted).

[15] *Id.* (citation and internal quotation marks omitted).

comments on the issue.[16] Accordingly, if WAPA's notice and comment provisions are to have any meaning, the public must be able to trust that the Council will issue a final rule that is reasonably anticipated to arise from the proposed rule.[17] Deletion of the Tier 2 provision at this advanced stage of the rulemaking will abrogate WAPA's notice and comment requirements and "pull a surprise switcheroo on the regulated entities."[18]

III. Conclusion

For the foregoing reasons, the Council could not lawfully delete the Tier 2 option for setting effluent limits from Appendix H of Chapter 1. At most, the Council could remand the proposed rule to DEQ and the Advisory Board to re-notice Appendix H in this new form for rulemaking in accordance with W.S. § 35-11-302(a), including the requisite notice and opportunity for public comment required under WAPA, consideration of the proposed rule by the Advisory Board, and a recommendation to the Council reflecting DEQ's and the Board's consideration of the factors in § 35-11-302(a)(vi).

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[16] *See id.* at 124-25 ("A rule is deemed a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.") (citation and internal quotation marks omitted).

[17] *Cf. id.* at 125 ("[I]f the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about ***which particular*** aspects of its proposal are open for consideration.") (emphasis in original) (citation and internal quotation marks omitted).

[18] *Id.*