

TESTIMONY – 2006 & 2007
PAW & Member Companies
Environmental Quality Council Hearings
CHAPTER 2 WATER QUALITY RULES AND REGULATIONS

Resubmitted by

PETROLEUM ASSOCIATION OF WYOMING

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EQC Hearing Testimony

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1 THE CHAIR: I'm sorry. That's part of
2 the evidence.

3 MR. MOORE: Mark that as Exhibit 1.

4 MS. FLITNER: Thank you.

15:45:07 5 While we invite Keith to come forward
6 and make his remarks, may those of you -- I think
7 there were about five of you in the back who were
8 going to speak at some point. Will you raise your
9 hands again, please?

15:45:23 10 So, I'm going to have Joe pass around a
11 different sheet, because I have about 20 names on
12 this one, and we're just going to do that in an
13 effort to keep this moving quickly so that we can
14 call you up right after Keith goes. Is anyone
15:45:42 15 prepared to speak longer than a couple of minutes?

16 (Whereupon, no response was had.)

17 MS. FLITNER: Perfect.

18 Okay, we'll get to you next. Thanks.

19 Welcome. Thank you.

15:45:53 20 Go ahead.

21 STATEMENT ON BEHALF OF THE CONSORTIUM:

22 MR. BURRON: Thank you, Madam Chair.

23 Members of the Council.

1 For the Record, I'm Keith Burron. And
2 I'm appearing today on, as sort of a spokesperson
3 on behalf of the Consortium.

4 Some oil-and-gas players, too, who have
15:46:07 5 signed onto the opposition to this request for
6 rulemaking. I'm going to address today the Motions
7 to Dismiss, or Motion to Terminate that's been
8 filed, and also, to an extent, address some of the
9 new information in the Status Report, or Third
15:46:29 10 Petition that's been filed.

11 And listening to Kate this morning, I
12 didn't hear a lot about what is actually requested
13 in the Petitions. What I heard is a, almost a, I
14 guess, an argument that DEQ is not adequately
15:46:50 15 addressing effluent limits for impacts to
16 agricultural use in permitting CBM discharges.

17 And I think we need to be very careful,
18 because that's not what these Petitions are asking
19 for. What the Petitions are asking for is,
15:47:03 20 regardless of whether you look at the initial
21 Petition or the second Petition, try to separate
22 out CBM water, or the Third Petition, which is a,
23 pollutions.

1 And the objective of those Petitions is
2 to stop the discharge of CBM water, not to regulate
3 the constituents in CBM water, which is what we've
4 heard about today. So, every iteration of the
15:47:25 5 Petition says the objective was trying to limit or
6 shut down water production, surface discharge of
7 water production from CBM water, and that is a, an
8 agenda that is being put forth by a vocal minority
9 of landowners, and by the Powder River Basin
15:47:45 10 Resource Council.

11 And I would submit to you the vast
12 majority of landowners do not agree with that
13 position that CBM discharges ought to be shut down
14 and ought to be limited in the fashion that PRBC is
15:47:59 15 asking for. In addition, PRBC is asking the DEQ to
16 revoke the policy that's been longstanding in this
17 area of the state for 120 years, and that is
18 encouraging the maximum general efficient use, use
19 of the waters throughout the state, and also
15:48:17 20 maximum use of drainages to carry that water,
21 especially where that water meets effluent limits
22 set by the DEQ, and Permit limits within these
23 Permits.

1 If what the Petitioners were asking for
2 goes forward, we are going to see very, a very
3 adverse effect on CBM production. We're also going
4 to see a greater incrustation to those landowners
15:48:43 5 who are using CBM water to a great extent.

6 As the Council's well-aware, the
7 information that we submitted agrees with the
8 information that the Attorney General put forward
9 in the AG's Opinion that was issued in this matter,
15:49:00 10 which essentially indicates that quantity
11 regulation of CBM water is not something that's
12 within the Council's jurisdiction.

13 That's what the AG concluded. And the
14 AG also concluded that water quantity can only be
15:49:15 15 regulated where it directly relates to water
16 quality.

17 And that occurs in the context of
18 pollutant loading and some other capacity. Does
19 not occur where the desire is just to limit the
15:49:26 20 amount of water that's flowing down the drainage.

21 That Decision is in accordance with the
22 law, and it's in accordance with the DEQ's
23 longstanding interpretation of its own Regulations,

1 which have been in practice for over 30 years. And
2 I think in the Status Report, Petitioners have
3 argued that DEQ needs to revert back to the course
4 it deviated from 30 years ago, and stop allowing
15:49:49 5 discharges from oil and gas operations.

6 I would submit to you that that is not a
7 de-, was no deviation 30 years ago. That's what
8 was performed.

9 That's what the policy of the state was
15:50:01 10 as policy of the effluent guideline, as well to
11 allow beneficial use of this water in arid
12 environments where it can be used. And that's
13 what's occurring.

14 It's been what's been occurring for 30
15:50:14 15 years under the current DEQ machine. Focusing on,
16 on a couple of particulars within the Petition,
17 various Petitions, and especially the Status
18 Report, it appears that what the Petitioners are
19 looking for is to regulate the quantity of water as
15:50:34 20 pollution, the quantity itself, as opposed to the
21 constituents within the water discharge.

22 Water quantity is not a pollutant. And
23 if water meets standards and limitations, it can be

1 discharged.

2 The fact that -- What PRBRC is seeking
3 is that if water meets effluent limits and
4 standards, PRBRC would still have the EQC require
15:51:00 5 still an additional test and additional requirement
6 that only a very limited amount of water could be
7 discharged. And I believe a fair reading of
8 PRBRC's response to our latest filing and the
9 Wyoming Outdoor Council's position would be that
15:51:14 10 only that water that's been permitted for
11 beneficial use by the State Engineer can be
12 discharged, and all other water has to be dealt
13 with in some other fashion.

14 Petitioners have argued today that DEQ
15:51:28 15 is violating the Clean Water Act by not limiting
16 the quantity of water. And it's important to note
17 in that context, number one, that the AG clearly
18 disagrees with that, and the DEQ clearly disagrees
19 with that.

15:51:40 20 But furthermore, not a single Federal
21 Court has ever held that a State is violating the
22 Clean Water Act by not regulating the quantity of
23 water discharge. Clearly this does not violate the

1 Clean Water Act, and there's nothing illegal about
2 the existing Appendix.

3 This is a program that EPA has delegated
4 to DEQ, and DEQ's in compliance with the program.

15:52:06 5 So, DEQ cannot regulate quantity just for
6 quantity's sake alone.

7 And getting back to this issue of the
8 State Engineer, whether the State Engineer's issued
9 a Permit or not, I think the thrust of what PRBRC
15:52:21 10 has argued is that if the State Engineer is not
11 regulating the water that's discharged in CBM
12 operations, then the DEQ must jump in and regulate
13 the quantity of that water. And that is clearly
14 not the case.

15:52:33 15 That's clearly not supportable under the
16 law. And it's never been the policy of the state.

17 That position ignores the fact that
18 there is no affirmative authority under the DEQ
19 Statutes and the Environmental Quality Act to allow
15:52:46 20 the DEQ to regulate water quantity. An

21 administrative agency is limited to those powers
22 that are vested in it by the Legislature.

23 And the AG concluded that there is no

1 what PRBRC is seeking to do. They are seeking a
2 change to the policy, a longstanding policy of this
3 State.

4 And it's a change that, to policy that
15:55:14 5 the DEQ is not authorized to make. And that change
6 is they are asking the Council to disallow the
7 longstanding practice of using natural drainages
8 and waterways and water courses to convey water,
9 even foreign water in the development of a state as
15:55:31 10 agriculture and mineral resources.

11 That has never been the policy of the
12 state. Waterways and drainages have always been
13 available for mineral and agricultural development
14 since statehood.

15:55:41 15 And in this case, discharge water that
16 meets effluent limits and standards is no
17 different, and should be treated no differently.
18 And just by way of example is this policy has stood
19 so long in the state that nearly every irrigation
15:56:00 20 district in the State of Wyoming diverts water from
21 one source and returns it to another source, either
22 through return free or other obligations.

23 We have a lot of situations where water

1 is diverted from one tributary to another, one
2 tributary that may have a good water source, into
3 a, another tributary that may not, for the benefits
4 of wildlife or for the benefit of agriculture, for
15:56:19 5 the benefit of municipal sources. All of those
6 change the hydrography of those drainages, change
7 the hydrology; add water to the drainages that have
8 historically been dried.

9 And all of that has been deemed
15:56:34 10 beneficial to economic development. This is no
11 different in this situation.

12 If we were to go down this road, I think
13 we need to take a look at what would the potential
14 impacts on agriculture be? Does that mean if you
15:56:48 15 import water into a drainage, that somehow we're
16 going to consider that quantity of water now as, as
17 a pollutant, and we're going regulate that
18 drainage, and the DEQ is going to have the ability
19 to say, "You can't bring water into this drainage"?

15:57:01 20 Is that going to affect Stage II
21 projects where we're depriving Little Snake
22 irrigators of the, or Little Snake water, users of
23 water that would also come to them because we're

1 bringing it over the hill and into the North Platte
2 drainage? Lots of implications along the lines of
3 what is being suggested by PRBRC.

4 Construction of reservoirs is another
15:57:24 5 longstanding alteration of a natural hydrology that
6 adds water to systems during times that they
7 typically would be dry or would not have the same
8 water flow. So, there are -- The point being,
9 there are many examples of where natural hydrology
15:57:41 10 is modified by activities: agriculture, mineral
11 development, municipal development.

12 And all of those are accepted as
13 acceptable policies because of the longstanding use
14 of the natural drainages to do that. Now PRBRC
15:57:58 15 wants to change this policy, essentially by saying
16 a minority of landowners don't want to see
17 increased flow within these drainages, that these
18 discharges should be prohibited altogether, or
19 somehow there ought to be a veto authority by
15:58:15 20 landowners to say, "No, we don't want water here
21 because it may change the character of ephemeral or
22 intermittent drainage by addition of water that may
23 not be otherwise there or maybe at different times

1 of the year.

2 To make a decision on that basis, it's
3 landowners against other landowners within the same
4 drainage. And we've seen it within a drain, where
15:58:40 5 you have one who doesn't want it and several who
6 do.

7 If we say, "No," we deprive the
8 landowners who want the water. If we say, "Yes,"
9 we're injuring the landowner who may not want that
15:58:52 10 water.

11 And we submit the answer is, "No," under
12 the policies of the State with respect to the use
13 of natural drainages. Simply put, the EC does not
14 have the authority to affect the policy change that
15:59:05 15 the PRBRC is seeking.

16 The AG's opinion made that clear. But
17 in addition, the policy of the State is preserved
18 beyond the reach of the DEQ by two other principles
19 of law, both of which have been recently reaffirmed
15:59:19 20 in the Maycock litigation.

21 Number one, there is an easement to flow
22 water within natural water courses of the State of
23 Wyoming. And if the DEQ were to limit the amount

1 of water, limit the quantity of discharge that
2 could be discharged into natural water courses of
3 the state, that would be impairing that easement,
4 which is a, which is vested in the, in the
15:59:45 5 Constitution.

6 So, limiting quantity for quantity sake
7 would reduce the scope of that easement which
8 exists under the Constitution of the United States.
9 Second, there is a right of condemnation to allow
15:59:57 10 the use of natural drainages to flow water for
11 mineral production.

12 And so, again, were the DEQ to limit the
13 amount of water that could be discharged would
14 deprive mineral development; if you take it in the
16:00:14 15 agricultural context, agricultural development.

16 But, it would limit the rights of industry to
17 exercise condemnation rights to allow for ways for
18 water to be discharged into drainages.

19 And essentially, by seeking to limit
16:00:34 20 these rights, those, PRBRC is running afoul of
21 longstanding policy, reconfirmed very recently in
22 judicial Decisions, under settled principles of
23 constitutional law, and existing statutory

1 authorities. So, we would urge that the Council
2 not accept the invitation to limit the quantity of
3 water and discharge, limit the quantity of
4 discharge water without regard to the quality of
16:01:09 5 water.

6 Finally, if the EQC proceeds to
7 rulemaking on this industry hazard, we believe
8 correctly that the EQC must receive the
9 recommendation of the DEQ on any proposed Rule.
16:01:27 10 And the fact that this is a Citizens' Petition, --
11 Citizens are certainly allowed to bring a Petition
12 forward.

13 The fact that this is a Citizens'
14 Petition does not negate the requirement under the
16:01:38 15 Environmental Quality Act that the EQC receive the
16 advice of the Advisory Board, the Administrator,
17 and the DEQ Director before proceeding to rule
18 making. And in this context, the DEQ is already on
19 record with basically agreeing that it did not have
16:01:56 20 the authority to proceed to regulate the quantity
21 of water.

22 And, it has taken a position that the
23 Agency lacks that authority. That position is but

1 addressed by the Attorney General's, which is an
2 area within the DEQ's own interpretation of its own
3 Rules.

4 And, in fact, on June thirtieth, the DEQ
16:02:17 5 reaffirmed its interpretation in response to
6 comments received on the Agricultural Use
7 Protection Policy to implement Chapter 11, Section
8 20, of the Water Quality Regulations. As the
9 Council's aware, that's the section that deals with
16:02:31 10 protecting agricultural use and setting effluent
11 limits.

12 And PRBRC made essentially the same
13 comment that they are urging the Council to adopt
14 into a Rule here, that the DEQ has the authority to
16:02:45 15 regulate water quantity and should regulate water,
16 water quantity in implementing Section 20. And the
17 DEQ response to comments on June thirtieth
18 indicated that the DEQ's response was, "We believe
19 the Agricultural Use Policy properly interprets
16:03:02 20 both the Statutory and Chapter 1 Regulations.

21 It is true that water quantities and
22 quality are related, and also true that the
23 statutory definition of "pollution," "pollution" is

1 broad, very broad; so broad, in fact, as to
2 preclude every human activity. However, the
3 definition of "pollution" oversight with respect to
4 water quantity, it refers to it, but says nothing
16:03:25 5 of an alteration of the quantity or flow.

6 The act of irrigation itself alters the
7 flow of streams by diverting the water from the
8 stream channel. Certainly this could be construed
9 as detrimental or injurious to the water quality.

16:03:40 10 And, however, the DEQ has not attempted
11 to regulate the quantity because a "lack of,"
12 parenthetic, "or excess of," close parenthetic, is
13 not defined as "pollution." In fact, the Wyoming
14 Constitution and Wyoming Statutes clearly identify
16:03:53 15 the Wyoming State Engineer as being responsible for
16 the management of water quantity.

17 So, the DEQ's position, as expressed in
18 February to the Council, to this very Petition, has
19 been reaffirmed in, on June thirtieth. That's
16:04:08 20 supported by what the Attorney General's Office has
21 already said.

22 So, PRBRC doesn't agree with that
23 interpretation from the administering agency,

1 doesn't agree with the Attorney General's Opinion,
2 and is asking the Council to ignore both. And we
3 are urging the Council not to accept that
4 invitation, because it would ignore the Agency's
16:04:31 5 only interpretation and the State's legal advisor
6 for the State's legal opinion.

7 So, we think you should decline that,
8 and consider the Petitions, and terminate this
9 procedure. On a final note, if, if the DEQ decides
16:04:46 10 to continue down this road, and adopt one of the
11 proposals that's been recommended, we would
12 certainly urge that whatever proceeds be clearly
13 identified so that as the matter proceeds, all
14 parties know exactly what proposal is being put
16:05:05 15 under, under, under discussion for ruling.

16 So, if there are questions, I'd be happy
17 to address them. Otherwise, that's the --

18 MS. FLITNER: Thank you.

19 MR. BURRON: Thank you.

16:05:18 20 MS. FLITNER: Questions?

21 (Whereupon, no response was had.)

22 THE CHAIR: Actually, I have, I have
23 one.

1 Keith, thank you. That was really good.

2 Thanks a lot. I'm struggling with this

3 idea that the only, the only way that you can deal

4 with Regulations is have the Government fix them

16:05:42 5 for you.

6 This seems anti-Constitutional to me.

7 Somehow it seems the power is vested in the people,

8 and, and there should be provisions somehow in, in,

9 in our government and in our state's Constitution.

16:05:57 10 And the way we conduct our affairs is

11 for citizens to be able to bring Petitions whatever

12 way. And I just wanted some clarification on that.

13 If I heard you correctly, the only thing

14 that can bring forth any kind of remedy is, is the

16:06:14 15 Agency itself.

16 MR. BURRON: Here's the -- I appreciate

17 the question. I think it's -- I understand what

18 you're suggesting.

19 The, the Administrative Procedures Act

16:06:25 20 clearly provides a right on the part of a citizen

21 to request rulemaking, to bring the Petition for

22 rulemaking. That position exists within the EPA.

23 However, within the Environmental

1 Quality Act, the rule-making provisions are also
2 very clear that before the Environmental Quality
3 Council adopts a Rule, they must receive the
4 recommendation of the Department. And there is not
16:06:51 5 an exception in the Act that I can read, or even
6 that would appear implied in there, that the
7 Council could proceed without that recommendation
8 from the Director.

9 And clearly under the, under the
16:07:02 10 regulatory scheme that's set up under the water
11 quality provisions and under the provisions dealing
12 with the Environmental Quality Council, it is
13 contemplated that the Advisory Board will consider
14 that, the Administrator will consider that, the
16:07:17 15 Director will consider that, and a recommendation
16 will be made to the Council.

17 In this case, the recommendation has
18 been fairly strongly telegraphed automatically,
19 though. In this procedure, we would certainly urge
16:07:31 20 the Council to give it to the Department and let
21 them do their analysis.

22 In addition, I think under the, the new
23 Council Rules for Procedure that were discussed

1 this morning, I think there's a provision in those
2 Rules that also suggests that prior to rule-making,
3 or in the context of a citizen Petition, there will
4 be a request for, for the DEQ to do an analysis of
16:07:52 5 the citizen proposal before that.

6 So, I think that's, that's at least how
7 we would read the Statute.

8 THE CHAIR: Okay. And I had another one
9 that was kind of more technical.

16:08:04 10 I looked up "black water," and I'm not
11 sure I can -- I just wanted -- If I understand this
12 is correct, it's 41-3-903, "By-product water;
13 definition.

14 By-product water is water which has not
15 been put to prior beneficial use[,], and which
16 is a by-product of some nonwater-related economic
17 activity and has been developed only as a result of
18 such activity [period]. By-product water includes
19 [,], but is not limited to [,], water
20 resulting from the operation of oil well separator
21 systems or mining activities such as dewatering of
22 mines."

23 I'm trying to figure out where this

1 "byproduct" definition fits in the CBM testimony we
2 have.

3 MR. BURRON: The, the State Engineer
4 currently -- As you probably know from information
16:09:00 5 that's been submitted, the State Engineer currently
6 permits CBM wells and the extractions of water
7 incident to that as a beneficial use. That is a
8 prior beneficial, which would, I suppose, calls
9 into question whether it's like byproduct, unless
16:09:19 10 it is within the context of water which has been
11 extracted under a dewater process, and in some
12 cases has a subsequent beneficial use either in a
13 reservoir or irrigation.

14 But when it doesn't, it is
16:09:36 15 unappropriated water. Unappropriated water, under
16 Code to State Engineer's Statutes, is water that's
17 subject or available for appropriation for
18 agricultural use.

19 THE CHAIR: Okay. Thank you.

16:09:49 20 MS. FLITNER: Other questions?

21 (Whereupon, no response was had.)

22 MS. FLITNER: No?

23 Okay, thank you.

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1 shut you off on those other things, but it's not the
2 right time. I really don't have anything to comment
3 specifically on; although, I do register what your
4 concerns are.

5 MR. JONES: Our desert needs water. Thank
6 you.

7 MR. GORDON: Thank you. I have Marvin
8 Blakesly. I met you out in the lobby.

9 MR. BLAKESLY: First of all, Mark, I'd like
10 to thank you for coming here to the Big Horn Basin and
11 hearing the concerns the ranchers and the operators and
12 the county government has here. We appreciate you
13 coming here to listen to us.

14 I wish we had had a little more time, because
15 there are a lot of people that are very concerned about
16 the loss of water here in the Big Horn Basin. I think
17 that was very evident at the meeting in Worland. There
18 was well over 100 people there. There was a lot of
19 concern expressed both with the ag protection policy
20 and the petition. I think the message came out loud
21 and clear that we need the produced water here in the
22 Big Horn Basin. Agriculture and wildlife very heavily
23 depend on the water.

24 I guess there's been some confusion as to
25 exactly what is moving forward with the rule making. I

1 was at the hearing in Casper when the motion to dismiss
2 was denied. I left that meeting and I was very unclear
3 as to what was moving forward with rule making, whether
4 it was the original petition, whether it was the
5 amended petition, whether it was the status report. I
6 think there was a lot of confusion as to just exactly
7 what was moving forward.

8 I guess what I have noted in your public
9 notice and with what Jill has said, that what is moving
10 forward for rule making is the amended petition; is
11 that correct, with the pending coal bed methane? Or,
12 is everything still on the table, I guess is my
13 question?

14 MR. GORDON: On November 13th in Buffalo,
15 we're going to have a working session to precisely
16 craft the language. There were a series of resolutions
17 which were passed, which as you say are confusing. And
18 so the point was to put it all in one place at one
19 time.

20 It's important that under public meeting
21 rules and so on and so forth that that be done in a
22 Council meeting with a quorum and all of that. I would
23 recommend that you come to that meeting.

24 We're not really taking testimony. It is to
25 put the language specifically together. That language

1 will then be published with the Secretary of State, and
2 that is the language we'll move forward for a hearing
3 on. Does that make sense?

4 MR. BLAKESLY: It does. I would just further
5 like to say that I'm a native of Thermopolis. I was
6 born and raised in Thermopolis, so I had the pleasure
7 to grow up here in the Basin and live around the oil
8 fields and discharge water.

9 You know, I'm a very avid outdoorsman. I
10 hunt along the discharge water, because that's where
11 the wildlife is at. The wildlife is very dependent on
12 the water here in the Basin, as is agriculture. And
13 the irrigation that comes from the produced water here
14 in the Big Horn Basin is also very important to the
15 wildlife and sage grouse, particularly on the
16 Cottonwood and the Gooseberry. It provides some very
17 critical habitat for the sage grouse populations here
18 in the Basin.

19 We're opposed to the petition. But I would
20 like to say we are pleased with some of the language
21 that has come forth in the amended petition and wanted
22 to recognize that.

23 We live in a very arid area here. We're in
24 the midst of a ten-year drought. And I think it became
25 even more apparent when the DEQ came here, for their

1 tours, just how important the produced water is here
2 for the folks in the Big Horn Basin.

3 You know, I think had we had more time there
4 would be a lot more people here, certainly, to express
5 their opinions on this. I just want to point out the
6 fact that if the water goes away from the Big Horn
7 Basin, I don't see any winners for this.

8 Wildlife and agriculture are the extreme
9 stream big losers. It also hurts the industry. I just
10 don't see any good thing to come of it. Agriculture
11 and wildlife and industry have lived in a very good
12 relationship here in the Big Horn Basin for 100 years
13 almost in some cases.

14 I respect your comments, and I would tell you
15 that's the first negatives comments that I've heard
16 about produced water here in the Big Horn Basin. I
17 appreciate your comments. If we ever hear comments,
18 it's where is our water, and, geez, could we have more.

19 If for whatever reason the wells go down and
20 the water is gone for a day or two, people are knocking
21 at our door saying, where's the water? Where's the
22 water? We really need it.

23 So I just hope that you'll take this away.
24 Please consider any negative impacts that would result
25 in the loss of the water here in the Big Horn Basin.

1 Again, we appreciate you being here.

2 MR. GORDON: Thank you. I apologize for the
3 short notice, again. What happened is, I didn't
4 realize DEQ was having their thing. I got that notice
5 actually from a cell phone call after it had happened.
6 I wish I had been able to attend. Then Norma Lee
7 Sanford, who probably you know --

8 MR. BLAKESLY: I do.

9 MR. GORDON: -- Norma Lee said, you've got to
10 get up there and listen to those guys because it's a
11 big issue.

12 MR. BLAKESLY: There was standing room only
13 in Worland. People were very concerned both with the
14 ag policy and the petition. You know, is it going to
15 take away the water that we've got now, and how much --
16 you know, we certainly see an impact to the future
17 opportunities to develop water, additional water
18 sources here in Basin.

19 I mean here in the Big Horn Basin and the use
20 of this produced water, it goes on all over Wyoming.
21 That was one of the original reasons that the
22 beneficial use was carved out in the Clean Water Act in
23 the first place, with Wyoming in particular in a desert
24 environment, and the beneficial uses of that water went
25 on for many, many decades, and we certainly want to see

1 that continue.

2 MR. GORDON: Thank you.

3 MR. BLAKESLY: Thank you.

4 MR. GORDON: Thank you very much. I have
5 Keith Hamilton.

6 MR. HAMILTON: What I was going to talk about
7 tonight is the same thing you guys have already heard.
8 I'm the Northwest District Director of the Wyoming Farm
9 Bureau. I represent the Big Horn Basin. The comments
10 that I have tonight have been submitted. It has to do
11 whether you guys actually have the authority to
12 regulate the quantity of water.

13 So if you've already -- if this is an
14 inappropriate time to present these again, why then
15 maybe I should wait until we can deal with it in
16 Buffalo. That's why I posed the question. You know, I
17 can read these. I can present them again.

18 MR. GORDON: Are those the same comments that
19 Ken Hamilton presented?

20 MR. HAMILTON: Right.

21 MR. GORDON: I mean, duly noted. And in
22 response, I would say that that is absolutely part of
23 what we're wrestling with. They're very good points.

24 MR. HAMILTON: So what you've said just
25 lately is that you will be putting this stuff together

1 somewhere in that whole process there needs to be a
2 place for agriculture, particularly, be able -- should
3 be given the opportunity to use that water, to put it
4 to beneficial use and they should have that choice.

5 If the contaminant or whatever is above the
6 standard that we're looking that, that certainly should
7 be in place as it is now so that they can take that
8 responsibility and use that beneficially. And,
9 certainly, along with that should be the notice of
10 water -- some of the severe side effects of this water
11 so they know fully well what they're getting themselves
12 into. I think that needs to be disclosed as well.
13 Whether it's produced in the future, that still needs
14 to be there, not just shut it off and they can still
15 use it.

16 MR. GORDON: Thank you. That is terrific.
17 Those are exactly what I was hoping to hear.

18 MR. CORBERG: Thank you very much. Thanks
19 for listening and having this meeting.

20 MR. GORDON: Thank you. That's the last
21 person I have. Is there anyone else?

22 MR. SUTPHIN: I came in late, may I?

23 MR. GORDON: You bet. And I guess because
24 everybody else had a name --

25 MR. SUTPHIN: Isaac Sutphin, S-u-t-p-h-i-n.

1 I'm with the law firm of the Sundahl, Powers, Kapp &
2 Martin in Cheyenne, Wyoming. We represent Merritt
3 Energy. I apologize for being late. I didn't get out
4 of Cheyenne as early as I wanted to.

5 But Merritt Energy is the operator of the
6 Hamilton Dome. We are in the somewhat unique position
7 of having a significant traditional oil and gas
8 production facility. But we also have some discharges
9 in the Powder River Basin and have an interest in the
10 coal bed methane side of things as well.

11 I, like most people, here was somewhat
12 confused about the nature of the meeting. That's fine,
13 we understand that, and we still appreciate the
14 opportunity to be here.

15 Mostly, what I wanted to reiterate today is
16 the tremendous impact that produced water from Hamilton
17 Dome has on agriculture, wildlife and, basically, on
18 life in general in Hot Springs County. And Merrit has
19 undertaken some significant economic analyses about
20 their water. They're happy with the partnership that
21 they have with the area ranchers. This was extremely
22 evident on the tour that has been mentioned tonight
23 when DEQ came and gave our facilities a visit.

24 But the fact remains that if any of these
25 proposed rules, which seem to purport to impose some

1 more stringent standards on the water quality, if these
2 are adopted, Merritt is going to be put in a very
3 difficult position of considering whether to attempt to
4 treat the water, possibly reinject the water. And the
5 answer is, based on the analyses that have been done
6 and comments that have actually been submitted to this
7 effect, it's not economically viable. Plain and
8 simple, those wells are going to be shut in and the
9 water isn't going to be there anymore.

10 We have serious concerns with the various
11 petitions that have been put forth by the Powder River
12 Basin Resource Council. I understand you're not here
13 tonight to discuss those petitions. But I did want
14 to mention Merritt's concerns.

15 Merritt is very concerned that any attempt to
16 separate traditional oil and gas produced water from
17 coal bed methane could not be a legally enforceable
18 distinction for a number of reasons that don't need to
19 be explained in detail at this forum.

20 Basically, what we're faced with at this
21 point, the DEQ as it exists at the moment and the
22 powers that it has are very clear. The definition of
23 pollution is broad, but the DEQ has the ability through
24 exceptions to dictate when and where and under what
25 circumstances water can be discharged in this state.

1 It's a system that has worked well. It's
2 protected the environment. It's resulted in a net
3 environmental gain as evidenced by the discharges at
4 Hamilton Dome and along the Cottonwood Creek. And we
5 have serious concerns about the proposed changes.

6 I suppose it's it's not possible to make the
7 request -- I mean, you don't seem to be giving any
8 indication tonight what sort of petition, what sort of
9 language will be set forth in the rule making. I take
10 it you can't do that for us.

11 MR. GORDON: I can't do that tonight because
12 that's the whole point of November 13th, the day of
13 November 13th.

14 MR. SUTPHIN: We do appreciate you being
15 here. We'll certainly be making efforts to be in
16 attendance at the meeting in Buffalo. And thank you
17 for you time, your concern.

18 MR. GORDON: Thank you. Thank you. To honor
19 Lorraine's -- is there anyone else that has any other
20 comments to make?

21 MR. BLAKESLY: Can we talk twice?

22 MR. GORDON: Sure, what the heck.

23 MR. BLAKESLY: I guess one of the things you
24 wanted to hear tonight is how this water is used in the
25 Big Horn Basin for the ag and ranchers. It's used

1 extensively for irrigation, particularly in the
2 Cottonwood drainage. Many other drainages use it for
3 irrigation. We grow some wonderful alfalfa crops,
4 totally with 100 percent produced water.

5 Extremely important to wildlife. The
6 McCulloch Peaks wild horse herd uses the water produced
7 from the Oregon Basin Field and discharged down Dry
8 Creek. That is for 30 or 40 miles across the north end
9 of the Big Horn Basin that is for most of the year the
10 only water source present out there. Whole ecosystems
11 have evolved around these produced water discharges.

12 I can say that the petition, as originally
13 proposed, would cause Marathon to lose 100 percent of
14 the discharges that we have today and probably, I'm
15 guessing, well over 80 to 90 percent of the
16 conventional oil discharges across Wyoming would go
17 away as the original petition was presented.

18 Marathon's water, in itself, provides
19 hundreds of acres of wetlands. Loc Katrine (ph) in the
20 Oregon Basin is very dependent up the produced water
21 from Oregon Basin Field. It provides an additional 3
22 to 500 acres of additional wetlands, and the BLM has
23 verified that this, in itself, produces, you know,
24 another 500 to 1,000 water fowl and shore birds.

25 That produced water is the only water keeping

1 Loc Katrina alive today in the drought that we've got.
2 So there are hundreds of miles of riparian zones and
3 habitat. The water foul use it. The deer and antelope
4 -- it was very evident on the tours that we did when
5 DEQ was here. We didn't see a living creature outside
6 of a half mile to a mile from where the produced water
7 was used in irrigatation down the Cottonwood drainage.

8 And as we went down the Cottonwood drainage
9 where the water was, there was deer, antelope and sage
10 grouse and just a myriad of wildlife out there as well
11 as productive ranches there. And it was very evident
12 of folks that have water rights and the ones that
13 didn't as you went down the drainage.

14 The folks that have water rights on the
15 Cottonwood -- the discharge from Hamilton Dome, down
16 the Cottonwood Field they have wonderful alfalfa fields
17 and cattle and horses in their pastures. And those
18 ranches that didn't were dust and desolate. It was a
19 very good example of what you have and what you don't
20 have with and without the water.

21 Just to reiterate how that water is used in
22 the Big Horn Basin, in may ways with the wild horses,
23 the wildlife, the agriculture all utilize the water
24 very significantly.

25 MR. GORDON: Thank you. That's exactly what

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1 You know, this number is water that's raw water. It's not
 2 treated. These are still drinking water supplies. And you
 3 would have to add in, you know, the cost of that delivering
 4 treatment to get to the value again in that drinking water.
 5 So I still think that's covered under that \$40.43, roughly,
 6 \$14,000 one-time charge in the present analysis.
 7 We have another example, which is kind of a
 8 combination. We recently completed a reservoir that was
 9 mitigation for -- you know, it's kind of related to both
 10 agriculture and municipal use; and it was for -- to provide
 11 mitigation for the City of Cheyenne, taking water out of
 12 the Green River Basin, mainly the Little Snake River Basin.
 13 And that reservoir was called the High Savery
 14 Reservoir, and on a per-acre-foot basis the cost of
 15 developing that -- again, we don't -- we had to add the
 16 treatment and all those other costs if it would be
 17 municipal water, but it's not being used for municipal
 18 water -- but the price for that turns out to be something
 19 like \$2250 an acre-foot.
 20 So that's somewhere between ag use and municipal
 21 use, and that water really is currently being used to
 22 supplement seasonal agriculture in the basin. And those --
 23 primarily that's the -- the other major category I used,
 24 which is not on here, is industrial use. And that's why
 25 some are in between.

1 What you can pay for a drink and what you'd be
 2 willing to pay for drinking water supply is the price for
 3 agriculture. And the only example that I have for that's a
 4 reported example in conversations I've had with former
 5 state engineers and the former guy that's going to be the
 6 new guy, the director of the water development program.
 7 In the late 1980s, PacifiCorp required water be
 8 irrigated at 3000 an acre-foot; and that's the industrials.
 9 Those are one-time charges.
 10 So that's the best I can do as far as trying to
 11 come up with a value for water.
 12 MS. FLITNER: Thank you.
 13 Are there questions?
 14 Thank you.
 15 MS. FOX: At this time -- and in the
 16 interest of time, Keith told me he has some people who need
 17 to testify today -- I'd just like to introduce a few of our
 18 individual petitioners, particularly Tooter and Joe Rogers.
 19 Would you stand up for a moment?
 20 These are people who -- thank you -- are among
 21 the petitioners. They ranch on Assay Creek, and we've made
 22 Assay Creek a little bit of a case study. I can tell you
 23 that the CBM water has been devastating to them and to
 24 their operation. If you have any questions for them,
 25 they're here.

1 But I'm not going to have each of our landowners
 2 stand up and make a statement. As I said to you,
 3 Ms. Flitner, in the interest of time, many of them have
 4 written letters, many of them have testified before. I
 5 don't want to suggest in any way, though, that this isn't
 6 important to them; and I want to -- I know that the Council
 7 will pay attention to their concerns.
 8 Also, where's Kenny Clabaugh? Well, you've heard
 9 from Kenny before. He's the guy on Wild Horse who has some
 10 of the severe flooding which I showed you pictures of
 11 today.
 12 Marge West is here -- I think you'll be here
 13 tomorrow also, Marge -- I showed pictures of some of the
 14 damage on her ranch as well, and she may testify if there's
 15 time left over. As I said, there are a number of
 16 landowners -- Eric -- hopefully Eric Barlow will be able to
 17 talk tomorrow as well.
 18 But at this time, we'd like to turn it over for
 19 Keith's people who need to get in and get out of town.
 20 Also, I'd like to reserve 15 minutes at the end,
 21 if I could.
 22 MS. FLITNER: Of today or tomorrow?
 23 MS. FOX: The end end.
 24 MS. FLITNER: Okay. I think that's just
 25 fine, and we appreciate your moving along so that we can

1 get Keith underway.
 2 And you'll both have the opportunity to follow up
 3 tomorrow.
 4 So why don't we get started with your folks. I'm
 5 not certain if everyone who raised their hand is with your
 6 group, Keith.
 7 MR. BURRON: I'm not either.
 8 MS. FLITNER: Okay. Could I take a moment
 9 to get the names or maybe -- Doug, do you mind helping me
 10 so that I don't have to take up time -- having a list of
 11 those who want to testify starting now. There were about
 12 eight hands that went up, and I'd like to make sure.
 13 Joe is going to grab another signup sheet for
 14 those of you who are going to start now; and if you don't
 15 mind getting underway while Joe helps with that, it would
 16 be great.
 17 MR. BURRON: Thank you, Madam Hearing
 18 Examiner.
 19 The two consultants that we would like to put
 20 on -- just keep her on for the record -- first is Penny
 21 Hunter. She's a consultant with Geomega consulting in
 22 Boulder. She has a short presentation -- I think about
 23 15 minutes -- addressing the effluent limits that are
 24 proposed in the petition.
 25 In addition, she did a risk assessment based on

1 the effluent limits using a few of the ranches in the
2 state. And so Mr. McCarty and Mr. Flitner are also -- are
3 landowners who were participants in that risk assessment,
4 and I think it dovetails well with what she has to present.

5 So I'd like to ask if Penny could go and then if
6 we could have Mr. McCarty and Mr. Flitner go.

7 After that, we've got one other consultant that
8 kind of needs to hit the road tonight, and that's
9 Dan Arthur with -- he's a DOE researcher, and he will
10 address some of the effects on production that could be
11 caused by some of these more stringent effluent limits.

12 MS. FLITNER: Okay. And I guess I should
13 say by way of transparency, you may have guessed that my --
14 I share the last name with one of the ranchers who will
15 testify, Greg Flitner, who is my cousin; and I will be
16 hearing his testimony for the first time along with all of
17 you. So I think there is no conflict there whatsoever; but
18 if anybody has a concern, feel free to express it.

19 MR. BURRON: Thank you.

20 MS. HUNTER: Thank you. Joe has my
21 PowerPoint presentation, if it's available to put up.

22 MR. GIRARDIN: That's the computer down
23 there, and I don't run any of that.

24 MS. FLITNER: Keith, would you state for
25 the record who you are representing, please?

1 limit for barium.

2 The petitioner's proposed limits are to change
3 those to 500 milligrams per liter per sulfates, 2,000
4 milligrams per liter for TDS and to add a limit for barium
5 at .2 milligrams per liter.

6 Also in note here, although sulfate is generally
7 a component of TDS, it is addressed in the regulations as a
8 separate -- by a separate limit. In addition, CBNG water
9 is typically characterized as sodium chloride or sodium
10 bicarbonate dominated; and therefore, for discussion
11 purposes today, the TDS components will be exclusive of
12 sulfates.

13 To review the petitioner's reason for changing
14 the effluent limits, the claim is that the current effluent
15 limits are not protective of stock and wildlife. We
16 reviewed their references providing support for the changed
17 limits.

18 For barium it's .2 milligrams per liter. Two web
19 pages are cited. Both are extension bulletins. The Utah
20 Extension Bulletin cites a .2 milligram per liter guideline
21 per livestock, but the reference it provides for
22 justification actually doesn't check out.

23 In addition, the Colorado State University
24 Agricultural Extension, if we follow the web link to that
25 website, it's, in fact, revised its guidelines and

1 MR. BURRON: Yes. My name is Keith Burron.
2 I represent Petro-Canada Resources. Ms. Hunter's
3 presentation is on behalf of a number of industry
4 interests -- CBM industry interests and conventional as
5 well.

6 And I will also pass out now the full Geomega
7 report, which we also have for the record. We've got
8 copies for everyone, which was actually produced for the
9 Petroleum Association of Wyoming. And we're going to put
10 that into the record.

11 And so I'll pass that out, and you'll have
12 something to look at when Penny's talking.

13 MS. HUNTER: My name is Penny Hunter. I'm
14 a senior ecological risk assessor with Geomega. I have
15 several years experience dealing with water quality issues
16 specific to wildlife and livestock. My company has ahold
17 of risk assessments and oversight to risk assessments both
18 nationally and internationally.

19 I'm here today to present the findings of my
20 ecological risk assessment and beneficial use assessment
21 for produced water surface discharges in Wyoming.

22 The issue, briefly, is whether current effluent
23 limits are protective of wildlife and livestock. The
24 current limits for sulfate and TDS are 3,000 and 5,000
25 milligrams per liter respectively, and there's currently no

1 currently does not have a guideline for barium.

2 This curve for sulfate at 500 milligrams per
3 liter, again, comes from Utah Extension Bulletin, which in
4 turn cites a Kober '93 guideline. However, when we read
5 fully through the guideline, it actually recommends a
6 sulfate limit less than 4500 milligrams per liter.

7 Finally, the support for TDS at 2,000 milligrams
8 per liter -- the extension service bulletin provided
9 support of 5,000 milligrams per liter limit with the
10 exception of a South Dakota agricultural extension
11 bulletin. However, this extension bulletin focuses on
12 sulfate-dominated water, not the other components of TDS
13 which we are dealing with today.

14 Interestingly, the recommendation for
15 sulfate-dominated water is disclosed to 3,000 milligrams
16 per liter, which is generally considered safe, according to
17 their extension bulletin.

18 So the conclusion after reviewing the
19 petitioner's supporting references is that the petitioner's
20 statements are not supported by their references provided.

21 However, we pose the question what the potential
22 risk could be of TDS, sulfate and barium and we've reviewed
23 three lines of evidence; the first being other
24 peer-reviewed, published guidelines, the second is
25 literature-based toxicity studies that were, again, peer

1 reviewed, and finally, ranchers and other Wyoming resident
 2 experiences, because they know better than anyone what goes
 3 on -- what their uses of produced water are.
 4 To quickly review the existing peer-reviewed
 5 guidelines, EPA does not have a current set of
 6 livestock-specific water quality benchmarks. Where we do
 7 get existing guidelines come from your Canada Environmental
 8 Ministry as well as a series of publications specific to
 9 livestock from the National Research Council or NRC.
 10 For barium, these recommendations range from 5 to
 11 300 milligrams per liter. For sulfate, again, the same
 12 references recommend between 1,000 and 3,000 milligrams per
 13 liter. And for TDS, EPA, though it doesn't propose a
 14 guideline specifically for livestock, does review toxicity
 15 studies related to livestock and has text that says between
 16 5,000 and 15,000 milligrams per liter is determined
 17 adequate for livestock-drinking purposes. In addition, the
 18 NRC recommends 5,000 milligrams per liter livestock.
 19 So the conclusion from our review of existing
 20 guidelines is that these guidelines are supportive of the
 21 current DEQ limits. However, they do not support the
 22 proposed changes to those limits.
 23 Our second line of evidence included a
 24 literature-based review of toxicity studies. And just
 25 briefly, toxicity studies generally include administering a

1 Essentially, we derived specific water quality limits for
 2 specific receptors, both nonruminant and ruminant as well
 3 as waterfowl.
 4 For barium, these concentrations are between --
 5 came up between 313 and 360 milligrams per liter; and, in
 6 fact, for barium, because there are not a lot of toxicity
 7 studies out there, instead of taking a geometric mean, we
 8 defaulted to the lowest LOAEL or lowest no adverse effects
 9 level.
 10 For sulfate, the range was between 3,010 and 5100
 11 milligrams per liter, and for TDS the range was between
 12 5680 milligrams per liter and 7800 milligrams per liter.
 13 So again, those benchmarks that we are deriving for our
 14 receptor-specific are in line with what the current WDEQ
 15 limits already are.
 16 The final line of evidence was to look at
 17 ranchers' experiences. And as Dr. Raisbeck alluded to
 18 earlier, there are gross limitations of toxicity studies,
 19 including the fact that the Wyoming open-range conditions
 20 where wildlife and livestock are exposed to produced water
 21 sources will differ from the environment in toxicity
 22 studies, which generally include the allotted environments.
 23 In fact, Johnson and Patterson recently did a
 24 study where they showed that cattle tolerance to sulfates
 25 in the drinking water was much lower in a feedlot

1 range of dosage to a test organism and some responses
 2 measured. And this is a generic dose response curve; and,
 3 hopefully, in most toxicity studies a similar curve is
 4 identified.
 5 In our risk assessment we identified two
 6 endpoints in the toxicity study; a no adverse effect level
 7 or NOAEL, which is the lowest dose at which an organism
 8 does not elicit any significant response. We also
 9 identified a low or LOAEL adverse effect level; and this is
 10 the lowest dose which does elicit a significant adverse
 11 response.
 12 These are interpreted in a risk assessment as --
 13 if an organism is exposed to a concentration at or above
 14 the LOAEL, risk is be more likely to that organism; whereas
 15 if that organism is exposed to a concentration at or below
 16 the NOAEL, risk is unlikely to that organism. In between
 17 these two, risk is uncertain; and oftentimes this is
 18 resolved by taking the geometric mean between the NOAEL and
 19 LOAEL and using this as a suggested benchmark.
 20 This is a standard practice in risk assessment
 21 and is often used by EPA as an EPA-accepted method. For
 22 instance, they use it to derive their soil screening levels
 23 for wildlife.
 24 To summarize our data review, I won't go into
 25 specifics because it involves a lot of details.

1 environment compared to open-range environment.
 2 In addition, animals can exhibit increased
 3 adaptation and tolerance over time without adverse effects
 4 in the long term, which has been demonstrated in a number
 5 of studies. And this is not generally measured in toxicity
 6 study.
 7 Finally, there are other study limitations of the
 8 publications themselves; for instance, gaps between the
 9 NOAEL and the LOAEL. So we interviewed a handful of
 10 ranchers in the Bighorn and Powder River Basin who use
 11 produced water sources with elevated sulfates and TDS
 12 compared to other water sources which are natural that they
 13 also use.
 14 In general, the ranchers found that there is no
 15 adverse effects on the livestock -- their livestock,
 16 including cattle, sheep and horses, that drank water
 17 containing sulfates at or below 3100 milligrams per liter
 18 and TDS at or below 5390 milligrams per liter.
 19 Where they did find adverse effects was apparent
 20 when the sulfates reached concentration at or above 4,000
 21 milligrams per liter and TDS at or above 7,000 milligrams
 22 per liter.
 23 Specifically, the Flitners, Greg and Dave, gave
 24 us some data on seven-year weaning rate averages, which
 25 were as good or better on the land with access to

1 produced-water-only sources compared to their land with
 2 natural water sources.
 3 Mr. McCarty also noticed that his ranches
 4 observed no adverse effects on their cattle that used
 5 produced water sources -- again, with the elevated sulfate
 6 and TDS -- compared to their natural water sources.
 7 Measures provided included body condition, mortality,
 8 weaning rates and weights and breeding rate.
 9 Interviews with other ranchers, including
 10 Mr. Meike, Mr. Schlaf and Mr. Shepperson, indicated no
 11 adverse effects on their cattle from drinking produced
 12 water sources compared to natural water bodies.
 13 And finally, the beneficial use letters, which
 14 are public record, indicated a number of times that their
 15 livestock have benefited and have not experienced adverse
 16 effects using the produced water sources.
 17 For wildlife effects, there have been a number of
 18 studies by the U.S. Fish and Wildlife Service that have
 19 shown no adverse effects on wildlife at the Loch Katrine,
 20 which is a play lake enhanced by produced water discharges
 21 that receive contributions up to 5,000 milligrams per liter
 22 TDS and over 2,000 milligrams per liter sulfates.
 23 And finally, ranchers' observations indicate that
 24 wildlife is often observed utilizing the produced water
 25 sources, sometimes in greater densities than the natural

1 discharges support additional herds of cattle and crops in
 2 the areas.
 3 Effects -- some effects of eliminating produced
 4 water surface discharge included loss of herd size to a
 5 number of ranchers in the counties affected. Some case
 6 examples are included below, and these are also -- can be
 7 extrapolated countywide in terms of loss of total economic
 8 output and loss of jobs and labor income.
 9 There's additional cost individually to ranchers
 10 to develop alternate water sources in the event that there
 11 are no more produced water surface discharges.
 12 Finally, in some cases, the effects of lowering
 13 the water quality limits are such that it would
 14 eliminate -- it would reduce exploration and development in
 15 certain counties, which affect county and statewide on lost
 16 tax and export revenue, lost jobs and contributions
 17 financially to social programs.
 18 Our study conclusion shows that current WDEQ
 19 effluent limits pose no measurable adverse effect to the
 20 health and well-being of domestic livestock and wildlife;
 21 and furthermore, there would be no incremental reduction in
 22 wildlife or livestock injury if the limits were changed to
 23 Petitioner's requested limits. However, associated social
 24 and economic impacts would be such that it would be harmful
 25 to the Wyoming residents.

1 sources and without adverse affects observed.
 2 The conclusion from this third line of evidence
 3 is that, again, the experiences of the ranchers and other
 4 folks in Wyoming in the field are supportive of the current
 5 limits, but they do not support the proposed changes to
 6 those limits.
 7 From our three lines of evidence, we derive a set
 8 of recommended water quality benchmarks. These include 13
 9 milligrams per liter for barium, 3,010 milligrams per liter
 10 for sulfates and 5600 milligrams per liter for TDS.
 11 Compared to the current effluent limits, these are
 12 consistent; however, they're not consistent with
 13 petition-proposed limits.
 14 Our recommended benchmarks also show that the
 15 current effluent limits are protective of wildlife and
 16 livestock.
 17 In the larger picture, briefly, there is other
 18 additional social and economic values that produce water
 19 surface discharges which should be taken into
 20 consideration. I'm not going to go into the details here,
 21 but a number of letters of beneficial use by Wyoming
 22 residents show that their cattle and often their crops are
 23 largely maintained by produced water sources.
 24 A series of use attainability analyses that are
 25 out in public record for Wyoming indicate also that the

1 Thank you.
 2 MS. FLITNER: Thank you.
 3 Questions for Penny, keeping in mind that she is
 4 not going to be available to you tomorrow?
 5 MS. HUNTER: And I also have an
 6 accompanying report which should be passed out to you.
 7 MS. FLITNER: Thank you. I have a couple
 8 of questions which I may have missed in the beginning.
 9 Would you -- part of what we're grappling with,
 10 obviously, is the numeric standards. And so would you
 11 review for me the basis for your findings on the standards
 12 that you are recommending?
 13 And you referenced your study a little bit, and I
 14 missed the methodology at the beginning -- if you wouldn't
 15 mind.
 16 MS. HUNTER: Sure. It's a standard
 17 ecological risk assessment. We looked through the
 18 peer-reviewed literature on toxicity studies and identified
 19 concentrations which definitely do not cause an adverse
 20 effect and concentration which do show a low adverse
 21 effect.
 22 We took the geometric mean between the two in a
 23 potential benchmark that could be used as a -- sort of a
 24 safe guideline for livestock and wildlife, and that was one
 25 line of evidence. We also looked at existing other

1 published guidelines. I know there's none for EPA, but
 2 Canada has one specifically for livestock; and then the
 3 National Research Council also has a set of guidelines.
 4 And finally, we used the Wyoming ranchers'
 5 experiences to support what we're finding in the literature
 6 and the guidelines as far as the concentrations go.
 7 And that, essentially, is how I came up with my
 8 recommended benchmarks.
 9 MS. FLITNER: And how many landowners were
 10 involved in your study?
 11 MS. HUNTER: Individual interviews -- I
 12 believe were six or seven. They're in the appendix there.
 13 You can count. We also looked to letters of beneficial
 14 use.
 15 MS. FLITNER: Thank you.
 16 CHAIRMAN GORDON: Can I follow up on that
 17 question?
 18 Your selection of landowners -- and I think I saw
 19 Mr. Meike --
 20 MS. HUNTER: Meike. Sorry.
 21 CHAIRMAN GORDON: That's okay.
 22 But I was just curious how you selected your
 23 landowners.
 24 MS. HUNTER: On availability and -- as I'm
 25 sure you're aware, my -- this report was supported by the

1 generally, and subchronic is less than a year exposure.
 2 For birds it can -- chronic is more than six weeks and
 3 subchronic is less than six weeks.
 4 MR. MORRIS: On your livestock report, was
 5 that just a visual observation or was there some scientific
 6 data?
 7 MS. HUNTER: On the ranchers' experiences,
 8 there were some data provided to me, especially -- the
 9 Flitners provided numbers and the McCartys had general
 10 numbers for me. On others it was anecdotal or qualitative.
 11 MR. MOORE: I'm trying to digest your
 12 report here, and I haven't had enough time to really feel
 13 comfortable with it, but I'm curious -- I was looking to
 14 try to find how many different toxicity studies for barium
 15 you were able to find and how you could draw conclusions
 16 based on the number of studies that you could find on
 17 toxicity.
 18 MS. HUNTER: Well, there are, obviously,
 19 study limitations to barium in particular. The number
 20 eludes me, but I believe it's between 5 and 10 per
 21 receptor. So the total per receptor is less than 20.
 22 MR. MOORE: Well, on page 17 of your report
 23 it says lethal dose studies on barium are nominal with
 24 direct effects on cattle.
 25 MS. HUNTER: That -- I'm reviewing general

1 Petroleum Association of Wyoming. They gave me some list
 2 of ranchers. I also contacted the BLM, and the name
 3 escapes me right now who gave us additional ranchers' names
 4 and numbers.
 5 Part of the limitation on the interviews was
 6 time. You know, I'm welcome -- I'm open to gathering more
 7 data, of course; and I think Mr. Raisbeck is of the same
 8 mindset that empirical data would be great.
 9 CHAIRMAN GORDON: Uh-huh. Thank you.
 10 MS. HUTCHINSON: My understanding of
 11 toxicity is it's also related to time of exposure. So
 12 certainly a person can be exposed to the same level for ten
 13 minutes and be fine or a higher level for less amount of
 14 time or a lower level for a long time.
 15 So my question is how does your timed exposure
 16 take into account the limits that you have proposed?
 17 MS. HUNTER: We discarded acute -- some
 18 very, very short-term studies. We looked at -- we tried to
 19 gather as many chronic studies as possible. In some cases
 20 there were no chronic studies, only subchronic. But we
 21 tried to look at long-term effects.
 22 MS. HUTCHINSON: What's the difference
 23 between chronic and subchronic?
 24 MS. HUNTER: It is almost operationally
 25 defined; but for mammals, chronic includes a year or more,

1 toxicity information on barium, and I do go through acute
 2 studies; but none of those were used to derive water
 3 quality benchmarks.
 4 If you look at table 1-6, I think, that will show
 5 you the number of studies that I used to look at water
 6 quality benchmarks.
 7 MR. MOORE: 1-6?
 8 MS. HUNTER: 1-8. I've lost count.
 9 MR. MOORE: 1-7 is barium toxicity study
 10 database.
 11 MS. HUNTER: There you go.
 12 MR. MOORE: But there were no -- according
 13 to your text -- no lethal dose studies on barium that
 14 sought --
 15 MS. HUNTER: Right. But we aren't really
 16 looking at lethal dose. Death is the ultimate endpoint.
 17 For here -- for this study we're looking at more subtle
 18 endpoints such as growth defects, reproductive defects.
 19 Those occur long before death, obviously.
 20 MR. MOORE: I guess -- okay. I haven't had
 21 a chance to digest this, so -- and bear in mind the
 22 petitioner asked to defer judgment on these until after
 23 Dr. Raisbeck's study is completed, anyway; so we'll have
 24 time to review it before we get to the meat of the issue,
 25 anyway.

1 CHAIRMAN GORDON: Could you just restate --
 2 there was a slide early in your presentation in which you
 3 talked about TDS and sulfates.
 4 Could you just restate what you did there? I
 5 think it's probably your second or third slide.
 6 MS. HUNTER: What was the subject? Do you
 7 remember?
 8 CHAIRMAN GORDON: Well, I think you were
 9 talking about TDS and why you were not considering --
 10 MS. HUNTER: Oh. It's this one.
 11 TDS, of course, is the measure of a number of
 12 different constituents. Sulfate is generally a part of
 13 TDS; but because it addresses a separate regulatory issue
 14 here, it's redundant to talk about sulfate toxicity and
 15 then TDS toxicity if we include sulfate in that TDS
 16 measure. So we're talking about other constituents of TDS.
 17 CHAIRMAN GORDON: Okay.
 18 MS. FLITNER: Other questions? No. Okay.
 19 Thank you, Penny.
 20 Keith, if I understand your earlier comments, you
 21 would like Dan Arthur?
 22 MR. BURRON: Correct. If we could, I think
 23 first Mr. Flitner and then Mr. McCarty.
 24 MR. MCCARTY: Chairman Flitner and members
 25 of the Council, good afternoon. Pardon me.

1 My name is Mick McCarty. I'm from Cody, Wyoming.
 2 I'm an attorney and a rancher. Don't hold the first part
 3 against me. Today I'm representing myself, and you know
 4 what they say about lawyers that represent themselves. The
 5 old saying is they have a fool for a client.
 6 But be that as it may, I'm representing our
 7 family ranching operation, which is known as McCarty
 8 Ranching. We're a third-generation ranching operation, and
 9 we're like most people involved in agriculture anymore.
 10 You own some land and you lease some land and you operate
 11 some land.
 12 Because of this, we have the ability to operate
 13 different herds in different fashions and compare that
 14 performance. On our own ranch, which is south of Cody, we
 15 operate what I call a range cow operation. In other words,
 16 we try to operate so that our cows never eat any
 17 processed forage. They don't -- we try and operate so they
 18 don't eat any hay. They eat mineral supplement, natural
 19 grass and protein blocks -- protein supplements.
 20 These cows are the cows that I gave an opinion to
 21 to Penny. In the summer they run west of Highway 20 on the
 22 face of Carter Mountain, and in the winter they run on BLM
 23 permits in the Oregon Basin. And they're there from
 24 November 1st to May 1st. Their sole source of water, with
 25 very, very few exceptions, is oil field discharge water.

1 And I can tell you that that oil field discharge
 2 water and sulfur -- and I'm not a scientist -- pushes the
 3 upper limits of all that has been discussed here today. So
 4 being able to compare that group of cows to other group of
 5 cows that we operate, we were always curious about this
 6 water.
 7 And the fact is we were curious at the outset
 8 about this water and hired a nutritionist to analyze it.
 9 His name is Dr. Trey Patterson, who's head of the animal
 10 science department at the University of South Dakota; and
 11 his father and he have a company. And now he's comanager
 12 of Padlock. So he's a Wyoming guy and familiar with these
 13 issues.
 14 So what measurements do we apply in ordinary
 15 operations? We don't apply very scientific type of
 16 measurements. But, you know, an easy one is what's your
 17 death loss? Well, on this herd our death loss is less than
 18 1 percent a year.
 19 What percent of your cows are bred in the fall
 20 when you pregnant-test? And this year it exceeds
 21 95 percent. What percent of these cows delivered a
 22 live-weaned calf? And for six years it's been over
 23 94 percent.
 24 How do these cows do on a day-to-day basis?
 25 Well, the animal scientists have a score system from one to

1 ten in the skinniest cow you ever saw to the fattest cow
 2 you ever saw, and they say range cows should be right in
 3 the middle at a body condition score of five. And it's a
 4 little mesenteric applying that on a herd, but we believe
 5 that we maintain that body condition score of five
 6 throughout the year.
 7 These cows -- and I can't tell you why --
 8 operated in this group perform better than our other
 9 groups. And it may be the terrain, it may be the grass, I
 10 don't know; but there isn't anything adverse from their
 11 drinking this high water with -- high sulfur content water.
 12 As far as I know, they're drinking it today; and that's all
 13 they have to drink today.
 14 There are some people that say that that warm
 15 discharge water -- cows like it. It reduces their caloric
 16 intake, and it may -- I know they prefer the warm discharge
 17 water.
 18 You know, I'm not here talking about coalbed
 19 methane discharge water, because I don't know about it; and
 20 I'm not here arguing rancher against rancher. I have a
 21 little problem with one group of ranchers wanting one thing
 22 and one another.
 23 But I guess from my perspective -- I guess what
 24 I'm saying to you as a council is that one size is not
 25 going to fit all. And one uniform rule imposed in a

1 nuclear fashion -- that seems to be a popular word today --
 2 is going to cause a lot of dislocation. It's going to
 3 cause a lot of harm to existing ranchers. It's going to
 4 cause a lot of harm to wildlife that depend on it, and it's
 5 going to cause a lot of harm to ranchers and business.
 6 I think that you're going to have to make some
 7 definitions of how it's applied and when it's applied, and
 8 that's going to be a big job.
 9 I thank you for the opportunity to be here today.
 10 I've got to cut this short because I know your time
 11 schedule and I know my time schedule; but if you have some
 12 questions, I'd be happy to answer them.
 13 MS. FLITNER: Thank you.
 14 Questions? Thank you.
 15 I believe Greg is next on deck. Dan Arthur will
 16 follow.
 17 We have nine people slated to testify today, so
 18 I'll remind you of a couple of things while Greg is making
 19 his way to the podium, especially since this is probably
 20 the only time anyone related to me might ever listen.
 21 We would like to limit the testimony to
 22 five minutes or under. My plan is get through these nine,
 23 plus Greg and Dan Arthur. So we need your help and
 24 cooperation to do that. We have letters from your
 25 past testimony -- we have letters that have been submitted

1 water out there.
 2 We've seen no evidence of water quality problems
 3 in our livestock from the produced water. Our calves seem
 4 to grade in the top 5 percent in the region for quality,
 5 according to ConAgra. And weaning weights from our calves
 6 on produced water as compared to other pastures throughout
 7 the ranch are as heavy or heavier than those calves. And
 8 in a lot of cases, they're heavier; and some of it may be
 9 attributed because the availability of the water is there.
 10 And I guess in all my years of riding out there
 11 I've never seen a wild horse that was adversely affected by
 12 the water. Maybe there's been, but I've not seen one. The
 13 only problem I can see with the produced water out there is
 14 if it ever quits. If it stops flowing, it would have a
 15 tremendous economic impact on our ranch and, in turn,
 16 rendering a large portion of our range unusable, resulting
 17 in a loss of jobs and possibly crippling our outfit to the
 18 point where it would no longer make sense to operate.
 19 That's all I have.
 20 MS. FLITNER: Thank you.
 21 Questions for Greg? Thank you.
 22 Dan Arthur is on, and on deck is Jeremy
 23 Butterfield, followed by Brad Basse or Basse. Pardon me if
 24 I get the pronunciations wrong.
 25 MR. ARTHUR: Madam Chairman, Council

1 into the record, and we have revisited past testimony; so
 2 new information is helpful and redundant information is
 3 redundant.
 4 Thank you.
 5 MR. FLITNER: Mrs. Flitner and members of
 6 the committee, I want to thank you for giving me the
 7 opportunity to get up here. I'm not much of a speaker,
 8 but -- especially following Nick.
 9 But we do run out there on some of this produced
 10 water. My wife Pam and I and my father and his wife -- we
 11 have a horse, cattle, farming and recreation operation
 12 which we run on private BLM state and Bighorn Park in
 13 Johnson County.
 14 We run a couple thousand head of cows and a
 15 couple hundred head of horses, and we've been there for a
 16 hundred years as of last summer -- the family. A large
 17 percentage of our herd runs on the produced water at
 18 different times of the year; spring, fall and some in the
 19 summer. There's about 500 head out there now that -- like
 20 Nick was talking a minute ago, that's the only water they
 21 have and will have for another month.
 22 So -- and the other thing -- there's about 500
 23 head of wild horses on that same country out there that
 24 primarily use that as their water source, especially over
 25 the past six, seven years where there hasn't been a lot of

1 members, thank you for having me.
 2 My name is Dan Arthur. I'm a registered
 3 professional engineer in the state of Wyoming. I'm a
 4 current researcher for the U.S. Department of Energy and
 5 have been since 1990. I've been working in the area of
 6 coalbed natural gas and produced water since 1988,
 7 beginning in the state of Alabama and have been working on
 8 produced water, coalbed natural gas research for the
 9 Department of Energy for about the last ten years.
 10 For my presentation, looking at the rationale for
 11 increasing stringency, I looked at a few different things.
 12 First, why you would do that; and that would be, ideally, I
 13 would assume, to alleviate perceived threats or
 14 environmental risk to surface streams, livestock, wildlife,
 15 and then identifying have threats been technically defined.
 16 That's one of the concerns that I have, is looking at the
 17 evidence that's been presented. The various research out
 18 there is that the threats do not appear to be very
 19 technically defined.
 20 And if there is a threat, is increased stringency
 21 technically justified? And as a Department of Energy
 22 researcher, my mission is to be looking at sound science,
 23 very technically supported decisions and to attempt my best
 24 to -- to consider things that are not specifically
 25 technical in nature.

1 So for instance, earlier hearing that it's
 2 pollution when somebody thinks it's pollution, it's not
 3 pollution when they don't think it's pollution, that would
 4 not be, in the way of my research, technically based.
 5 Furthermore an ongoing, will increased stringency
 6 have a clear and resultant impact that is positive and
 7 balanced? So that's something you're looking at. And
 8 myself, as a former representative of the U.S.
 9 Environmental Protection Agency in a past life, that was
 10 something that we looked at -- and regulatory
 11 development -- on a national basis.
 12 And lastly, have lost coalbed natural gas
 13 reserves and associated impacts to the state and all
 14 involved been considered? All those things are very, very
 15 important.
 16 Within this I wanted to try my best to display or
 17 present a very balanced set of analyses that's been done to
 18 give you an idea from that and not just from the U.S.
 19 Department of Energy or consultants or whatnot. One of the
 20 things that I chose was some work done by the Bureau of
 21 Land Management in Miles City, Montana.
 22 And that's of specific concern because many of
 23 the watersheds in Wyoming that are receiving coalbed
 24 natural gas water run into Montana, and that's significant.
 25 And through some of the studies that were done by the BLM

1 first started in the Powder River Basin comparing
 2 precolalbed natural gas flow data in these watersheds as
 3 well versus post is flows went down, and largely due to
 4 drought, even with increased discharges.
 5 Another example of this is sodium adsorption
 6 ratio versus flow in the Powder. In this case what you
 7 actually saw and what the BLM in Miles City concluded was
 8 that SAR actually improved in the Powder at the Arvada
 9 monitoring station and the other monitoring stations that
 10 they analyzed.
 11 So some of the impacts to coalbed natural gas
 12 development and in considering more stringent requirements
 13 is going to result in increased cost to operators for water
 14 management -- something that all of them do in a very
 15 detailed and careful manner anymore to allow those projects
 16 to move forward with review and detailed scrutiny by the
 17 Bureau of Land Management, the state engineer's office, the
 18 Wyoming DEQ and countless other agencies.
 19 One of the experiences that I've been fortunate
 20 enough to have as an engineer is I was able to manage for a
 21 number of years the largest water reuse system on the
 22 planet, and that's in Saint Petersburg, Florida. They have
 23 an on-demand reuse system where treated wastewater's used
 24 for irrigation throughout the city.
 25 And one of the things we learned -- and it was

1 in Miles City, what they found is that discharges from
 2 coalbed natural gas had no discernible impacts on any of
 3 the watersheds there, such as the Tongue and Powder.
 4 This example that I have here -- and I have a
 5 couple of these -- this is specific conductance versus
 6 flow -- on the Powder River at Arvada. And what you see as
 7 the light blue color is specific conductance data collected
 8 at that monitoring location from 1946 to 1999; and then
 9 1999 to 2004, the yellow; 2005 data, the red.
 10 As you can see statistically looking at that
 11 data, it's very difficult to see any discernible difference
 12 in the water quality data there either before coalbed
 13 natural gas development or during.
 14 MR. MOORE: Excuse me a minute. As far as
 15 just to the rest of the Council, the slides are cut off on
 16 that screen. The full slide's shown on this one, so you
 17 might want to look over your shoulder.
 18 MR. ARTHUR: Of further interest -- and
 19 when you look at this -- is that in a lot of the research
 20 that we've done on many of these watersheds throughout the
 21 Powder River Basin, what you see is the very oddities and
 22 influences from things like drought.
 23 You can actually look at some of the flow data
 24 from the Powder, the Tongue or the Little Powder; and what
 25 you see is from the point that coalbed natural gas was

1 very evident of that project -- is that you needed a
 2 toolbox of tools to manage the water, to allow the water
 3 reuse system to be successful. And that meant at some
 4 point you had to dispose of water.
 5 We used about a dozen 30-inch diameter injection
 6 wells at that site to be able to manage water when
 7 irrigation was not needed. And what we did throughout that
 8 process is we had a lot of controversy on wasting water and
 9 the desire not to waste water. But the fact of the matter
 10 was that you had to have ability to dispose of some water
 11 to be able to make and maximize the benefits of reusing the
 12 water later on.
 13 One of my concerns is that removal of surface
 14 discharge as an economic alternative to managing coalbed
 15 natural gas produced water could have a significant effect.
 16 Increased emphasis on other management
 17 alternatives also needs to be considered, just like you've
 18 heard some of the testimony so far today about looking
 19 downstream. That's a little bit more complicated issue
 20 than I think has been given credit to date.
 21 But as you perhaps reduce use of surface
 22 discharge, there could be other things that may be utilized
 23 to be able to compensate for that, if possible.
 24 Furthermore, overwhelming the capacity of class 1 disposal
 25 wells to handle waste burrowing is of particular concern to

1 me.
 2 In a conversation I had -- had and have had
 3 several times with Don Likwartz of the Wyoming Oil and Gas
 4 Conservation Commission -- I talked to him again yesterday
 5 in Casper -- one of the things with water treatment plants
 6 is whether it's RO or ion exchange, they have a
 7 concentrated waste byproduct that has to be disposed of.
 8 That's disposed of in class 1 injection wells.
 9 Those are the most stringently regulated class 1 or type of
 10 injection wells in the United States. There's very few of
 11 them. I believe in Wyoming there's three. Those wells are
 12 at capacity.
 13 Permitting types for new class 1 disposal wells
 14 is one to two years, along with another probably one to two
 15 years to drill and get the injection well ready to move
 16 forward. So you're looking at a significant amount of time
 17 just to be able to have a waste-byproduct-handling method.
 18 Further limiting how or if development can occur
 19 is going to be, I think, a direct result of increasing and
 20 what I believe is increasing requirements without --
 21 certainly without being technically based; but irregardless
 22 of that, whether technically based or not, it will have an
 23 impact.
 24 One of the other things I wanted to present is
 25 the Department of Energy ARI report that was completed in

1 2006 looking at water disposal costs. I've heard some
 2 costs this morning on some things.
 3 But what the Department of Energy did in this
 4 study is they looked specifically at the Powder River
 5 Basin. They made their cost analysis based on TDS and not
 6 the additional treatment that would be required to address
 7 barium and sulfate. That would increase these costs.
 8 From my direct experience looking at water
 9 treatment plants, water treatment -- a study that we did
 10 with the Department of Energy and the Wyoming governor's
 11 office working with Mary Flanderka is we saw costs in this
 12 range, but in some cases going up to as high as \$2, not to
 13 mention the issues and costs associated with delays and all
 14 the things that go along with that -- very complex.
 15 Some of the toolbox things that you'd want to
 16 consider as an operator -- surface discharge, infiltration
 17 ponds, no-discharge ponds, irrigation injection, livestock,
 18 wildlife watering, treatment discharge, evaporation, a
 19 number of different things -- all important, all
 20 specifically customized to a particular area.
 21 Incremental water management, if we look at -- at
 22 this from a -- from a very core level, are we going to have
 23 more infiltration ponds, more sealed ponds, more irrigation
 24 injection, livestock? The issue with surface discharge is
 25 this is one option with significant additional capacity.

1 So -- that's technically supported with the
 2 current discharges that we've seen. We've seen -- you
 3 know, if you look at the numbers, the environmental impacts
 4 are undiscernible in the major watersheds.
 5 If uneconomical due to treatment cost, continued
 6 production may no longer be economical or feasible for
 7 coalbed natural gas in the Powder River Basin. That's a
 8 big step, but I'll talk about that in a little bit.
 9 One of the implications that I encourage you to
 10 consider on increased treatment is more treatment plants.
 11 And this goes back to a study that we did for the Montana
 12 Department of Environmental Quality as well as in some of
 13 our DOE research -- but more plants, more pipelines, more
 14 truck traffic, and then looking at where the waste brine
 15 goes.
 16 So if you assume -- somebody said earlier --
 17 about 1.4 million barrels per day of total water -- I
 18 assumed about 1.5. If 20 percent of that has to be treated
 19 down to a 500 milligram per liter limit and 10 percent of
 20 that would be waste brine, that's 300 truckloads a day of
 21 trucks driving around the country hauling water.
 22 That means more dust, more truck traffic, a
 23 number of other impacts that would certainly have to be
 24 evaluated.
 25 One of the things that I do a lot of is NEPA

1 work, and I understand it's a federal program. But that
 2 balance of looking at every decision you make and seeing
 3 what all the other repercussions of that are is certainly a
 4 challenge that you all have, and that's a big challenge.
 5 Real effect, ending surface -- or end of surface
 6 discharge or untreated CBNG water -- I think that that's a
 7 reality. If we start getting to points where the idea of
 8 treatment starts becoming uneconomic, it has a big effect.
 9 In the Powder River Basin this is a very
 10 different play than conventional oil and gas. We're
 11 working on other projects in other areas of the country and
 12 in Wyoming where it's feasible to go in and develop one
 13 well. If you talk to a lot of the coalbed natural gas
 14 developers, they have to develop a lot of wells.
 15 These aren't high production wells, they're low
 16 production wells; and you have to have a lot of them to be
 17 able to support the infrastructure and all the other things
 18 that you have ongoing.
 19 If, you know -- and we've already seen this to
 20 date -- is having shut-in coalbed natural gas wells that
 21 don't have an area or a route to take their water to,
 22 reduced new development of coalbed natural gas, reduced
 23 revenue, reduced tax to counties, states and nation -- all
 24 of these are certainly a concern of the Department of
 25 Energy.

1 Coalbed natural gas is about 11 percent of the
2 natural gas production in the United States. Demand is
3 certainly outpacing production. Seeing what we're seeing
4 now, declining production in the Powder River Basin is of
5 particular concern to DOE.

6 More water treatment plants -- feasible until
7 impacts make development uneconomical. In a 2006 DOE study
8 that was prepared with the Wyoming governor's office in
9 response to some proposed Montana treatment requirements,
10 that study noted that the treatment requirements that were
11 proposed in Montana could ultimately result in the
12 cessation -- complete cessation of coalbed natural gas
13 development in the Powder River Basin.

14 So in closing, are more water treatment plants
15 the answer? You know, there's certainly a lot more than
16 there were. Siting and permitting costs combined with
17 limited proven treatment options are causing unexpected
18 costs.

19 One of the challenges you have -- my wife is an
20 engineer for the City of Tulsa -- I'm from Tulsa, Oklahoma.
21 I spend a lot of my time here, but she works with the City
22 of Tulsa's planning -- has managed the water treatment
23 plant. You count on water being a very consistent nature.
24 Water treatment plants for municipalities are generally
25 built to run on their own in the coalbed natural gas

1 environment.

2 They're not -- the water quality's changing. New
3 wells are coming on and off. Rates are changing, water
4 quality's changing. We have a lot of different things to
5 deal with, and that's part of the reason why you've had a
6 lot of treatment research done specifically here in the
7 Powder that has not been successful.

8 And again, looking at the potential for the
9 cessation of development -- and, I think, that's serious
10 and supported -- in my opinion -- my technical opinion as a
11 registered professional engineer and what I've seen, the
12 research that I've been doing in Wyoming and Montana
13 specific to coalbed natural gas increased stringency does
14 not appear justified on a strictly technical basis.

15 That's all I have. If you have any questions,
16 I'd be happy to answer them or do my best to do so.

17 MS. FLITNER: I -- my question is -- is
18 that clearly as we get into layers of this it becomes more
19 complex in terms of related problems, which you referenced.

20 MR. ARTHUR: Absolutely.

21 MS. FLITNER: I did not hear a
22 recommendation from you with regard to solutions, which is
23 what we are particularly interested in; though I heard and
24 have no reason to dispute the testimony about the expense
25 associated with other options and the other problems

1 associated with consumption.

2 I'm just wondering if -- this is a question I'm
3 going to start asking a lot -- is there a way that you can
4 aid us in our deliberations to try to move forward in a way
5 that addresses the complexities we're looking at?

6 MR. ARTHUR: I would be happy to support
7 you in that manner, and I could see doing that in couple of
8 different alternatives that I would be willing to volunteer
9 for.

10 The first thing that I can do is that -- we've
11 done a number of research projects published by the
12 Department of Energy, including on reports evaluating
13 feasibility of produced water beneficial uses, produced
14 water management, the study that we did for the Wyoming
15 governor's office that we provided to the Montana DEQ in
16 their BER that today I was thinking, Golly, I wish I would
17 have brought those with me to provide to you, because
18 they're really dealing with some of the same issues.

19 MS. FLITNER: Does the DEQ have an
20 awareness level of those reports?

21 MR. ARTHUR: They participated in the
22 project that we did, so we could certainly provide you with
23 those copies.

24 MS. FLITNER: If they have it, we sort of
25 have it. And I guess -- dang it. We're looking to -- to

1 solve some problems here, and it's hard to see our way to
2 doing that.

3 MR. ARTHUR: And the other thing that I can
4 do as a researcher with the Department of Energy is I have
5 access to a number of experts, and if there are particular
6 issues that -- that you're looking at that you're looking
7 for assistance on specifically trying to find -- I'm quite
8 confident that we could probably get help from, for
9 instance, a national lab or something of that sort to weigh
10 in on the situation.

11 MS. FLITNER: Thank you.

12 CHAIRMAN GORDON: I had a question. I
13 really appreciated your testimony. I'm curious -- as I
14 remember, the price of gas was around \$15 last January, and
15 it's about 6 now.

16 Is there -- do you have a comment on how a person
17 should judge -- because clearly both price and then the
18 cost of production have a bearing on the profitability --
19 so do you have a way of sort of coming to some kind of
20 recommendation for us on how we should judge that toolbox?

21 MR. ARTHUR: You know, that's probably
22 something that -- that I would -- that I would be more than
23 willing to talk more with you about.

24 What I will say is that within that and -- it
25 gets complicated real quick, because one of the things that

1 you note -- and it's very evident in the oil and gas
 2 industry right now especially -- is that as the price of
 3 oil and gas have gone up, all of the other prices for
 4 everything there have also gone up.
 5 Through that period of time, especially in the
 6 Powder River Basin, you've had multiple environmental
 7 impact statements that have been done, updates to resource
 8 management plans on the federal side of things, a lot of
 9 new regulations -- really a moving target on regulations
 10 for a number of different agencies and many times for the
 11 right reasons, including the Wyoming DEQ, that has been
 12 evolving their regulations to keep up with what's
 13 happening, what they're dealing with with the coalbed
 14 natural gas industry.
 15 So we've seen and documented those. We're
 16 actually participating right now with a DOE research
 17 project where we have a memorandum of understanding signed
 18 with the Wyoming DEQ, and we're participating with you
 19 looking at produced water impoundments.
 20 But all of that the same, it's not -- it's not a
 21 straightforward issue, because as prices go up or they go
 22 down -- you know, what's happened most recently is prices
 23 went up, services went up, drilling rigs went up, all the
 24 costs went up, price goes down -- those don't follow it
 25 exactly.

1 And within that a year ago, two years ago,
 2 five years ago, if you're going to site a new plant or a
 3 new discharge, it costs a lot less -- there was a lot less
 4 that you had to do, a lot less scrutiny, a lot less time.
 5 Now there's so much more coordination.
 6 We worked on the siting of a water treatment
 7 plant in the Fence Creek area. We had to move it about 20
 8 times coordinating with Fish and Game, DEQ requirements,
 9 BLM, the landowners, all these different things that now
 10 are taking more time than ever before.
 11 As well is that a lot of the water treatment
 12 companies like EMIT and others that are working in that are
 13 getting a better handle on what their costs are. So
 14 they're saying, Well, we're charging you for this but now
 15 we've got to do waste disposal so we're going to charge 3
 16 or 4 dollars a barrel to dispose of the waste.
 17 So you look at all those. It's -- you know, I
 18 realize you're looking for a -- you know, almost a graph
 19 that you can say when the price is this, the cost are these
 20 and easily compare all the different alternatives.
 21 Unfortunately, it's not that easy. Even within
 22 that, in some of the areas that we deal in, we may have
 23 options or alternatives like evaporation that may be a lot
 24 less extensive in some areas than others, depending on the
 25 tool that you're using in the toolbox. And furthermore,

1 just to make everything work, you may need, in some areas,
 2 to use every single tool available to you.
 3 MS. FLITNER: I'm going to stop you there
 4 and let Rick ask his question.
 5 Go ahead.
 6 MR. MOORE: I just wasn't clear. Are you
 7 testifying today on behalf of the Department of Energy?
 8 MR. ARTHUR: I'm testifying today on the
 9 behalf of myself as a Department of Energy researcher.
 10 MR. MOORE: But not -- the things you gave
 11 us are your opinions and not the position of the Department
 12 of Energy?
 13 MR. ARTHUR: Correct. So what I have tried
 14 to do within that, Rick, is -- that's why I pulled in
 15 information from DOE studies, Bureau of Land Management
 16 studies. And what I tried not to do, specifically as a
 17 researcher, was just to show my research. So I tried to
 18 show a balance thing that are things that I'm looking at
 19 that are as a technical researcher that are providing that
 20 information in a balanced manner.
 21 MR. MOORE: Would you provide a copy of
 22 your PowerPoint presentation for the staff?
 23 MR. ARTHUR: Sure. It's on this computer.
 24 Is that enough or --
 25 MR. MOORE: No.

1 MR. ARTHUR: Okay.
 2 MS. FLITNER: Not unless you're going to
 3 give me that computer.
 4 MR. ARTHUR: I don't know whose computer it
 5 is.
 6 MS. FLITNER: I misunderstood. So you were
 7 not testifying with Keith's -- on behalf of Keith's group
 8 and Petro-Canada?
 9 MR. ARTHUR: No. I'm --
 10 MR. MOORE: Who are you testifying on
 11 behalf of, yourself?
 12 MR. ARTHUR: Uh-huh.
 13 MS. FLITNER: We are going to start wading
 14 through the testimony of those of you who are still
 15 endeavoring to get out of here today.
 16 We'll have to take a break at 5:00 because
 17 there's another meeting going on, and they're going to take
 18 some of those chairs. We'll deal with that. We will
 19 squeeze you in over here, and maybe they won't take all of
 20 them -- yet more inspiration to move along as efficiently
 21 as you can.
 22 And Jeremy Butterfield, you can set the example.
 23 On deck is Brad Basse.
 24 And I am going to time you out of respect for
 25 all. I have no better way of doing this. I will wave or

EQC Hearing Testimony

January 18, 2007

1 MR. MORRIS: Would you advocate a rule
2 instead of a policy?

3 DR. SHOGREN: Well, for just about
4 everything in the state we do have a rule. I mean, we have
5 a rule for all the different potential minerals and
6 chemicals that are in our water in terms of safe minimum
7 standards. De facto Montana has sent one for us, and
8 that's why we're here.

9 People in Montana may have a different idea of
10 the social value of coalbed methane. We don't have to go
11 by what Montana does, but de facto -- they have set the
12 rule.

13 MS. FLITNER: Thanks, Jay. Appreciate it.
14 At this time we're going to start working through
15 the testimony from all of you. I assume that some who
16 signed up yesterday are not with us today, just looking at
17 the faces in the crowd.

18 Again, it would be helpful if you would identify
19 yourself for the record and state whether or not you
20 support the proposed language. We would benefit from
21 knowing your specific comments about Appendix H and
22 Appendix I.

23 Again, rest assured that we have, I think, a good
24 understanding of the complexities we're dealing with that
25 some benefit, some don't. We understand why that is. We

1 are looking for your ideas about what's being proposed
2 specifically so that we can respond to that.

3 That being said, we will begin with Doug Cooper,
4 and I'll just go down the list as -- in the order that you
5 signed up yesterday.

6 Doug Cooper, are you here? Next is Tim Barber
7 from Yates Petroleum.

8 Are you here?

9 MR. BARBER: I am, and I'm going to defer
10 my time.

11 MS. FLITNER: Okay. Until later?

12 MR. BARBER: Yes.

13 MS. FLITNER: Understanding -- okay. You
14 went from 2 to maybe number 49.

15 MR. BARBER: I understand. Thank you.

16 MS. FLITNER: Joe Olson, whom I don't see.
17 Joe Olson?

18 UNIDENTIFIED MAN: He's in the hall, Madam
19 Chair. I'll just holler at him. Why don't you go to the
20 next one, and he'll be one behind.

21 MS. FLITNER: Leslie Petersen I don't see
22 here today.

23 Will Schumacher? Will Schumacher?

24 MR. SCHUMACHER: Madam Chair, members of
25 the Board, thank you for listening to me.

1 I don't support the petition. I'm here on behalf
2 of myself, people I work with and our families. I've been
3 a resident of Wyoming for the last 20, 25 years. I've
4 worked in the oil field for almost 12. Currently I pump
5 two fields in Big Horn Basin with discharges of
6 approximately 70,000 barrels of water per day.

7 We monitor our discharges daily to make sure
8 we're in compliance with your limitations, which we take
9 quite seriously. I know this petition doesn't affect me
10 directly right now, but we're afraid it will move that way
11 over time. Our waters benefit sheep and cattle as well as
12 wildlife. The drainages we use would normally be dry if it
13 weren't for our discharges.

14 Being forced to reinject our waters with
15 additional cost would prohibit us from producing many of
16 our wells that are now economical. Shutting those wells
17 require less manpower, putting jobs at risk. Less
18 production means less demand for more support industries,
19 putting more jobs at risk.

20 I feel these effects would be felt throughout the
21 Big Horn Basin. I guess it would be similar consequences
22 throughout the state with other oil and gas companies and
23 their suppliers. I feel state water should be managed as
24 they have for years. They've done a good job.

25 I don't have any solutions for you today. I just

1 wanted my voice to be heard.

2 MS. FLITNER: Thank you, Will.

3 Any questions?

4 Joe Olson?

5 MR. OLSON: I'll yield.

6 MS. FLITNER: Okay. Thank you.

7 Isaac Sutphin? Hello, Isaac. And following

8 Isaac, Joanne Tweedy.

9 MR. SUTPHIN: Hello, and thank you. I

10 appreciate the opportunity to be here.

11 My name is Isaac Sutphin. I'm an attorney at
12 Sundahl, Powers, Kapp and Martin here in Cheyenne; and I am
13 here representing Merit Energy.

14 As we've heard already, Merit Energy operates the
15 Hamilton Dome oil field in Hot Springs County. They do
16 have a very small presence in coalbed methane; but we're
17 mostly, at this point, concerned with the conventional oil
18 and gas production over there.

19 I'm not here today to rehash the legal arguments.
20 We've made those arguments in our brief, and they have been
21 brought up in other briefs as well. I'm here to talk about
22 the practical effects of what's happening and what this
23 decision could mean to Merit Energy and to the people that
24 have based their livelihood on the water that we produce.

25 In particular, we're concerned with the -- with

1 the proposed rules and the attempts to regulate pollution.
2 Despite what we've heard, a careful reading of the proposed
3 rules indicates that it's not regulating pollution but it's
4 banning pollution.

5 It talks -- we've heard the PRBRC's own experts
6 that credible data is difficult, if not impossible, to
7 obtain; and yet that's precisely what they're requiring
8 producers to obtain in order to support their discharges.

9 Basically, the rule, as it's proposed, discusses
10 pollution in a very broad sense as it's defined in the
11 statutes; but then talks about how we -- a discharger will
12 not be permitted to discharge their water if it affects or
13 alters the natural state of the receiving stream in any
14 way, including temperature.

15 And, you know, I've been thinking about that.
16 And I thought, Well, maybe I ought to bring a bottle of
17 crystal clear, cold Evian water; and if I were to take that
18 cold water and pour it into another identical bottle of
19 crystal clear, room-temperature Evian water, I would be
20 introducing pollution into that room-temperature water by
21 changing its temperature. And that's absurd.

22 This water has been put to beneficial use for
23 years, and the livelihood of these people, especially --
24 and I, of course, am speaking particularly about the
25 Hamilton Dome discharges -- they have based their

1 livelihood on that.

2 And we've heard that numerous times in the course
3 of this hearing. We heard this morning from Jim Hillberry
4 about how he and 35 other ranches that are dependent upon
5 this water would be forced to go out of business.

6 And Merit recognizes that the PRBRC has made an
7 attempt mid-petition to amend their proposed rules, to
8 focus only on coalbed methane water. Merit is not -- you
9 know, is not conceding the point that that -- that
10 differentiation wouldn't stand up to a legal challenge.

11 I know that this Council is aware of the legal
12 opinions that have been generated and that call into
13 question the legality and enforceability of a distinction
14 like that. But again, Merit isn't conceding that point,
15 but we are concerned that adopting these rules would pave
16 the way and open the floodgates to more stringent standards
17 on the traditional, conventional oil and gas produced
18 water.

19 And thank you. If Merit Energy were forced to
20 meet these more stringent standards -- well, the fact
21 remains they couldn't do it. It's economically impractical
22 to either treat or reinject, and the field would be shut
23 in. And you've heard what the effects would be if that
24 were to happen.

25 You want solutions, and my response to that

1 request for solutions is that those are built into the
2 current regime and the system as it exists today. You ask,
3 Well, what about this offsite landowner who doesn't have a
4 way to leverage the industry into protecting them? They
5 have that.

6 The civil court system contemplates actions for
7 nuisance, for trespass, for property damage; and it's --
8 just because we're dealing with water, those rights don't
9 go away. The system, as it exists today, is effective, as
10 demonstrated by 70-plus years of beneficial use of the
11 discharge water at Hamilton Dome; and it is unnecessary and
12 imprudent to make the changes as proposed.

13 And I thank you.

14 MS. FLITNER: Thank you.

15 Any questions? Yes, Mark.

16 CHAIRMAN GORDON: I'm really struck by the
17 testimony we've heard and how important all of this is, and
18 what I'm -- what I'm trying to understand a little bit --
19 we struggle a lot with numbers of standards and so on, but
20 one of the things that really seems to come through in this
21 testimony today is how important regulatory cost is to your
22 ability to function.

23 And I really had two questions. One was do you
24 have a sense of the incremental cost of regulation and when
25 it becomes uneconomic to produce?

1 And the second one I had was could you kind of --
2 I mean, I understand commodities. Cattle prices were at an
3 all-time high in August, and right now they're in the tank.
4 And unfortunately, we're in a drought; and I know how you
5 guys are having to deal with this kind of stuff.

6 So I guess I'm wondering, relative to commodity
7 price fluctuation, how does it regulate cost and does it
8 make sense -- I guess is the third comment -- for us to
9 reduce so that you can operate at lower -- you know, lower
10 margins? So I guess I had three questions.

11 MR. SUTPHIN: And unfortunately, I don't
12 have an answer for any of those questions.

13 The information that we have provided -- and it's
14 in the record -- is basically from a use attainability
15 analysis that was undertaken on Hamilton Dome, and it
16 speaks in terms of the amounts that would be required, sort
17 of as a bright line -- Should reinjection or treatment be
18 required?

19 I am not aware of -- though I'm not trying to say
20 that we don't have that data -- but I personally am not
21 aware of the type of data that you're asking me for.
22 Certainly it makes sense that if we were to consider it,
23 you know, on a scale, that there would be some -- some
24 evaluation that would have to take place.

25 I, unfortunately, don't have that information

1 with me, and I apologize.
 2 CHAIRMAN GORDON: Okay. Thank you.
 3 MS. FLITNER: Thank you.
 4 Mrs. Tweedy? And Mrs. Tweedy will be followed by
 5 Margo Sabec, Nicol Kramer and Dan Hengel from Devon. And
 6 I'm not sure if each of you wanted to testify separately,
 7 if you're still here.
 8 Mrs. Tweedy, go ahead.
 9 MS. TWEEDY: Good morning, Madam Chairman,
 10 members of the Committee. Thank you for allowing me to
 11 testify before you again. I have been here before numerous
 12 times, so I will not be redundant in the essence of time.
 13 Yesterday Joel Ohman spoke on my behalf and our
 14 behalf. We live about ten miles apart, so his testimony is
 15 part -- would have been part of my testimony. Having said
 16 that, I rise in opposition to the citizens petition. We
 17 ranch, my husband and I, in Campbell County, south of
 18 Gillette; and we've had coalbed methane development on our
 19 place for eight years.
 20 We manage our water and have managed it well
 21 working with industry in our private domain. We wish
 22 government to stay out of our business. We want to
 23 regulate and negotiate and work with our ranch, our water,
 24 our negotiations in private without any undue regulations.
 25 In our personal case -- and many of my neighbors

1 of coalbed natural gas. We oppose the Environmental
 2 Quality Council's citizens petition and the unfounded
 3 adoption of this amendment to the Wyoming water quality
 4 rules as these changes are an infringement on private
 5 property rights.
 6 They are also unrealistic, and they constitute a
 7 government intervention without just compensation. We
 8 respect the current reasonable water regulations, which
 9 include the wide variety of beneficial uses for coalbed
 10 methane water. We do not support changes to these
 11 regulations. We believe they would intrude upon private
 12 property rights and possibly our own well-being.
 13 We understand the variation in water quality
 14 across the Powder River Basin and Wyoming firsthand. We
 15 can tell you that a blanket rule or one-size-fits-all
 16 solution regulating coalbed methane water will not work.
 17 We will, instead, call for the EQC and other Wyoming
 18 regulatory bodies to utilize the wide variety of water
 19 management techniques that exist and continue to grow.
 20 This approach works best to meet the needs of landowners,
 21 operators and the environment.
 22 This had been signed by hundreds of citizens,
 23 landowners, ranchers; and I will give it to you for it to
 24 go on the record.
 25 And thank you.

1 were here yesterday, having to go home and take care of
 2 their ranches. Some still are with me -- are in the same
 3 boat. In our case, this petition, as I read it, would
 4 impact our ranch in the respect that we could no longer
 5 manage our water like we have been because the restrictions
 6 would be -- the standards would not stand up. They would
 7 be too restrictive, and we could not use the water.
 8 Secondly, in our case, since we've had coalbed
 9 methane for eight years and it's on the decline, we would
 10 have to have our revenue streams turned off, our coalbed
 11 methane wells. That is a large -- a large amount of
 12 taking.
 13 So I stand in opposition to any -- anything that
 14 gives a one size fits all. I recognize there is damages
 15 and people have been damaged. I certainly feel for them,
 16 and I think the court system is probably the place to go.
 17 I don't have all the answers either, but I do not think one
 18 size will fit all of us. We have good water, we use it, we
 19 recognize how to use it, and everything is working well.
 20 Having said that, I speak for the hundreds of
 21 landowners, workers and citizens of Wyoming that are in
 22 opposition to this particular petition, including employees
 23 of oil and gas, ranchers, landowners and citizens and wish
 24 to be entered -- this into record saying, We are the
 25 landowners and people affected every day by the development

1 MS. FLITNER: Wendy has a question or two.
 2 MS. HUTCHINSON: Thank you for coming. I
 3 have some questions specific to your comments about how you
 4 feel that the rule, if we passed it, would impact you
 5 personally in what you're trying to do with the water on
 6 your ranch.
 7 And I was wondering if you could give a specific
 8 example why you think that's going to be, and let me sort
 9 of lead you in and --
 10 MS. TWEEDY: Okay. As I understand it --
 11 and, once again, I'm not a hydrologist or an engineer -- I
 12 understand when the water quality standards, the ECs and
 13 the other things, start becoming more restrictive, my
 14 water, although it meets standards now, to be discharged
 15 into a streambed or into reservoir would no longer meet
 16 that standard.
 17 At that time, if I had coalbed methane in the
 18 first year of our life or the second year of the coalbed
 19 methane's life, that would probably -- industry then would
 20 come in and say, Okay, we will fix that. We will -- we
 21 will inject it, we will do something else with it.
 22 I would not expect industry, after eight years of
 23 production, when my wells are going on the decline to come
 24 in and fix a problem that would not help their bottom line.
 25 It doesn't make sense. We're all business people.

1 MS. FLITNER: Thank you.
 2 Rick?
 3 MR. MOORE: I concur with that. I think it
 4 would be prudent to defer a decision on the standards.
 5 My only question -- and it's not prudent right
 6 now -- is whether we table it or just reject it and go
 7 through a normal rule-making based on the study. We can
 8 discuss that later, but I definitely agree that we should
 9 wait for the results before we take any action.
 10 MS. FLITNER: Thank you.
 11 Mark?
 12 CHAIRMAN GORDON: Well, I'm encouraged that
 13 enough stuff has happened this year, maybe because of this,
 14 after, you know, starting in 1999 -- I do think it makes
 15 sense to wait. I don't think it make senses to wait
 16 forever. So I think it's important to have the time
 17 certain.
 18 MS. FLITNER: Okay. And I support waiting
 19 for the results of the UW study, for the record.
 20 MR. BOAL: What you guys all said.
 21 MS. HUTCHINSON: Yes, I would wait as well.
 22 MS. FLITNER: John, we're taking sort of a
 23 straw poll as to whether or not there's agreement on the
 24 Council to wait on a decision on the numeric standards
 25 until we have the results of the University of Wyoming

1 study.
 2 MR. MORRIS: Well, I think we could wait
 3 for a decision, but I'd hate to see it just shut down.
 4 MS. FLITNER: Okay. Thank you.
 5 I -- procedurally, I think we have to adjourn the
 6 hearing and make that formal motion, and we're not going to
 7 waste your time doing that. But I hope that helps you all
 8 understand that we think it makes sense to wait for the
 9 results of that study, and we're interested in the best
 10 data possible. And that seems to be the way we're moving
 11 on the numeric standards.
 12 MR. MORRIS: One other comment. That
 13 doesn't mean that we have to accept that study and that
 14 that's going to be gospel.
 15 MS. FLITNER: That's correct.
 16 MR. MORRIS: I don't want us to shut down.
 17 I mean, that's just going to be one opinion.
 18 MS. FLITNER: Thank you. And obviously
 19 there are other issues -- other elements of the petition
 20 that we have to address, and that is what we're going to do
 21 going forward.
 22 So hopefully you now have one more piece of
 23 clarity with regard to the petition, and we would benefit
 24 from your comments specific to Appendix I(a). And we're
 25 going to move into testimony from all of you, starting with

1 Margo.
 2 MS. SABEC: Thank you, Madam Hearing
 3 Officer. I'm Margo Sabec. I am here today not to testify
 4 for Devon Energy, but speaking on my own behalf.
 5 I grew up on a ranch west of Kaycee, and I own
 6 land there. That's in the upper end of the Powder River
 7 Basin. I have water rights, stock watering, irrigating and
 8 domestic use. I'm also an attorney; and over the years
 9 I've represented many landowners on disputes associated
 10 with water rights and water use, operational conflicts and
 11 the lease and sale of agricultural property.
 12 I also represent oil and gas companies on a
 13 number of issues, including produced water, and have
 14 provided services to the operators group in their
 15 preparation for this hearing today. But I am off the
 16 clock, and today I am offering my comments not on behalf of
 17 any client.
 18 I would submit to the Council that the petition
 19 before you is not about damaged property. In fact, I don't
 20 believe there's a shred of evidence that there is actual
 21 damage to property or even the threat of damage to
 22 property -- quite the contrary, in fact.
 23 Anyone in the ranching business or anybody in the
 24 business of buying or selling agricultural property will
 25 tell you that having year-round flow of water, stock water

1 on ranch property, increases animal production as well as
 2 the value of that property.
 3 Animal unit carrying capacity, which is the
 4 measure -- the unit of measure for value of agricultural
 5 property, recognizes that value increases when there is
 6 live or flowing stock water available on an agricultural
 7 property.
 8 The State and County also recognize that there is
 9 value of water on agricultural land, and you'll see that in
 10 the tiered assessment system that we have for ag property
 11 taxes.
 12 The petitioners in this matter have very skilled
 13 attorneys. You've heard from a couple of them in the past
 14 two days. And I submit that if there was credible
 15 evidence, which is the word we are bantering about -- that
 16 the flow of produced water has caused property damages or
 17 was posing an imminent threat of causing damage to property
 18 or losses to agricultural operations, the place that they
 19 would go to seek redress for that harm is through the
 20 court. The court is in the business of making sure that
 21 the operations on one property do not affect and harm and
 22 injure another neighboring property. That is where they
 23 can go to make their clients whole. This is not the place.
 24 If there was a threat -- a credible threat of
 25 imminent harm or damage to property, the court would grant

1 an injunction which would stop the flow of produced water
 2 to prevent that harm.
 3 So you can't file a claim for damages in court.
 4 However, when the evidence shows that the property owner is
 5 actually standing to benefit from the use of the water or
 6 having the water flow down the channel -- and you can't
 7 file a claim in court simply because you don't like what's
 8 going on on your neighbor's property or you feel that your
 9 bargaining or leverage power should be improved somehow.
 10 So if this case isn't about property damage, then
 11 what is it about? I think if you look at it closely you
 12 will see one element of the petitioner's petition is an
 13 attempt to reverse a hundred years of water law in the
 14 state.
 15 They claim in their petition that return flow is
 16 waste or excess water, and they're asking this Council to
 17 regulate it as pollution. So I will submit to you that the
 18 real goal of this petition is to prohibit return flows from
 19 water wells that are producing groundwater, that
 20 groundwater is being applied to beneficial uses and then is
 21 returning back to the surface water and groundwater
 22 suppliers. And they want that groundwater to be regulated
 23 as pollution.
 24 I'm not aware of any beneficial use of water in
 25 the state that when it returns to the system, the water

1 system does not alter the physical and chemical
 2 characteristics of that water. At the very least, the
 3 temperature is changed.
 4 In this case, landowners -- and you've heard from
 5 many of them -- have acquired water rights to use as water.
 6 They have water rights to produce from CBM wells 25 gallons
 7 per minute in over 14,000 wells in the Powder River Basin.
 8 They have water rights to irrigation upstream and
 9 downstream of where coalbed water is produced and
 10 discharged. They have a right to make a call for that
 11 water to be delivered to their points of diversion through
 12 that water course.
 13 I submit to the Council today that those water
 14 rights are extremely valuable. They're a valuable,
 15 protected property right under the law of the State of
 16 Wyoming.
 17 And you're being asked to enter into an arena
 18 where your decision would have the effect of taking
 19 entirely or at least partially the right of landowners and
 20 operators to produce this water. And that, I think, is a
 21 significant consequence associated with this proposed
 22 rule-making.
 23 You indicated in your comments that you would
 24 like landowners or commenters here today to focus on
 25 whether or not these standards are good or bad and

1 recommend to you what you should do. I submit to you that
 2 it is the job of the Council to review all of the potential
 3 benefits of the proposed standards and of this request to
 4 prohibit return flows, if there are any, and all of the
 5 collateral damage or harm that that will cause and who is
 6 going to be harmed.
 7 When you're asked to change the leverage, the
 8 bargaining power of individuals -- I submit to you that
 9 authority lies only in elected officials of this state. It
 10 does not lie within the purview of this Council.
 11 And I think that's really what you're being asked
 12 to do is prohibit landowners from using their water rights
 13 and being able to protect those property rights which are
 14 extremely valuable to them and they're also valuable to the
 15 operators.
 16 Thank you.
 17 MS. FLITNER: Thank you.
 18 Questions? Wendy.
 19 MS. HUTCHINSON: Margo, on your comment
 20 about us calling return flow waste, that's what you feel
 21 this petition is doing -- if you eliminate item (iii),
 22 which is the one that says the produced water shall not
 23 cause pollution -- if you eliminate that, do you still
 24 believe that A(i) and A(ii) have the effect of calling
 25 return flows waste?

1 MS. SABEC: Madam Hearing Officer, I do,
 2 because I think the overarching goal here of this petition
 3 is to invite the DEQ to regulate return flows from
 4 beneficial uses. And those beneficial uses, to a large
 5 extent, are agricultural uses.
 6 So when you begin to go into the arena where you
 7 are actually deciding whether water that has come out of a
 8 well has been put to stock watering use can go back into
 9 the system and you call that pollution or you say that that
 10 is a discharge that should be prohibited, I submit to you
 11 there's no difference between that water being discharged
 12 by a coalbed operator or by a landowner who has a water
 13 right in that well. It's the same water.
 14 And what this does, in my opinion, is opens the
 15 door for the DEQ to regulate the quality of water that can
 16 be used in agriculture and discharged back down the stream
 17 and used in return flow.
 18 So I do believe that when you begin to
 19 characterize this water as harmful -- and there are
 20 landowners with water rights in those wells and stock ponds
 21 that are storing water -- you have crossed over into an
 22 arena that is no longer regulating industry. It begins to
 23 regulate agriculture.
 24 So as a policy matter, I think it's a significant
 25 diversion from existing water law in this state, and I

1 think that it's also an arena that you would find that -- I
2 would say there are very few agriculture producers in this
3 state that would really want you to go there.

4 MS. FLITNER: Mark has a question, and then
5 I've got a follow-up question to that.

6 CHAIRMAN GORDON: I had actually two
7 questions. One was on that thing I asked about right
8 before our break where in the revision in 2004 the State
9 got in the business of saying this water's being used.
10 Prior to that the landowner did.

11 Do you -- to me that seems to represent maybe a
12 change in how the landowner participated in that process,
13 and I just wanted to know if you have any comments.

14 Do you have any problems, I guess, of putting
15 that back in that the landowner actually certifies it?

16 MS. SABEC: I think that there is a
17 mischaracterization of what the beneficial use statement
18 does; because I'm not aware in my experience in talking
19 with landowners, representing landowners or representing
20 industry, of a circumstance where an operator has wells
21 that are producing coalbed water on a landowner where that
22 landowner is not putting that water to beneficial use.

23 I think where we get into the gray area here is
24 how far downstream do landowners have a right to say, That
25 water's not being beneficially used by me so I shouldn't

1 question. You're talking about beneficial use, and I think
2 you're using it in a lot of ways when you're talking about
3 what's recognized under the state engineer. And I think
4 you're talking about a use that's beneficial to the
5 property, which isn't recognized under the state engineer.

6 And I guess that is, to my thinking, some of the
7 difficulty; because all the downstream users would have the
8 beneficial use under that general concept, I guess, if we
9 followed your logic. Because simply having flowing water
10 is a beneficial use.

11 But that's not recognized by the state engineer,
12 is it?

13 MS. SABEC: Madam Hearing Officer, it is.
14 The only right that is not officially granted as a property
15 right is a right to instream flow for livestock water.

16 And there are a number of groups who are
17 advocating that there should be instream flow in a number
18 of ephemeral drainages in the state. In fact, there's a
19 bill in the legislature right now on that issue.

20 But downstream landowners who have stock
21 reservoir rights, reservoir rights for irrigation and
22 irrigation diversion points have vested property rights in
23 their water rights to have flow come to those points. And
24 the state engineer administers that based on seniority or
25 priority of right.

1 have to have it on my property.

2 This is a balancing of property rights, and a
3 significant property right here is water. And I think that
4 one of the reasons that -- that the beneficial use
5 statements are no longer required is because these very
6 groups have alleged that landowners are being paid to sign
7 those things.

8 And I submit to you that if an operator is
9 operating on a landowner's property, they have an agreement
10 with that landowner and that landowner is involved in the
11 use of the water and the decisions that are made in using
12 the water on his property.

13 When you get to downstream landowners -- I don't
14 know, does that go to the state line? Does it go to
15 Mexico? Where does that end, that downstream landowners
16 think that they should be at the table as stakeholders in
17 what happens with production of water on their upstream
18 neighbor? That, I think, is the crux of the problem.

19 So do I see that the beneficial use statement has
20 some impact of the bargaining power of landowners? I
21 absolutely do not.

22 CHAIRMAN GORDON: I wasn't asking about
23 impacts of bargaining. I guess I was asking about the
24 change of relationship in how that was done.

25 But I also wanted to kind of ask a clarifying

1 So if you're a downstream landowner and you have
2 spreader dams in the Powder River Basin or if you have a
3 headgate or whatever the diversion structure is in the Big
4 Horn Basin and you have a senior water right, you
5 absolutely have the right to call water through that
6 watershed to your headgate. And you have the right to use
7 that water because it belongs to the State. It's return
8 flow that's gone back into the surface water supply, and
9 you have a right to use it.

10 So I do think that when you get into the business
11 of saying whether there can and cannot be flows in the
12 channel, you are directly interfering with vested property
13 rights, and that, I think, is not -- it's a concern of mine
14 as a property right owner, and I'm certain it's a concern
15 of many people that you've heard here today.

16 And that's -- if they're not articulating that
17 clearly, that really is a significant part of the argument
18 that they're making.

19 CHAIRMAN GORDON: But for clarification --
20 because I think we're off on a tangent, but -- you don't
21 think there's any substance to the landowner part of that
22 landowner agreement that they basically -- the state oughta
23 just say that water's all being put to use?

24 MS. SABEC: I do, because we are in a state
25 that invests billions of dollars in water development, and

1 it's part of our overall policy.

2 MS. FLITNER: I believe there are two more
3 questions, and I'm encouraging you guys to refocus the
4 discussion.

5 MR. MOORE: Thank you. I'm a little bit
6 troubled by your comment that you don't think this body
7 should be dealing with regulations that, as you imply,
8 might affect the water right.

9 And just as a hypothetical example, I would say
10 that the current regulations already do that, even if we
11 don't do anything. For example, take a conventional oil
12 and gas well that's producing right now and producing at,
13 say, 4500 TDS, and somebody files for a water right on the
14 water that's running down the drainage.

15 Then what happens if that produced water, as the
16 well is developed, suddenly jumps up to 5500 TDS and is no
17 longer allowed to be discharged?

18 Isn't that the same type of scenario?

19 MS. SABEC: Madam Hearing Officer, what I
20 am saying to you is before you consider changing an
21 effluent limit that you know and have reason to know is
22 going to take water rights or adversely affect water
23 rights, you should have clear, convincing, uncontroverted
24 evidence that that water is going to cause an actual
25 property damage harm to people downstream or to wildlife,

1 not speculative, not potential -- maybe there's a slight
2 tiny risk. You --

3 MR. MOORE: So you would support, then,
4 that the regulation should be based upon credible data for
5 implementation of the regulation?

6 MS. SABEC: I do. And it has to be
7 balanced with the socioeconomic effects of the taking of
8 that water. And I think that is the job of this Council,
9 and I'm suggesting to you that you're hearing from lots of
10 people who are using this water successfully. So that
11 evidence is missing.

12 MS. FLITNER: Thank you.

13 John and then Wendy, and then we'll move along.

14 MR. MORRIS: I think we're getting way off
15 the subject here. We're not here to regulate water rights
16 on beneficial use. We're here to talk about quality, and
17 there are other agencies that regulate the water rights and
18 beneficial use and that type of thing.

19 Our job is to make sure that there's quality
20 water. So I think we're way off focus here. This is not a
21 water right issue that we're addressing. This is not our
22 assignment or beneficial use is not our assignment.
23 Primarily we're dealing with quality.

24 MS. FLITNER: Do you have a question that
25 you'd like Margo to address?

1 MR. MORRIS: This is just a comment I'm
2 making.

3 MS. SABEC: Could I respond, because I
4 couldn't agree more with you. I agree wholeheartedly that
5 that is your charge. And the question is what does this
6 petition see, and I think you need to look at that very
7 carefully.

8 MS. HUTCHINSON: I know I'm going to sound
9 like I'm taking a tangent, but really I'm not.

10 You had comments -- and I agree with your
11 concerns -- about the downstream concerns, where does it
12 end. And I guess my impression of the ag protection policy
13 is that it is trying to take a look at downstream concerns.

14 Is there precedence already being set for that
15 and in that policy -- since I know you know it better than
16 I do -- is there a limit on when that ends?

17 MS. SABEC: Madam Hearing Officer, I know
18 this is not the hearing on Section 20, but I will say that
19 for the very reasons I have tried to articulate here today,
20 I would be adamantly opposed to Section 20 because it --
21 there is no end. There is no end to where a downstream
22 landowner can control whether or not there are flows of
23 water in the watershed. That's the net result of Section
24 20.

25 MS. FLITNER: Thank you very much.

1 Next up is Nicol Kramer -- is Nicol here --
2 followed by Dan Hengel.

3 If anybody's wondering how to behave, they should
4 emulate the children in the fourth row. I'm impressed. My
5 kids would never do that.

6 MS. KRAMER: Madam Hearing Examiner, my
7 name is Nicol Kramer. I'm with Williams, Porter, Day and
8 Neville in Casper, Wyoming; and I represent -- I'm here
9 today on behalf of Devon Energy.

10 We have submitted most of our comments in a joint
11 comment brief to the Council, and I did participate in the
12 writing of some of those; so I won't go into detail on all
13 of those.

14 To begin with, I'm going to apologize if my
15 comments are a little bit disjointed; but because of some
16 of the conversation and questions that have went on this
17 morning, I've changed my comments.

18 During the entire proceeding, starting last
19 February, I think, this has been a moving target. And the
20 landowners that are here today and were here yesterday, I
21 think, are feeling that pain as well. And I know that
22 you're tired of hearing repetitive testimony, but they did
23 just find out; and I think we just figured out for sure a
24 few moments ago that you're not going forward with the
25 effluent limit changes.

1 So I would ask that you still let each one say
 2 their piece, because they have taken valuable time.
 3 MS. FLITNER: Just for the record, we
 4 absolutely intend to let everyone who wants to speak speak.
 5 MS. KRAMER: And they have taken valuable
 6 time out of their schedules, which they may not be able to
 7 do once you go back to this issue to address effluent
 8 limits again.
 9 Just one other issue about separate standards.
 10 The policies that are being established through this rule
 11 are not because there's coalbed methane companies producing
 12 this water. It's because of environmental protection, and
 13 it's because of how the water is used. It's because
 14 livestock are drinking the water. That's what the effluent
 15 limits are established for, and it's because of
 16 environmental impacts. That's what Appendix I(a) is being
 17 established for.
 18 So I still feel that there's a great concern, and
 19 the Big Horn Basin landowners are justified in getting up
 20 here and expressing their concerns that these standards
 21 have the potential to impact them.
 22 To address Mr. Boal's statement of what does
 23 Appendix I(a) do, first of all, I want to clarify that the
 24 current language does prevent all discharge. The current
 25 language proposed by petitioner would prevent any

1 fact, the Council's charge is to actually protect the
 2 State's rights, and that would give the rights up.
 3 The other issue is that there's been some
 4 discussion of treatment or piping this water to
 5 municipalities or doing something with it; but in reality,
 6 we're looking at a handful of landowners, and the vast
 7 majority of landowners are using this water. Maybe their
 8 cows aren't drinking it all; but they're using it for
 9 irrigation, they're using it for fish ponds. You've heard
 10 all kinds of information about that.
 11 When I was in law school, I worked for someone
 12 from Wright; and he said -- he came back from going home
 13 one weekend and said, I hate coalbed methane. They're
 14 putting those little boxes all over, and it's ugly. And
 15 then a couple months later he came back from a duck hunting
 16 trip and he goes, God, as much as I hate coalbed methane, I
 17 love those ponds. There are ducks everywhere.
 18 So the water is being used in the vast majority
 19 of circumstances, and to set up a treatment facility for
 20 ten properties that can't use the water is just not
 21 economically feasible.
 22 And one last thing, I know that you want a
 23 solution. I don't feel that the Council is the person --
 24 or is the body that can make that solution. The coalbed
 25 task force has been working on these issues for a year and

1 discharges.
 2 The petitioners are saying that coalbed
 3 discharges are pollution, and the rule says you cannot
 4 discharge unless you can prove it is not pollution. So
 5 that is another reason that all of these landowners are
 6 coming up here so concerned, because they would lose all
 7 ability to discharge the water.
 8 If you removed section C, the rule wouldn't do
 9 anything. The DEQ already regulates unacceptable effects
 10 on water quality, and I submit to you that there hasn't
 11 been anything here -- and as an attorney for industry,
 12 trust me, I would love to solve this problem. I would love
 13 to. This is all I spend my time on, and I'm sick of it.
 14 But I don't think there's anything we've heard
 15 here that can be put into these rules that would solve the
 16 problems of the people who believe they have problems.
 17 Maybe first and foremost among those reasons is -- and I
 18 won't belabor the point -- but the reasons that Margo was
 19 bringing up, that the State has an easement in
 20 watercourses.
 21 And I understand that some landowners would
 22 rather the water not be in the watercourse; but
 23 unfortunately, that is not their property right, and it
 24 never has been for the last 125 years. So that is not a
 25 rule that this Council can write, unfortunately. And, in

1 likely in response to this petition.
 2 One of the things that's in front of them is
 3 something called a produced water initiative that the
 4 Petroleum Association of Wyoming, Wyoming Farm Bureau,
 5 Wyoming Stock Growers -- and I hope I haven't left anyone
 6 out -- are working on as an alternative dispute resolution
 7 mechanism and as a mechanism to get technical data out so
 8 landowners who are uncertain of how water will affect their
 9 land -- and they need help in negotiations.
 10 So I urge you to consider that. I think someone
 11 else is going to talk a little bit more about that.
 12 MS. FLITNER: Great. I'd like to hear more
 13 about that. Thank you.
 14 Are there questions?
 15 MR. MORRIS: What would you recommend the
 16 task force do?
 17 MS. KRAMER: Well, I think that the task
 18 force has done a lot together on a lot of information.
 19 MR. MORRIS: Can the task force make a
 20 solution?
 21 MS. KRAMER: Yeah, I think they can,
 22 because I think that they're empowered with legislative
 23 powers that bridge the gap. Because, with all due respect,
 24 your jurisdiction is limited to environmental issues; and I
 25 think that the issues that have been brought up here by the

1 petitioners are primarily property right disputes in
 2 private property damage issues.
 3 MS. FLITNER: Wendy has a question.
 4 MS. HUTCHINSON: Okay. You made a comment
 5 that if we eliminate the pollution clause, as I'll call it,
 6 that the rule does not help us. It's already happening
 7 now.
 8 So one of the things that I thought was
 9 different -- and I would like your take on this -- is that
 10 this Appendix is asking for credible data to establish that
 11 the water is actually going to be put to ag or wildlife use
 12 and that -- and again, credible data will be required --
 13 but the quantity of produced water shall not cause or have
 14 potential to cause unacceptable water quality.
 15 Do you believe that is happening today?
 16 MS. KRAMER: And I should have -- I should
 17 have mentioned that, too. I think that the credible data
 18 requirement is overkill for the -- putting to beneficial
 19 use. I think that's difficult to get.
 20 I mean, if you want every rancher to document
 21 where his cows go, document how many wildlife are using the
 22 riparian areas around the pond, that's very difficult to
 23 do.
 24 I think that there is a lot of data being
 25 gathered on these streams. The companies are not doing

1 about what we call regulatory creep is that -- what -- this
 2 is not going to stay in the Powder River Basin. And the
 3 perfect example is the groundwater policy that was
 4 developed, refined in the Powder River Basin and now has
 5 just gone statewide. And so I would ask that that also be
 6 considered. I don't think this is just an issue in the
 7 Powder River Basin.
 8 And then I think to address Mr. Gordon's comment
 9 about the beneficial use letters, my understanding on that
 10 was that it now is just assumed that that will be put to
 11 beneficial use, and that burden was taken away from the
 12 landowners so that they didn't have to come up with a
 13 letter and sign it. It had to be put in with it with this
 14 application.
 15 That's all I have to add. Thank you.
 16 MS. FLITNER: Thank you.
 17 Questions? Thank you very much.
 18 Caroline.
 19 MS. HAMILTON: Thank you for this
 20 opportunity, Madam Chairman and the Board.
 21 I am here to read a letter -- I've been asked to
 22 read a letter from a fellow landowner in Sheridan County
 23 who could not be here, and his name is Tom Colpiska with
 24 the Hat Crew Taro Ranch.
 25 MS. FLITNER: Would you state your name for

1 nothing. They are studying the issues constantly. It's a
 2 consultant string, trust me.
 3 MS. HUTCHINSON: My question is on the
 4 second item on the -- quantity should not cause
 5 unacceptable water quality.
 6 Is that -- is that being addressed under the
 7 watershed permitting at this point?
 8 And someone else can try and answer the question
 9 when they come up.
 10 MS. KRAMER: Well, and I'm not very much
 11 involved in the watershed permitting process, but I do
 12 believe it is. They're looking -- they have effluent
 13 standards that they start with for every watershed.
 14 MS. HUTCHINSON: Thank you.
 15 MS. FLITNER: Thank you, Nicol.
 16 Next up is Dan Hengel, followed by Caroline
 17 Hamilton.
 18 MR. HENGEL: Madam Hearing Examiner,
 19 Council members, thank you for this opportunity today.
 20 I only have a couple points because I'm not near
 21 as eloquent as the two previous speakers, who, I think,
 22 stated their cases very well.
 23 Prior to coming to Devon, I spent three and a
 24 half years with DEQ in the water quality division. I think
 25 the landowners in other parts of the state -- their concern

1 the record.
 2 MS. HAMILTON: Caroline Hamilton.
 3 Gentlemen and ladies, what works for a rancher or
 4 farmer in Sheridan County may not work for a Campbell
 5 County landowner. In the past six years I've had a lot of
 6 experience with the coalbed natural development --
 7 MR. MOORE: Would you slow down just a
 8 little bit for the reporter's sake?
 9 MS. HAMILTON: Okay. In the past six years
 10 I have had a lot of experience with coalbed natural gas
 11 development on my 3500 deeded acres, 500 of which is
 12 irrigated; and I lease 1500 acres from the State of
 13 Wyoming. All development is complete, and I am pleased to
 14 report that it was less disruptive than I had anticipated.
 15 Three companies, Fidelity, J.M. Huber,
 16 Pinnacle-Marathon, are now producing, transporting and
 17 selling CBNG from my land.
 18 Because of the unknown effects of the water being
 19 produced and used on pasture and croplands, originally I
 20 had elected to have all the water removed from my property
 21 to my neighbors' property who were more than willing to put
 22 it to use growing hay for the cattle.
 23 My lands have water rights that date back to 1884
 24 and enough storage or high mountain water to survive almost
 25 any drought condition. My neighbors are now unfortunate

1 And I will read just the beginning of the second
 2 one, and then I will introduce them.
 3 Re: Petition for rule-making filed by the Powder
 4 River Basin Resource Council. Dear EQC, the Meeteetse
 5 Conservation District Board of Supervisors, MCD,
 6 representing the citizens that elected it -- and then an
 7 asterisk with the enabling legislation -- hereby further
 8 registers its opposition to the cited petition. This
 9 petition is an unwise attempt to create a statewide,
 10 one-size-fits-all rule in response to a local situation.
 11 This petition should be killed immediately
 12 following the January 2007 hearing. The MCD presents the
 13 following comments which are particularly relevant to your
 14 action on this petition. These comments are similar to
 15 some of those filed with the Wyoming DEQ, WDEQ and Wyoming
 16 Water Quality Division -- sorry -- the Department of
 17 Agriculture regarding the Chapter 1, Section 20
 18 Agricultural Use Protection Policy.
 19 These comments are derived from those which were
 20 developed at a properly noticed public meeting convened by
 21 the Hot Springs Conservation District.
 22 The EQC must follow Wyoming Statute 35-11-302
 23 requiring the State to consider and evaluate the economic
 24 impacts of any proposed rule or regulation.
 25 35-11-302, Administrator's Authority to Recommend

1 Standards, Rules, Regulations or Permits. The
 2 administrator, after receiving public comments and after
 3 consultation with the advisory board, shall recommend to
 4 the directors rules, regulations, standards and permit
 5 systems to promote the purposes of this act.
 6 Such rules, regulations, standards and permit
 7 systems shall prescribe -- in recommending any standards,
 8 rules, regulations or permits. The administrator and the
 9 advisory board shall consider all the facts and
 10 circumstances bearing upon the reasonableness of the
 11 pollution involved, including --
 12 MS. FLITNER: I'm going to ask you -- we're
 13 over the time allotted. Do you mind finishing? You can
 14 certainly enter those into the record.
 15 Did you have anything else you wanted to add?
 16 MS. YETTER: No, I will enter these in the
 17 record, and that should be sufficient.
 18 Thank you so much for the opportunity.
 19 MS. FLITNER: Thank you so much for making
 20 the trip. We appreciate it.
 21 Ranae, would you -- would you like to go now or
 22 after Mr. Blakesley?
 23 MS. VALENTINE: I would like to go now, if
 24 that's okay.
 25 MR. BLAKESLEY: I would defer my comments.

1 MS. FLITNER: I had you pegged for a polite
 2 man.
 3 Ranae Valentine and extremely well-behaved
 4 children.
 5 MS. VALENTINE: I just have a couple
 6 comments.
 7 My name is Ranae Valentine. I'm here to
 8 represent Lyman Ranch Company. We have four places
 9 around -- outside Thermopolis around Black Mountain, and we
 10 run -- can run over a thousand head there, but there's no
 11 surface water without the surface water discharge. And so
 12 our -- we wouldn't be able to run cows three out of four
 13 seasons, at least.
 14 So especially with the many, many, many years of
 15 drought that -- we're really dependent on it. And as far
 16 as quality, we've never had any problems. Our cows drink
 17 it, the antelope -- or the elk and deer drink it. And we
 18 just really rely upon that.
 19 And that's all I came to say. So thank you.
 20 MS. FLITNER: Thank you.
 21 Questions? Thank you.
 22 Marvin Blakesley. Thanks for your flexibility.
 23 MR. BLAKESLEY: Madam Chairman and members
 24 of the Council, thank you for the opportunity to comment.
 25 My name is Marvin Blakesley, and I represent

1 Marathon Oil Company.
 2 I won't take any of your time talking about all
 3 the beneficial uses of this water in the Big Horn Basin
 4 across Wyoming. You've heard it multiple times. We know
 5 it's very important.
 6 I'm not an attorney, so I just want to express to
 7 you our concern as a company that, by some way, shape or
 8 form, the proposed changes to the effluent limits could end
 9 up on conventional discharges. And if the current proposed
 10 limits were adopted, I can tell you it would take away
 11 100 percent of Marathon's surface water discharges of
 12 produced water.
 13 I also want to submit that if there are any
 14 reduction in the current effluent limits across the board,
 15 be it coalbed methane or conventional, there will be a loss
 16 of water on the landscape.
 17 It concerns me -- I appreciate the DEQ's effort
 18 to hire Mr. Raisbeck and for him to do the study on the
 19 effects of the current effluent limits on stock water and
 20 quality. My concern is that this study will be
 21 ultraconservative. It will reflect feedlot conditions. It
 22 may not reflect actual on-the-ground circumstances in
 23 Wyoming.
 24 As we heard yesterday during the Geomega
 25 testimony and Mr. McCarty and Mr. Flitner, they have used

1 water at the current effluent limits very successfully, and
2 people have used these for decades. And I request that
3 should there be a lowering of the standards that both the
4 DEQ and the EQC look at current Appendix H and Appendix I,
5 which provides provision of Appendix (c)(i), which states
6 for existing permits for the original permit application --
7 was submitted prior to September 5, 1978, Modification of
8 the effluent limits described to paragraphs (b)(vii) of the
9 Appendix may be granted on a case-by-case basis if a signed
10 letter of beneficial use from the landowner was provided
11 specifically requesting the discharge in question be
12 allowed to continue or a signed statement of the Wyoming
13 Game and Fish Department was provided in which it was
14 stated that the discharge in question is of value to fish
15 and wildlife.

16 I won't go on and on. You can read the rest of
17 it. I think this is a very important provision to maintain
18 in both Appendix H and Appendix I because should there be a
19 lowering of the effluent limits, there's still a mechanism
20 here for those folks who want the water, have demonstrated
21 the beneficial use of this water for decades and continue
22 this use.

23 And I think that's very important, and I'd like
24 to focus your attention on both of those provisions in the
25 Appendix. I think that does provide some solution.

1 I also want to speak to you, not as an employee
2 of Marathon Oil Company, but as a sportsman of Wyoming. I
3 was born and raised in Thermopolis, I grew up around the
4 discharges, I've hunted around them all my life; and that's
5 because that's where the wildlife was at, that's where the
6 game is at.

7 If this water's removed from the landscape, it
8 would be an ecological disaster and an economic injustice
9 to the citizens of Wyoming.

10 And I thank you for the opportunity to comment.
11 I know you're in a difficult situation. I sympathize with
12 the folks who have problems. I think those problems can
13 and should be addressed on a case-by-case basis. I don't
14 think broad-sweeping, statewide rule changes are the avenue
15 for this.

16 I submit and I challenge and I encourage those
17 landowners with problems and those operators who've
18 operated on their properties to sit down at the table, talk
19 about the problems and see how they can be fixed on a
20 case-by-case basis.

21 And don't penalize the rest of the state of
22 Wyoming and all the benefits that come from this water for
23 some instances that surely there must be a resolution to.

24 Thank you.

25 MS. FLITNER: Thank you.

1 Can you hold on a second? We have a question
2 from Wendy.

3 MS. HUTCHINSON: What is your position with
4 Marathon?

5 MR. BLAKESLEY: I'm an HES professional.

6 MS. HUTCHINSON: So do you do some of this
7 program?

8 MR. BLAKESLEY: I do. I have been in
9 charge of the NPS program for Marathon Oil for ten years.

10 MS. HUTCHINSON: Can you tell me if these
11 rules are passed that are going to require you to provide
12 credible data that the water's actually put to agricultural
13 use -- can you make any comment about whether or not you
14 think you would be capable of trying to come up with that
15 sort of --

16 MR. BLAKESLEY: It depends on what that
17 credible data is. You know, we have decades of documented
18 and demonstrated beneficial use. If you go back many
19 years, we were always required to get a beneficial use
20 letter from the landowner. We've never had a problem with
21 that.

22 All the folks up there in the Big Horn Basin want
23 the water. The Game and Fish supports us very strongly.
24 Both the Cody Bureau of Land Management and the Worland
25 Bureau of Land Management strongly support this water on

1 the landscape. It's very important for many public lands.
2 So it depends on what you mean by "credible data."

3 We would have no problem providing evidence of
4 beneficial use. I do know that.

5 MS. HUTCHINSON: Well, the credible data
6 requires that you use referenced lab and field methods from
7 qualified personnel and that you have a quality assurance
8 plan.

9 MR. BLAKESLEY: That causes us problems.

10 MS. HUTCHINSON: That's what we need to
11 know.

12 Thank you.

13 MS. FLITNER: Thank you.

14 Anybody else? Thank you, Mr. Blakesley.

15 Faye Mackey, followed by Steve Jones.

16 MS. MACKEY: Madam Chairman, members of the
17 committee, I'm Faye Mackey. I'm a rancher on the east fork
18 of Wild Horse Creek in Campbell County. I'm going to
19 submit some pictures into the record.

20 And having heard discussions for two days, I'm
21 going to submit my speech into the record; but I'm just
22 going to talk to you.

23 Is that okay? Thank you.

24 I've sat for a couple of days, as well as you
25 have, and listened to the testimony. And Mr. Boal says

1 is taking anything away from me, because you've already got
2 that.

3 This particular issue -- certainly if the
4 industry was much smaller, we would have heard about it.
5 But it's a big industry, and we do have areas where it's
6 sort of causing us to look at a lot of our traditional
7 rules and statutes a little bit differently. I've had to
8 do some of that.

9 So where it actually belongs on the quantity side
10 is going to be whether you characterize this as a use or a
11 discharge question. And John and I both scratched our
12 heads in a number of ways as to where does it most rightly
13 belong or does it belong as civil issue where it has been
14 up to this point?

15 Because in my opinion, the majority of the
16 coalbed natural gas production does not have this specific
17 problem. Much of it goes along, and we never -- we hear
18 very little out of Belle Fourche, for example. We hear
19 very little out of other drainages. And so the problem,
20 while it exists, is not -- it doesn't exist in every creek
21 and every drainage and every river basin up there.

22 I may be argued with on that point a little bit,
23 but we start to hear about it more in some areas than
24 others. In those areas where it's a problem, there's no
25 doubt that it's a legitimate problem.

1 Mr. Morris, if I had that silver bullet here today, I would
2 love to actually leave it here, unshot, of course; but -- I
3 need to mind myself here, we are being transcribed.

4 If I had that silver bullet -- and we scratch our
5 heads routinely and regularly on is -- one of these days --
6 and it may be tomorrow -- we'll find that one little piece
7 of language somewhere that will -- Why haven't we thought
8 about this two years ago or five years ago? Well, I'm not
9 there yet.

10 We're certainly trying to make our part of this
11 be as -- pose as much discipline as necessary in the
12 industry while allowing the flexibility of that industry
13 and use of the water to continue.

14 MR. MORRIS: Would you feel comfortable if
15 we came back to you later and asked for a recommendation?

16 MR. TYRRELL: I'd be happy to review
17 whatever you came up with. Whether I would have a
18 recommendation at that time would be prejudging my ability
19 to think ahead.

20 I'm happy to be a part of your deliberations.

21 MR. MORRIS: Very good answer.

22 MS. FLITNER: I'm glad that one is being
23 transcribed. We'll all need to use that.

24 Any other questions for Pat? Thanks so much for
25 your time.

1 CHAIRMAN GORDON: Pat, I appreciate that.
2 I hate to ask this question, but it really is only -- so in
3 your view, under Wyoming law, CBM water would be different
4 from conventional oil and gas water?

5 MR. TYRRELL: It is to the -- Madam Hearing
6 Officer, Mr. Gordon, it is to the extent that -- in two
7 ways. Number one, the fact that we hold the permit on that
8 gas well, that CBM well, is that first beneficial use.
9 That kicks it out of the byproduct statute, unless the
10 statute is tweaked if there's benefit to doing so.

11 The other thing is that this water is, as I
12 mentioned before -- we would essentially treat it as new
13 water to the watershed. And while it is certainly usable
14 and can flow down channel and can be put to use, it's not
15 the kind of water we would honor under a regulatory call
16 because that's natural flow.

17 In those two regards, it is somewhat different.

18 CHAIRMAN GORDON: Thank you.

19 MS. FLITNER: Is that it for Pat?

20 MR. MORRIS: I've got -- what would you
21 recommend for our solution?

22 MS. FLITNER: He's going to ask somebody
23 that comes in with a broom, so don't -- the person
24 vacuuming. Don't feel like he's putting you on the spot.

25 MR. TYRRELL: Madam Hearing Officer and

1 MR. TYRRELL: Thank you and good luck.

2 MS. FLITNER: We are going to continue with
3 testimony.

4 I will also let you know a couple of other
5 things. Our plan is to take testimony until a few minutes
6 before 3:00 and then take about an hour for some discussion
7 among the Council.

8 I was kicked out of the family van on Monday
9 morning along the interstate, and I have to catch a flight
10 out tonight before my six-year-old is a seven-year-old in
11 the morning. So I apologize to all of you, but that is as
12 legitimate of a reason as I can come up with; and so I am
13 going to do that.

14 We will not close the hearing without everyone
15 who wants to testify being afforded that opportunity, and I
16 obviously commit to all of you that I will read the
17 testimony, whatever testimony that you might have that I
18 miss, in person.

19 It is our intention to get through all the
20 testimony today and to close the hearing. And you will
21 have an idea, along with us, when you hear the
22 deliberations of the Council as to what progress we can
23 make today at the conclusion of the hearing.

24 Are there questions about what we're aiming to
25 do?

1 Clear to all of you as well? All right. That
 2 being said, I believe next up is David Gremel.
 3 Is David here? Following David is Delbert
 4 Jenkins.
 5 MR. GREMEL: Madam Chair, members of the
 6 Council, my name is David Gremel. I'm a land man with
 7 Petro-Canada Resources, USA. I've been involved in the CBM
 8 plain and Powder River Basin for -- well, since 1998 when
 9 it pretty much first started. I've lived in Wyoming for
 10 the past seven years.
 11 Petro-Canada operates CBM wells in numerous areas
 12 mainly in the Powder River Basin. One of the key elements
 13 in Petro-Canada's environmental health and safety policies
 14 is their stakeholder relations. And we value -- our
 15 relations with our landowners is very key to our success,
 16 and we've worked hard to address these concerns.
 17 We've worked with our landowners both on our
 18 leaseholds and also in areas -- the offsite areas that
 19 downstream water is, and we continue to monitor and
 20 mitigate concerns that are taking place there.
 21 In our experience, we've been able to mitigate
 22 these concerns almost on a whole, and we feel like the key
 23 to being able to mitigate them is the relationship that we
 24 have and the communication and cooperation that we have
 25 with our landowners.

1 calls to the attorney, I wasn't able to make any contact
 2 with him; so we faxed a letter -- and I believe that letter
 3 has also been submitted for the record here -- and to this
 4 day we still have had no response from Mr. Clabaugh or his
 5 attorney.
 6 And I guess the reason I bring up this point is
 7 that it's unfortunate that we've, you know, had to come to
 8 a hearing like this in order to have our voice be heard,
 9 and that is the fact that we're willing to mitigate these
 10 concerns. But we are not able to do so unless there's some
 11 communication, first of all, and some cooperation with the
 12 landowners in trying to do that.
 13 All up and down Wild Horse Creek we've been able
 14 to mitigate those concerns with other landowners, and so at
 15 this point we're -- at this point we're, you know -- we're
 16 willing to help there; but, like I said, there has to be
 17 some communication.
 18 So basically, I just -- again, I invite
 19 Mr. Clabaugh -- I invite anybody who has a concern with
 20 downstream water in areas that we're working to come to the
 21 table, and we're willing to talk to them and address those
 22 concerns.
 23 MS. FLITNER: Thank you.
 24 Questions for David?
 25 MS. HUTCHINSON: If these rules go into

1 I'd like to address -- or focus my comment on --
 2 in an area along Wild Horse Creek, an area I'm real
 3 familiar with. There's been a lot of comments, pictures
 4 that have been shown here on the Clabaugh Ranch in Wild
 5 Horse Creek. Wild Horse Creek is an area I'm very familiar
 6 with.
 7 We've been working -- actually, since 1996 we
 8 started drilling conventional wells in that area, and so
 9 I've been running up and down Cheetah Road for ten years
 10 now -- very familiar with the conditions.
 11 We've been able to mitigate landowner concerns
 12 along Wild Horse Creek, you know, by placing low water
 13 crossing, removing debris, just various mitigation methods
 14 that have worked. And we continue to monitor and mitigate
 15 those concerns.
 16 We understand that there are issues on the
 17 Clabaughs' Ranch. We've never been contacted by
 18 Mr. Clabaugh. We -- it wasn't until January of 2005 that
 19 we were made aware of these concerns, and they were brought
 20 to our attention through one of the regulatory agencies.
 21 At that time, letters were written, and I believe those
 22 letters have been submitted to you in previous hearings.
 23 And as of earlier in 2006, I personally made some
 24 calls to Mr. Clabaugh, all of which were -- in which I was
 25 basically told to contact his attorney. And after several

1 effect, do you believe your company is going to be able to
 2 provide credible data on ag and wildlife use or what kind
 3 of difficulties are they going to cause you?
 4 MR. GREMEL: You know, I am not prepared to
 5 answer questions on credible data. I'm going to defer that
 6 to others here that have that information. That is
 7 something I don't have expertise, so I would defer.
 8 MS. FLITNER: Thank you.
 9 Delbert Jenkins? Marge West?
 10 MS. WEST: I'm Marge West. Thank you for
 11 letting me speak to you here today.
 12 I am a downstream landowner and a mineral owner.
 13 I truly believe that if credible data had been required to
 14 show no injury to my ranch, we would have not lost our best
 15 hay meadows and we would have not lost over 200 old-stand
 16 cottonwood trees.
 17 I would like to issue the Council an invitation
 18 to come see my ranch at your convenience. I would also
 19 like to issue an open invitation to anyone who believes
 20 that damage does not occur from coalbed methane gas
 21 discharge to come and tour my ranch at their convenience.
 22 Thank you.
 23 MS. FLITNER: Thank you, Marge.
 24 Could you -- besides the numeric standards, I'm
 25 just wanting to make sure I understand if you have other

1 large, if you will, and perhaps get to them closer to
 2 3:00 before we have our -- some of our discussion.
 3 I hope -- can you tell it feels like hours and
 4 lots of syllables for me? I'm starting to lose track. But
 5 I believe I can read the next name, and that would be
 6 Eric Barlow, followed by Tim French.
 7 MR. BARLOW: I appreciate the Council's
 8 tenacity and endurance, and I will forgo putting you
 9 through any more. So Mr. French can --
 10 MS. FLITNER: Thank you.
 11 MR. FRENCH: Ladies and gentlemen, Madam
 12 Chairman. My name is Tim French. I'm a county
 13 commissioner from Park County, Vice Chairman of Board; Park
 14 County being Powell, Cody, Meeteetse area -- as far as you
 15 can get from Cheyenne, that's where we're at.
 16 In my real life I'm a farmer. We farm west of
 17 Powell 15 miles. Our concern -- I know you wanted
 18 specifics. I don't have that, so please bear with me. Our
 19 concern as a board of county commissioners is that if you
 20 change the quality standards of the water over there at
 21 that -- that will migrate over the mountain to Park County.
 22 And you've heard from our citizens -- you know,
 23 our concern if it's lower standards on that water quality,
 24 that that water coming out of these oil fields will have an
 25 effect on our oil fields. Our main oil fields are

1 100 years old. They're very old oil fields. They're very
 2 important to us.
 3 If they have to reinject that water, some of your
 4 larger producers like Marathon, Anadarko, whoever they are,
 5 can probably do that. Some of the smaller producers may go
 6 out of business, costing jobs, et cetera. If that water's
 7 no longer available, it has an adverse impact on our
 8 ranchers.
 9 Not only that, there's a lot of wildlife up
 10 there. A lot of people come to Park County to either view
 11 wildlife or hunt wildlife. A lot of -- there's several
 12 businesses in Cody that run tours to the wild horses east
 13 of Cody. That could be affected if that water runs down
 14 there for those horses also.
 15 As county commissioners, our concern is anything
 16 that -- we're not just talking about some of our ranchers
 17 who are very important to us and some oil field jobs.
 18 Anything that you may do that affects our revenues has a
 19 direct impact on 28,000 people.
 20 Now, why do I say that? As a board of county
 21 commissioners, we set the budget for county clerk,
 22 treasurer, assessor, clerk of district court, county
 23 attorney, sheriff, jail, road and bridge. We also fully
 24 fund in Park County the library system, the fair, the
 25 museums, the rec boards. We partially fund senior citizens

1 centers in Powell, Cody and Meeteetse, Park County Mental
 2 Health, Boys and Girls Club, drug court. There's a number
 3 of things.
 4 Anything that you may do as a group on lowering
 5 these standards, that possibly may creep over the mountain
 6 to us and have an effect on our revenues. If we have less
 7 in revenues, we may have to cut; because by law we have to
 8 have a balanced budget.
 9 So -- and that's not easy to cut the senior
 10 citizens, Meals on Wheels, drug court, Park County Mental
 11 Health. We may have to cut sheriff's budget, jail -- we
 12 fully fund -- our landfills.
 13 So I'm just here representing Park County
 14 commissioners, and they ask that I read one statement real
 15 quick. Let me get my cheaters on here.
 16 MS. FLITNER: Get your cheaters and look at
 17 your watch. You have about a minute.
 18 MR. FRENCH: Okay. I'll be done.
 19 MS. FLITNER: But if you think I'm big
 20 enough to stop you --
 21 MR. FRENCH: Well, thank you for the
 22 additional minute. I've been here for two days, and I'm
 23 going to have nightmares over this.
 24 MS. FLITNER: I appreciate that. I'd hate
 25 to cause that.

1 MR. FRENCH: The board of county
 2 commissioners of Park County recommends that the petition
 3 submitted by the Powder River Basin Resource Council be
 4 denied due to an anticipated negative impact on the social,
 5 economic structure of Park County.
 6 So your actions may very well have a big impact
 7 on all 28,000 of our people; and as their elected
 8 representative, you know, I take that very serious.
 9 MS. FLITNER: Thank you. As do we, and
 10 thank you.
 11 Any questions for the commissioner? Okay.
 12 Thanks for making the trip.
 13 MS. FLITNER: Duane Siler from Marathon,
 14 Steve Jones to follow.
 15 MR. SILER: Madam Hearing Officer and
 16 members of council, I'll be real brief.
 17 I simply wanted to make one point as you begin
 18 looking toward your deliberations at 3:00. And that is
 19 that Marathon would strongly council against this body
 20 attempting to rewrite in a very short period of time
 21 subsection A of this proposed petition.
 22 During yesterday's proceedings, the Council for
 23 the petitioners essentially repudiated the text that has
 24 been before us in which we -- was of notice for this
 25 proceeding and on which all parties have commented,

1 including the joint industry comments that we participated
2 in.

1 in the very limited time that you're going to have.

2 MS. FLITNER: Thank you.

3 The rule that the Council decided to move forward
4 beginning last summer and noticed per hearing has the
5 language in Section (a)(iii) that would require a permit
6 applicant for a CBM discharge permit to prove that it
7 "shall not cause contamination or other alteration of the
8 physical, chemical or biological properties of any waters
9 of the State."

3 Questions? Wendy.

4 MS. HUTCHINSON: This is my standard
5 question.

6 I recognize your concerns with item iii, which
7 are mine as well. But I would like some better comments
8 from you on Sections i and ii; in other words, having the
9 companies provide credible data that the produced water is
10 used for ag and wildlife usage.

11 MR. SILER: Well, I'm not a technical
12 person and I'm not an engineer and I don't apply or write
13 the permits; however, I would say that based upon the
14 statutory definition which was created for a different
15 purpose, the infrequent review and determination in setting
16 the water quality standards requirement for peer-reviewed
17 references and so forth, that this is -- would be very
18 burdensome to the applicant and may -- as DEQ has pointed
19 out -- may be impossible to collect this kind of data, even
20 for the more limited purposes in subsections (a)(i) and
21 (ii).

22 And we've heard testimony today from industry
23 folks that this would be a heavy burden on them as they
24 apply for permits. I would say I think the most
25 constructive thing that we've heard today was the

10 That's the proposed regulatory language, period,
11 no qualifiers and no caveats. And indeed the Department of
12 Environmental Quality in its comments has said that this is
13 an absolute bar on pollution and one which no permit
14 writer -- no permit applicant could ever approve would not
15 be the case.

16 Council for petitioners yesterday said that this
17 is not really what petitioners intend, that they would
18 allow DEQ to permit some pollution under some undefined
19 circumstances. Ms. Fox did not attempt at that time to
20 articulate any specific regulatory language, so we're
21 wondering when petitioners are going to propose for the
22 public's benefit the exact language that they would like to
23 see here.

24 And in the absence of some language in black and
25 white, it's really futile for the Council to spend time and

1 proceed on this portion of the rule-making; because there
2 will have been no notice or opportunity to comment on what
3 the rule real is.

1 discussion about produced water initiative. And
2 unfortunately, there's very little time available to you
3 today; but I would commend that to your attention as a
4 dispute resolution process which would address what I think
5 we've all come to appreciate are some limited cases where
6 folks can't get together and reach agreement.

4 What petitioners apparently would like this
5 Council to do, rather than proposing definite language
6 themselves, is ask the Council to craft this afternoon some
7 language for subsection A that meets the concerns that
8 they've identified.

7 MS. FLITNER: Further questions? Thank
8 you.

9 The problem is not just that this presents the
10 proverbial moving target for all of the rest of us who are
11 concerned with this rule-making; but with all due respect
12 to the Council and its sincere wish to address the problem,
13 writing rules on-the-fly this afternoon is not this
14 Council's job, and it's not a good way to proceed with
15 rule-making.

9 Steve Jones? That will give Carlton a chance to
10 figure out if I'm talking about him or her. That's all I
11 have written down.

16 If petitioners have been unable to craft a rule,
17 bring it forward and then leave it alone so that the public
18 can comment on it and you can deliberate on it, then no
19 rule can be lawfully adopted, at least not with respect to
20 that portion of the language which petitioners have
21 repudiated as of yesterday.

12 Is there a Carlton in the room? Good. I
13 remember you. You will follow Steve.

22 So we believe that the Council should reject
23 subsection A in its entirety; but at a minimum, we do not
24 believe that it would be appropriate or lawful for you to
25 proceed to try to rewrite Section (a)(iii) this afternoon

14 MR. JONES: Thanks very much. My name is
15 Steve Jones, and I'm here representing Wyoming Outdoor
16 Council.

17 I wanted to try to provide you some thoughts
18 based on what I've heard here today as well as yesterday,
19 mostly from a legal perspective, I guess, because that's my
20 background.

21 First of all, I think the contention that the
22 Council doesn't have the jurisdiction to adopt this rule is
23 just not well-founded at all. If you don't want to adopt
24 the rule, that's one thing; but to say there's no
25 jurisdiction is completely mistaken.

1 MS. FLITNER: Thank you very much. Thank
2 you to both of you.

3 I'm getting some dirty looks, so I will allow for
4 a five-minute break, but I'd like to get Eric's testimony
5 first. I don't know how pressed you are, but let's go
6 ahead and take your testimony; and then I'll leave with
7 you, because they're really giving me dirty looks over
8 here.

9 MR. HISER: The Council looks restless
10 here.

11 My name's Eric Hiser. I'm with the firm Jorden,
12 Bischoof and Hiser, council for Yates Petroleum, and was
13 asked to try to pull together a number of industry
14 positions for you.

15 Madam Hearing Officer, members of the Council,
16 you have a difficult job. The Environmental Quality Act
17 requires you to both protect our resources and also to
18 provide for their proper development. And it's important
19 that we don't lose sight of that developmental aspect of
20 your responsibility as we go through this situation.

21 Second, as several of you have said, you need to
22 do what is right; and what is right is not only what is
23 right for the individual landowners who may be affected by
24 coalbed natural gas development, but also for the great
25 number of citizens of the state who depend upon the

1 data to come to us, because we may not be able to get it in
2 any good way or else you may have to go through a very
3 extensive process of looking at all sorts of soils up and
4 down the drainage?

5 That's an issue, too, because it raises two
6 additional problems. First, what we're doing is we're
7 shifting even more burden onto the landowners in that area,
8 because now they're going to have to open their ranches up
9 to all sorts of survey crews poking holes everywhere trying
10 to determine what that water quality data is for purpose of
11 evaluating this and to personally redress this harm that
12 we've heard in a couple of cases that have developed.

13 And many of those landowners may not want to
14 share where is their best fishing hole or what is the
15 status of my elk herd or something like that, because that
16 is information that is valuable to them and which we know
17 are going to put into the public record for all we know to
18 see. That is a burden that you're placing on those other
19 landowners.

20 What do we do about the landowner that elects not
21 to participate in that burden? We now cannot fulfill that
22 mandate for credible data. Does that mean, then, that a
23 noncooperating downstream landowner has a veto by simply
24 saying, We will not give you access to this land?

25 Well, that precludes perhaps getting credible

1 industry or the water for other things that they do as
2 well. So you do have a very tough balance that you must
3 do.

4 And finally, just, you know, when you come to
5 hear -- the petitioners have proposed this rule, and it's
6 really up to them to carry to you that burden of proof to
7 show that the rule that they're proposing will, in fact,
8 address the harms that they have cited and not cause a
9 disbenefit to the development of the state.

10 Let's turn, then, as a number of you have asked,
11 and look at the actual language that's being proposed by
12 the petitioners.

13 First of all, we come across this issue of
14 credible data. What is credible data and how will we do
15 that?

16 Well, this is a significant problem. As the
17 petitioner's expert, Chris Lidstone, said, basically this
18 is very hard data to get because you don't know when a
19 rainstorm is going to occur that gives you the data that
20 you're necessarily looking for. And that may be, as we've
21 just come through seven or eight years of drought, a very
22 long time indeed.

23 So what is industry to do or people that want to
24 use this water in the meantime? Do we sit and simply let
25 the plague pass or what -- while we wait for the credible

1 data, and that really does shift the leverage. Veto is a
2 very effective shift. But we have to evaluate, once again,
3 in light of your mandate to provide for protection and
4 development. Is that an appropriate resolution?

5 Let's go to the quantity issues. The big problem
6 with this is that there's really no meaningful standard on
7 quantity. What is good for one person on the drainage may
8 be considered not good by another person on the drainage.
9 And that leaves us with the problem of how do you
10 administer that standard? Because if we are to be a
11 government of law, that law or that rule has to mean the
12 same thing for everyone. It can't mean one thing for one
13 person, another thing for another person; because then we'd
14 have the government of personal preference.

15 And that's not what you're here to do as a
16 council. You're here to set forth rules and guidelines
17 that will apply uniformly to everyone that's going to be
18 applied. And that's a big concern to us. It also adds to
19 the regulatory uncertainty, which is a significant concern
20 of ours.

21 Finally, we come to the definition of pollution,
22 which is being imported into this. This has a number of
23 significant problems. First, as several have observed, no
24 water exactly mirrors the water to which it is being
25 discharged. So one level of this would simply prohibit the

1 ability to do any discharge.
 2 For example, our best water quality that goes
 3 into the Powder River would clearly violate this standard
 4 because it alters the Powder River where it joins it. And
 5 so to that extent, it's a counterproductive rule.
 6 Second, it is overbroad; and it really is, once
 7 again, coming back to this sort of nuisance issue. And
 8 here's where the Council has a problem: Unfortunately, the
 9 tools that you have to wield, which is a tool that's very
 10 broad and very blunt because it does have to apply across
 11 the state and does have to apply sort of equally to
 12 everyone.
 13 And so this is a case where it may be better to
 14 do as best you can with the numeric standards that you can
 15 and then to let the civil system, as someone suggested,
 16 sort out those really what are nuisance issues where
 17 there's too much water and it's causing a harm to a person
 18 in a particularized instance and can come to the best
 19 equitable judgment.
 20 And we think that would be good thing for you to
 21 look at. Because as you're looking here now and stepping
 22 back, it's your overall balancing job. We have some cases
 23 where there's instances of harm. I don't think anybody's
 24 denying that. But we have a lot of benefits that you've
 25 heard. You've heard from numbers in the Big Horn Basin,

1 They're not entitled to any compensation -- just
 2 something for you to think about.
 3 I have one last little procedural point, Madam
 4 Hearing Office, which I would like to bring to the Council.
 5 This has to do with where we stand sort of from the
 6 industry perspective. And that is that obviously we favor
 7 you rejecting this, but you've discussed tabling or
 8 whatever.
 9 Our real preference would be that if you take
 10 this up and decide to defer action that you postpone it to
 11 a definite time, such as after the receipt of the
 12 University of Wyoming report. And the reason why we think
 13 that's more appropriate than tabling is that a table can
 14 come back up at any moment, and that really could mean that
 15 we would have to bring everybody here for every meeting of
 16 the Council between now and when the University of Wyoming
 17 report were to come back, in case it came off of the table.
 18 Whereas if you were to postpone it to a definite time, it
 19 would be much less of an inconvenience for everybody.
 20 MS. FLITNER: Thank you.
 21 Questions?
 22 CHAIRMAN GORDON: Thank you. And I like
 23 your procedural point.
 24 I actually wanted to ask you about that landowner
 25 consent form, and I'm reading here from Chapter 7, which is

1 you've heard a number of ranchers in the Powder River Basin
 2 who really rely and depend upon this.
 3 We've heard from county commissioners who have
 4 talked about the budgetary impacts that this would have and
 5 the diminish in services that could result from it. And so
 6 here we have -- and the last thing I would say is that the
 7 petitioners really have not made the case that their
 8 numeric standards -- which they're sort of taking off the
 9 table today -- are going to give you much additional
 10 benefit.
 11 So as you look at this, we have no general
 12 benefit on the standard side yet, understanding there's
 13 deferring that; and we have a couple particularized cases
 14 of harm. And then we have on the other side -- we have a
 15 lot of potential disruption to the industry, a lot of
 16 disruption to landowners who use that water; and you have
 17 to balance it. How are you going to come out of that?
 18 You've got some few affected here, many on the
 19 other side. The degree of harm may be different. But
 20 remember this: Under the civil system, those few who are
 21 harmed now are entitled to compensation if they show
 22 damage. But if you were to disrupt the industry and to
 23 make it difficult, if not impossible, for this to continue,
 24 who will compensate all of the others who depend upon that
 25 water now and where that water will go away?

1 that 1978 to 2004. And under the beneficial use
 2 subcategory, it has, Through submission of signed letter of
 3 beneficial use from the landowner specifically requesting
 4 this discharge in question be allowed to continue, the user
 5 must indicate the exact beneficial use of the water, stock
 6 water and irrigation, et cetera, and the history of such
 7 use.
 8 No action taken by the Department under this
 9 section or any other section of the regulations is said to
 10 be interpreted as a valuable water right or any other water
 11 use authority.
 12 Do you have any problem with that language?
 13 MR. HISER: In general, it worked
 14 reasonably well. Where you run into problems is sometimes
 15 you would have difficulties with landowners that may or may
 16 not be related to whether or not there was a beneficial
 17 use. And so like everything in a negotiation, you use the
 18 chips that you have available.
 19 As it was pointed out, the practice of the agency
 20 was that you also substitute a professional's opinion, and
 21 that was done. And as long as that was done as well, I
 22 think that's fine. It really goes for the question of, Is
 23 the water of a quality that would allow that use? If
 24 that's the question, we would be okay with that.
 25 CHAIRMAN GORDON: Okay. Thanks. The

1 second is -- and I wanted to ask you if you ever
2 represented anybody who's bonded on. I guess one of the
3 questions I have -- if somebody is bonded on, it may or may
4 not be the practice to have surface use agreements.

5 And I guess what I'm wondering about -- if
6 someone is bonded on and they have water discharge issues,
7 are they entitled to the same kind of property protections
8 that you might expect to have; and if so, what would their
9 opportunities be to seek some sort of control?

10 MR. HISER: If a company were to bond on to
11 a piece of property instead of coming on through the
12 surface and damage agreement, the mineral estate owner, the
13 developer of that property, still owes compensation for any
14 damage that occurs to the surface estate.

15 And so if that damage would be related to a
16 discharge, that would be one of the things that should be
17 recoverable in those cases. The measure of damages may be
18 a little bit different from what surface and damage
19 agreement might apply. And that's why we use surface and
20 damage agreements because they're more easily liquidatable
21 and it's easier to administer in the use of the transaction
22 cost for both the landowner -- or the surface user and the
23 mineral developer.

24 But the general measure of damages should be the
25 same. They would be entitled to recover for damages done

1 address credible data. It still seems our focus on
2 credible data is on the scientific stream situation and
3 that sort of thing and not use, which is what the rule --
4 part of the rule requires.

5 Can you imagine what credible data would be for
6 use?

7 MR. HISER: Well, Council member, you have
8 arrived at a very real problem, and I think that one of the
9 landowners spoke to this fairly eloquently, although it
10 wasn't specifically in response to the question about
11 credible data.

12 They were wondering how they would try to show
13 how much water their cattle would use, and we can bandy
14 around certain default numbers -- it's 20 percent of the
15 weight of the cow or whatever, but all that really begs the
16 question about transmission loss and having water available
17 wherever the cattle may want to be.

18 And the cattle may -- you know, unless we're
19 going to attach little drinking things to the cattle as
20 they wander around on the range, we're going to have to put
21 water on the land in order for the cattle to go to it.

22 And so there is no good way to really come up
23 with a tight quantification of how much water the cattle
24 are going to use and where it is on the land, how does it
25 relate to the amount of discharge. And that problem is,

1 to the surface estate.

2 CHAIRMAN GORDON: Okay. And the last
3 question -- I'm a little bit confused.

4 Did I understand that that language proposed in
5 the rule on the definition of pollution comes from the
6 statute? I thought you said it was overbroad. So is your
7 position the statute's overly broad?

8 MR. HISER: No. That's a very good
9 question, Mr. Gordon. The reason that is not overbroad in
10 the statute is that in the statute what the definition of
11 pollution does is it provides when you can't cause
12 pollution. And as a matter of state policy, we want that
13 to be a very broad definition.

14 What the statute does, though, is it says that
15 you may allow pollution if you obtain a permit from the
16 Department of Environmental Quality. And so pollution
17 isn't permissible if it is done pursuant to the permit.

18 So you want a very broad, general definition of
19 pollution to bring people into the permitting universe; and
20 then the Department ensures, through the exercise of its
21 rules and in its best professional judgment, that that
22 damage, in fact, meets the criteria set forth in the EQA.

23 CHAIRMAN GORDON: Thank you.

24 MS. FLITNER: Other questions? Wendy.

25 MS. HUTCHINSON: Thank you for trying to

1 unfortunately, even much more compound an issue with the
2 wildlife, which moves even more vagrantly around the
3 landscape than the cattle does or birds.

4 And for fish, I have no idea how you would do it
5 except that feed enough obviously that they can swim around
6 and live and not choke to death in the summer or freeze to
7 death in the winter.

8 So, I mean, that's sort of what you're looking
9 at.

10 MS. FLITNER: Other questions?

11 Thank you very much.

12 We'll take a five-minute break and reconvene at
13 3:10 by that clock.

14 (Recess taken 3:02 p.m. to 3:12 p.m.)

15 MS. FLITNER: As I said before, there are
16 about six remaining testifiers, including the petitioners.
17 We are going to have a little bit of conversation now, if
18 that's all right with you all, and to try to give, again,
19 some idea and get some idea of where we are coalescing.

20 In addition to the scheduling conflicts, we have
21 received lots of new exhibits and stacks this high today of
22 things that have been entered on the record, but we have no
23 idea what they are; so that's another reason that most of
24 us, I think, feel comfortable waiting -- I know you're
25 anxious to know about if we're going to make a decision

1 today, and I have only one vote. So it's a little bit up
2 to me, but I don't think we will vote today.
3 We will -- we will do a little better than that
4 giving you an idea of the schedule before this day is out.
5 We are as anxious as you are to come to a decision and
6 consider the next set of challenges. So with that being
7 said, I'd like to open it up to the Council for some idea
8 of your reactions to what we've heard while we are still in
9 here.

10 MR. MORRIS: Why don't we just take a vote
11 of the audience?

12 MS. FLITNER: I'm all for democracy, John.
13 This could be a short discussion.

14 I guess I will -- I will begin just by saying
15 that it strikes me how -- in some ways, how far we have
16 come; and I think there are important studies being
17 conducted -- does someone mind closing the door, please --
18 I think the conversation and debate has helped inform all
19 of us.

20 I am still grappling with exactly the same
21 conundrum that I was at the beginning of this; that is, the
22 relationship between quantity and quality and the practical
23 ability to measure and quantify beneficial use.

24 So I -- I'm there -- right there with the same
25 set of questions, and it's clear to me that whatever part

1 Anybody else?

2 CHAIRMAN GORDON: Well, I'm just sort of
3 struck by the conundrum that we're in, and I don't mean to
4 belabor this; but I guess I sort of feel that no matter
5 what we do people are going to go out of business here,
6 from what we've heard today in testimony.

7 MR. MORRIS: That may be us.

8 CHAIRMAN GORDON: That's true, too.

9 And I think that's a terrible position to be in,
10 and I suddenly started thinking about sexual assault and
11 just the fact that sexual assault doesn't happen all that
12 often or that people that don't -- that has it happen to
13 them sometimes don't complain doesn't mean it's right.

14 So -- and maybe that's a very bad analogy, but I
15 feel that, to some degree, that's kind of the issue that's
16 in front of us and that we have a responsibility and we
17 need to proceed.

18 But I don't necessarily think we can proceed to
19 an end today.

20 MS. FLITNER: And Wendy, you did --

21 MS. HUTCHINSON: I guess -- and you can all
22 tell from my mode of questioning here is I do believe it's
23 our responsibility as we look to these rules to see how are
24 they -- how do you comply with it? If you're the person
25 that's got to comply with this rule, how do you do it?

1 of the city we get into with regard to this issue, it's
2 just another slice of complexities. I am not hearing any
3 sort of practical solutions to what is obviously a -- an
4 attempt to look at some way to remedy the gap in the
5 regulation.

6 I do think that we're still -- we're not where I
7 could see a practical implementation. We have some
8 different options for dealing with that, obviously, in our
9 decision-making process; but, you know, the foundation that
10 we're on is not as strong as it needs to be for every
11 single interest we've heard from.

12 MR. MORRIS: Maybe we can get a comment
13 from the attorney general staff now that they've had
14 two days of testimony.

15 MS. HILL: You know, our comment would be
16 we responded to all your questions that we feel like -- in
17 writing. I wouldn't, at this point, add anything to the
18 things that we've said. If you have specific questions for
19 us, certainly we're always happy to look at those sort of
20 things; but I wouldn't add anything to the things we've
21 written to you already about these topics. And I would
22 leave it at that.

23 MR. BOAL: Let's hear the rest of the
24 audience.

25 MS. FLITNER: Just like that.

1 And is it -- is it possible or incredibly onerous
2 or is it not, and that's obviously something I'm getting
3 little feedback on.

4 But in case you had any questions about why I'm
5 asking for credible data, that's what I'm looking for.
6 Every rule in my mind has to meet some sort of test as to
7 whether or not it can be complied with. That's the --
8 where I've been going with my questions.

9 MR. MORRIS: I think it's our duty and
10 obligation to address this because of the quality issue,
11 whether we approve the proposal or whether we don't. But
12 we have a quality issue here, and it's our obligation to
13 address that. How we go about, you know, that's --

14 MS. FLITNER: Well, I'm going to ask you
15 what you've been asking everybody else, then.

16 What's your idea for a solution, Mr. Morris?

17 MR. MORRIS: I said take a vote of the
18 audience.

19 MR. MOORE: I feel uncomfortable discussing
20 too much until we close the hearing, so I think we need to
21 take the rest of the testimony and allow the petitioner
22 their final statement and then we can discuss things. But
23 it's premature.

24 MS. FLITNER: Let's proceed. I'm happy to
25 hear from everybody.

1 We have left to conclude today's proceedings
 2 Rob Garland, John Robitaille, Keith Burrton and Kim Warberg
 3 and then Kate Fox.
 4 Is there anybody I've missed? Okay.
 5 Let's call Rob Garland.
 6 How about John --
 7 UNIDENTIFIED MAN: Rob's here.
 8 MS. FLITNER: John, you're on deck.
 9 MR. ROBITAILLE: If I can go in his place,
 10 Madam Chair. Thank you.
 11 John Robitaille with Petroleum Association of
 12 Wyoming. Here we go again.
 13 We've got a few problems with this, as you may
 14 suspect. I'm going to be fairly broad in my -- in my
 15 response to this petition in general, and then I'd like to
 16 get into a little bit of a program that we've been working
 17 on in an attempt to resolve some of these problems that are
 18 going on out there.
 19 First of all, I need to jump back to my original
 20 objection to this entire process in that what we're dealing
 21 with is a regional problem. What you have before you is a
 22 statewide solution. I think we have areas in the state,
 23 particularly in the southern portion of the state, where
 24 people would very much like water to be on surface.
 25 That water is being produced from a coal seam.

1 we all that grew up in Wyoming believe and still believe, I
 2 believe, that these things can be solved sitting down at
 3 the table rather than through governmental action.
 4 What this program does, plain and simple, is it's
 5 an attempt to get those folks together. And it may not go
 6 from the headwater down to the ocean or anything like that,
 7 but it is in place -- and it's still a draft. Let me keep
 8 that in mind. It's very much a draft -- but what it would
 9 do is it would open the door for discussion for these
 10 people that maybe, you know, if they -- if a company man
 11 came to the door, maybe they're not going to answer; but if
 12 they sat down with somebody that they perceived as --
 13 didn't really have a dog in the fight, maybe they'll start
 14 to open up. Maybe we can find some common ground and get
 15 something worked out.
 16 The ag groups that I've spoken about, Farm
 17 Bureau, Wyoming Stock Growers Association, Wyoming Wool
 18 Growers Association, Wyoming Association of Conservation
 19 Districts and my association, have worked on this program
 20 for, oh, six or eight months or so. We've still got some
 21 kinks to work out.
 22 One of the things that we're kind of excited
 23 about in this program -- I believe you all have a copy of
 24 this -- is a process that we've stolen from the Department
 25 of Agriculture called the technical review team. We're

1 Currently it is not available to them, and they are
 2 disappointed and trying to figure out ways to make it
 3 happen. If this petition goes forward, how will they be
 4 affected?
 5 We've heard Powder River Basin, we've heard Big
 6 Horn Basin, haven't heard much outside of that; but this is
 7 not a basin-specific model. What you've done is limited it
 8 to a coalbed -- or tried to.
 9 But again, I believe that it is broader than
 10 that, and it -- as my friends from DEQ can tell you, I'm a
 11 little paranoid about a thing I like to call regulatory
 12 creep. It's items where you target something small and
 13 over time it grows into something bigger. I think what you
 14 have before you may fit that bill.
 15 I also reiterate that the CBM task force is
 16 reviewing this type of thing; and I believe that is a
 17 makeup of legislators, landowners, agency people -- I think
 18 it's a good group of folks, and we ought to let them do
 19 their work and see what they can come up with.
 20 It's been alluded to, but I'd like to touch on a
 21 little bit more -- it's a program called the Wyoming
 22 Produced Water Initiative, and what this is a -- it's a
 23 format in which my association and several other
 24 agriculture associations have come together in an attempt
 25 to resolve these issues on our own in a manner that -- that

1 still working out details of that, but essentially what
 2 that would be is you'll -- you all agree to what may be
 3 necessary, what specialist may be necessary -- get them
 4 out, get some idea of what's going on that would go into
 5 what's essentially a mediation program.
 6 Our hope is to complete this, get it to a place
 7 where we think that it's available for publication. We
 8 would then publish it. And notice also that this is the
 9 Powder River Basin region. This is specific to the Powder
 10 River Basin. If, in fact, we run into a situation similar
 11 in other areas of the state, they would tailor it -- we'd
 12 take this as a template and tailor it to those specific
 13 needs rather than trying to use an umbrella approach.
 14 So with that, I'll leave this with you all and
 15 let you review that, but we are very positive about this.
 16 We believe that it's got some real Merit.
 17 MS. FLITNER: Thank you.
 18 Questions for John?
 19 MR. MORRIS: Are you including the DEQ in
 20 this group in these discussion or is this just industry
 21 and --
 22 MR. ROBITAILLE: Madam Chair, at this
 23 point, no. I can tell you as far as the DEQ is a member of
 24 the coalbed task force, they have received a copy of this.
 25 We have been in front of the task force numerous

1 times explaining what we're doing; and, in fact, in their
2 interim report, our little coalition, if you will, has
3 reported in there as to what we're doing. And it appears
4 as though they will endorse.

5 MR. MORRIS: I think it's great. I think
6 that's good for stuff to come together.

7 MR. ROBITAILLE: Yes, sir, I hope it works.

8 MS. FLITNER: Did you have a question,
9 Mark?

10 CHAIRMAN GORDON: Yeah.

11 John, thanks. You and I talked about that
12 process before. It's fabulous.

13 MR. ROBITAILLE: Yes, thank you.

14 CHAIRMAN GORDON: Do you have an opinion on
15 the way it needs to be done, the beneficial use statements
16 done by the landowner or the Game and Fish and -- do you
17 have any thoughts on that? I was thinking that your
18 process could result in those kinds of statements.

19 MR. ROBITAILLE: Madam Chair, I'm not sure
20 I'm following you. I'm not sure -- maybe we'll need to sit
21 down and visit some more, but I'm not sure how this is
22 going to evolve into that type of process.

23 I do recall that the Game and Fish just decided
24 that they were being asked too often and just made a
25 blanket statement.

1 barium, sulfate and TDS. I work for a company named CBM
2 Associates. We do water quality monitoring and compliance
3 reporting in the Powder River Basin and other basins in
4 Wyoming for energy production.

5 The objective of the study, which you have in
6 your hands there, is to contrast the current limits for
7 total recoverable barium, total dissolved sulfate, TDS,
8 against those PRBRC has proposed in their petition to
9 change.

10 We want to evaluate the potential effects on oil
11 and gas production and the availability of water due to the
12 more restrictive proposed standards. The data sources that
13 were used came from the DEQ's discharge monitoring reports
14 for coalbed methane production and for conventional oil and
15 gas. They were reviewed from a period of 1999 through
16 2006.

17 We looked at a number of different outfalls that
18 were across the Powder River Basin and other oil producing
19 basins in the state of Wyoming. For barium we examined
20 produced water from the discharge permits. The outfalls
21 had mean concentrations of total recoverable barium that
22 were used to average the samples from the same outfall
23 together over the period of record that we had for them in
24 order to get a mean value, which we feel is most
25 representative -- we hope the DEQ would agree -- of what

1 As an opinion, I don't have an opinion one way or
2 the other.

3 CHAIRMAN GORDON: Okay.

4 MR. ROBITAILLE: I do believe that if our
5 process works the way we all envision it to work, I believe
6 that we will use a rifle as opposed to shotgun.

7 CHAIRMAN GORDON: Okay.

8 MS. FLITNER: Thank you.

9 Rob Garland?

10 MR. GARLAND: Thank you. I'm not sure how
11 to plug in.

12 Is there a connection to your projector?

13 MS. FLITNER: I'm not sure how to proceed
14 with the -- if you -- it's up to you, but we'll follow
15 along, considering.

16 MR. GARLAND: Okay. My name is Rob
17 Garland. I appreciate the Council hearing testimony today.

18 This is on the water quality that we are dealing
19 with, the effluent limits as part of this discussion.

20 MS. FLITNER: We can use the slides on
21 paper, if you'd rather. I just don't want to use up your
22 time with technological malfunctions. It's up to you.

23 MR. GARLAND: I'm testifying on behalf of
24 the industry and the -- all right. This discussion is on
25 the effects from the PRBRC proposed effluent limits for

1 kind of water quality you see in there. It's fairly
2 consistent over the time of the period of record as well.

3 For the barium from the CBNG produced water, we
4 had 2,658 individual outfalls that we looked at; and
5 99 percent of those outfalls had mean barium concentrations
6 for total recoverable barium that would exceed the proposed
7 200 microgram per liter standard. Under current standards
8 of 2000 microgram per liter, less than 1 percent exceed at
9 this point in time.

10 There's a map there that shows you the
11 concentration of those exceedances. I will give the
12 Council the PowerPoint presentation, and I will e-mail it
13 or provide a CD, whatever you would like, so you can
14 examine these in more detail. Again, I apologize for not
15 being able to see the figures larger.

16 Again, these maps show the concentrations.
17 They're contoured out there. The gray area around the blue
18 is an area where we don't have any data because --

19 MS. FLITNER: You have one minute.

20 MR. GARLAND: Okay. The histogram that
21 follows that shows the distribution of those concentrations
22 for that coalbed methane water. The produced water from
23 conventional oil and gas is pretty sparse as far as
24 containing barium concentrations; but if -- we had to treat
25 for that -- excuse me, back up here -- we had to treat for

1 this barium in the water for the coalbed.
 2 We are looking at a significant treatment cost of
 3 about 35 to 60 cents per barrel of water and that would
 4 roughly equate to about a 147 to \$252 million increase a
 5 year in treatment costs. These numbers are based on the
 6 current production that just elapsed over the period of
 7 2006.
 8 So those are all the statistics there. It would
 9 also increase the value of the -- or the cost of the gas to
 10 produce at the wellhead from 63 cents to 1.08 because most
 11 water is produced per mcf of gas than a barrel of water.
 12 It's about 1.8 right now.
 13 The conventional oil and gas has very little
 14 barium, and it doesn't appear that there would be much
 15 problem with that. We probably have about -- well, I take
 16 that back -- you'd have 38 percent of the conventional oil
 17 and gas that also has to be discharged -- would have to be
 18 treated if you lower the standards to 200 micrograms per
 19 liter.
 20 Sulfates -- coalbed water does not contain much
 21 in the way of sulfates. You have about 2 percent. Out of
 22 1383 less outfalls examined, you would have approximately
 23 2 percent that would have to have treatment. Conventional
 24 oil and gas, produced water sulfates, 71 percent would be
 25 seen in the proposed standards at 500 milligrams per liter

1 of sulfate.
 2 And that data is mainly gathered from Salt Creek
 3 and Big Horn Basin where we had available data. Again,
 4 those aren't required effluent limits to be taken, those
 5 are from some other studies that have been done out there.
 6 TDS from 1,942 outfalls, in the case that's
 7 6 percent of the currently operated outfalls. That would
 8 not comply for coalbed natural gas with the proposed 2,000
 9 limit. And then with conventional oil and gas, 89 percent
 10 would not comply with the TDS limits that have been
 11 proposed in petition.
 12 Questions are -- I believe this Council should be
 13 addressing what is the risk of harm to the livestock and
 14 the wildlife and the produced water under these existing
 15 limits. Where is credible data that the existing limits
 16 are not protective of wildlife or livestock. I haven't
 17 seen it. I've done a lot of water management plans and
 18 worked in the field out there.
 19 What is the risk of harm to the livestock and
 20 wildlife? Produced water is removed from the state's water
 21 supply. We've heard plenty of discussion today on that
 22 question. Where's the credible evidence of measurable
 23 benefits to livestock and wildlife from the proposed
 24 limits? I think there is a study underway.
 25 MS. FLITNER: Thank you.

1 MR. GARLAND: Finally, loss of the produced
 2 water to existing livestock and wildlife uses and the loss
 3 of oil and gas reserves offset and justified by the
 4 credible, measurable benefit from adopting new limits.
 5 MS. FLITNER: Thank you.
 6 MR. GARLAND: Any questions?
 7 CHAIRMAN GORDON: I have two questions.
 8 On the barium that you produced, you have a
 9 conservative cost; but I didn't see those on the others.
 10 Is there a reason?
 11 MR. GARLAND: I just did that because of
 12 the brevity of this discussion here, and it would take some
 13 time to do that. It is going to be very similar to the
 14 cost you see for the barium or each one of the contaminants
 15 it would have to be.
 16 CHAIRMAN GORDON: What is that estimate
 17 based off of?
 18 MR. GARLAND: The estimate is based off the
 19 current cost to treat the water where it is being treated
 20 on the Powder River, and it's being gathered and treated by
 21 an ion exchange system and discharged to the river to meet
 22 the current standards.
 23 CHAIRMAN GORDON: Specifically for barium?
 24 MR. GARLAND: No, specifically for the
 25 sodium adsorption ratio -- well, in sodium, actually, now

1 and for EC.
 2 CHAIRMAN GORDON: Okay.
 3 MS. FLITNER: Wendy has a question for you,
 4 too.
 5 MS. HUTCHINSON: Just a comment, really.
 6 Thank you for the statistics. I find it very
 7 interesting. Since we think in some measure we're going to
 8 postpone the standards, I guess I would encourage you --
 9 after Dr. Raisbeck's study comes back to us that there
 10 might be another opportunity that this presentation would
 11 come to force again.
 12 MR. GARLAND: I would appreciate it.
 13 MS. FLITNER: Thank you very much.
 14 Keith Burron and Tim Barber? Great. Keith is
 15 ready.
 16 MR. BURRON: Thank you, Madam Chair,
 17 members of the Council.
 18 For the record, I'm Keith Burron. Just a little
 19 bit of background, first. I've been an attorney in this
 20 state for 15 years practicing in water law. Before there
 21 was coalbed methane development to any great degree, I
 22 represented a lot of agriculture interests, and I'm
 23 sensitive to those interests.
 24 I'm here today speaking for Petro-Canada
 25 Resources. You heard a little bit from David Gremel

1 earlier today. Petro-Canada began operating in the Powder
2 River Basin by taking over the assets of a company called
3 Prima, and that happened in mid-2004. Petro-Canada was
4 fortunate enough to pick up Mr. Gremel in that process of
5 picking up Prima's assets. Petro-Canada is one of several
6 operators in the Wild Horse Creek drainage.

7 I guess I'd start with what Lorraine Quarberg
8 said earlier today that -- maybe paraphrasing a little
9 bit -- not all problems require a solution from the
10 government. Petro-Canada, as you heard from Mr. Gremel,
11 has worked out cooperative solutions in every area in which
12 it works, including Wild Horse Creek, with one exception.

13 And that's the situation involving Mr. Clabaugh
14 on Wild Horse Creek. And I want to make clear that I'm not
15 here today to pick on Mr. Clabaugh, and I'm not here today
16 to debate that issue; but it is important, I believe, to
17 note that yesterday in our slide presentation you saw a
18 number of slides of water out of the banks on the land.

19 Every one of them, to my recollection, was Wild
20 Horse Creek on Mr. Clabaugh's land. Now, you've heard from
21 Mr. Gremel that he's attempted to contact Mr. Clabaugh on a
22 number on occasions by telephone -- and he's spoken with
23 him twice, but got, basically, Talk to my attorney.

24 Now, again, it's the Powder River Basin Resource
25 Council's petition who has brought this here, and I'm sure

1 limbs, things like that, in that state section; and the
2 hydrologist that did the study concluded that the debris
3 piles are the largest factor that impedes the natural
4 hydraulic capacity at Wild Horse Creek.

5 There are solutions to fixing these problems, but
6 we need some cooperation to do it; and again, we'll extend
7 that cooperation and ask for that cooperation from
8 everybody involved. And I think we're going to get that
9 cooperation from the State of Wyoming; because after the
10 State reviewed this plan, they've essentially said we'd
11 like to see you proceed with it and send us a letter of
12 agreement.

13 So currently, the process is there are costs
14 being developed to do this. Petro-Canada's talking with
15 the other operators about sharing costs, but we'd like to
16 go into Section 16. Obviously, we'd like to extend that
17 and talk with Mr. Clabaugh about addressing that.

18 Madam Chair, I'm sorry. I do have a little bit
19 more, and I hope you'll indulge me with that.

20 Let me move on about the EQC's decision for
21 today. The Council's sitting to evaluate the petition that
22 is in front of you and not something else, recognizing that
23 you've asked for what are solutions -- and to back up one
24 step, what Mr. Robitaille and Ken Hamilton indicated about
25 produced water initiative -- I've now reviewed the plan

1 Mr. Clabaugh does not want to be the lightning rod for the
2 discussion that we're having. But nonetheless, the
3 situation is this is not a situation that has occurred
4 because of operator neglect.

5 Petro-Canada and the other operators in that
6 drainage have attempted to rectify this situation and to
7 date have been unable to do so. And that's not to say that
8 they're not committed to continue to trying to do that;
9 they are. And that's a solution that's going to require
10 some cooperation.

11 I do want to touch on one more aspect of the
12 Clabaugh situation and give the Council a little bit of
13 information about where that stands. Section 16 is a state
14 section within the Clabaugh Ranch. We, being Petro-Canada,
15 on behalf of operators in the drainage, have contacted
16 State Lands to ask if we could do mitigation within Wild
17 Horse Creek on Section 16.

18 The State allowed Petro-Canada to send a
19 consultant out and do some assessment. The consultant came
20 back and said there are many things that can be done to
21 address flooding concerns on the State's piece of property,
22 which, by the way, is leased by Mr. Clabaugh, operated as
23 part of his ranch unit.

24 The primary finding that the consultant made was
25 that there are about 33 debris piles washed out, dead tree

1 extensively. I'm aware it's in development.

2 That sounds like something that could have a lot
3 of promise, because it brings in someone else to facilitate
4 these kind of conflicts. That's something my client would
5 certainly support.

6 But for today, you've been tasked with something
7 that really is impossible, because what I heard in the
8 petitioner's presentation is a comment to the effect that
9 if a landowner wants the water, it's not a nuisance; but if
10 a landowner doesn't want the water, it is a nuisance. And
11 how can those two interests be accommodated within the same
12 drainage? I don't think that they can.

13 I believe -- and it's in our written materials --
14 that the right to flow water in a natural waterway is
15 established as a matter of law. It's not a nuisance to
16 flow water in a natural watercourse. Were that not the
17 case, water development in this state would not have
18 occurred.

19 We would not have the ability for the City of
20 Cheyenne to pump groundwater wells and discharge them in to
21 Crow Creek. We would not have the ability to bring water
22 from Little Snake over to Cheyenne and deposit it into Crow
23 Creek because it's artificial supply going into a different
24 drainage.

25 I understand that even within the Powder River

1 Basin, Prairie Dog Creek -- one of the creeks up there.
2 And I apologize for not knowing which one -- receives
3 diversion from another creek up there, which augments its
4 water; because it's typically water -- but that's not an
5 uncommon situation. It happens all over the state in every
6 irrigation project.

7 So essentially, that is an issue that has been a
8 matter of state policy for over a hundred years since prior
9 to state government.

10 And Mr. Morris and Ms. Hutchinson asked the
11 question, What about downstream landowners who don't have
12 an opportunity to deal with the operators on these issues?
13 I think that's a hypothetical question, and maybe in some
14 context it's come up; but the reality is they do. And the
15 reality is a lot of operators are working with downstream
16 landowners to mitigate their concerns.

17 Again, Petro-Canada is one of those companies,
18 and Wild Horse Creek is a good example. There are a number
19 of landowners in drainage -- none of whom are here today,
20 except for one. So you're faced with a petition that, from
21 a practical standpoint, just doesn't work. In addition,
22 the language of the petition, as has been pointed out,
23 arguably bans discharges altogether.

24 And I think it's interesting that Mr. Wagner, the
25 water quality administrator, is the one who concluded that

1 reading the rule -- the proposed rule, and he is the one
2 who would be charged with implementing that rule. So if
3 that's his reading, I have some concern.

4 I would also say that I think the rule can be
5 fairly read that way; and as I read the transcripts from
6 Buffalo -- and again, we talked -- you folks talked
7 yesterday about having some of your language and
8 transcripts coming back at you. I believe that's how
9 Ms. Hutchinson read that and Mr. Moore also, that you can't
10 have a rule that bans pollution and then have a discharge
11 permit that allows it. So the current language simply
12 doesn't work.

13 And you're now apparently being invited to revise
14 that exhibit to say something that it doesn't say, to have
15 an intent that we don't quite know what that is. And that
16 will require another rule-making, and it's certainly not
17 something that the Council is necessarily equipped to do --
18 to craft that language. If there's an issue out there to
19 address, then that ought to go to the Department to come up
20 through the rule-making process.

21 But in context of what Petitioners have proposed,
22 if it fails on its own merits, the Council is not obliged
23 to rescue it. And if it's not there, it's not something
24 that can be adopted.

25 Two issues that I would like to talk about that

1 were specific questions -- one of them from, I believe,
2 Chairman Gordon -- and the question is what about the
3 beneficial use waivers or statements that were signed?

4 The DEQ, it's my understanding, did away with
5 that requirement because of the determination that if water
6 meets discharge specs, if it meets livestock water quality,
7 there will be a presumption that it's going to be used for
8 livestock use.

9 And I think it's very difficult to dispute that
10 in the arid regions we deal with, if that water is there
11 and meets discharge specs, it's going to be used for stock
12 and wildlife. So that was a logical decision, I believe,
13 on the part of the Department.

14 One, that we would not necessarily want to see it
15 revisited for the reasons that Mr. Hiser stated, because it
16 really adds a layer of regulation that does nothing from a
17 practical matter in terms of adding to the regulatory
18 scheme.

19 The second issue that I want to talk briefly
20 about is credible data, because I think Ms. Hutchinson has
21 really focused on a huge pitfall in the proposed regulation
22 and one that gives me a great deal of concern. Because
23 credible data is a term of art defined in the Environmental
24 Quality Act and under the clean water act as well, and it
25 provides that credible data is valid means --

1 scientifically valid chemical, physical and biological
2 monitoring data collected under an accepted sampling and
3 analysis plan, dah, dah, dah.

4 How do you apply that in a context where it has
5 never, ever been applied before and in the context of the
6 petitioner's proposed rule relating it to water quantity,
7 which is something that it has not been related to in the
8 past? If you're going to relate it to water quantity, you
9 have to ask how does that affect -- again, to borrow
10 Mr. Robitaille's term -- regulatory creep?

11 How does that affect when we deal with irrigation
12 return flows or dewatering from irrigation? How does it
13 deal with conventional production? How does it deal with
14 municipal applications?

15 We're not requiring credible data in the context
16 of flow or any of those contexts, nor does it fit. But
17 probably more importantly, some of the things you heard
18 today from the experts that were provided by the
19 petitioners is that it's very difficult to come up with
20 credible data on intermittent ephemeral streams.

21 And I would also point out -- and we pointed this
22 out in one of our earlier responses in this proceeding --
23 but the Environmental Quality Act in the water quality
24 rules and regulations in Chapter 1 make an exception for
25 the use of credible data and say, Credible data exceptions

1 are "in instances of ephemeral or intermittent water values
 2 where chemical or biological sampling is not practical or
 3 feasible."
 4 So as petitioners well know, in the Powder River
 5 Basin or in coalbed methane areas where you're dealing with
 6 intermittent and ephemeral drainages, credible -- the
 7 credible data standard is very difficult, if not impossible
 8 or infeasible, to apply; so certainly it shouldn't apply in
 9 this instance.
 10 One final point and I'll stop, and that is that
 11 under Section 312 in the Environmental Quality Act it
 12 provides the very limited purposes for which credible data
 13 was intended to be used; first of all, in designating uses
 14 of surface water and determining water bodies' attainment
 15 of designated uses.
 16 Credible data was never intended to be used for
 17 setting effluent limits nor was it intended to address
 18 whether or not the quantity of water is being put to
 19 beneficial use, which, I believe, is the reading that's
 20 attempted to be added in petitioner's Appendix I.
 21 So with that, I'll stop, unless there are -- I'm
 22 sorry. I do have one procedural question.
 23 I would like to request that the Council leave
 24 the record open for us to provide some information to the
 25 record based on prior proceedings of the Council, of which

1 transcript. I'm just aware the testimony is there, and I
 2 think it would supplement what has been put in.
 3 MR. MOORE: So not an inordinate amount of
 4 time?
 5 MR. BURRON: Oh, no.
 6 MR. MOORE: Thanks.
 7 MS. FOX: I'm sorry. I don't mean to butt
 8 in, but I think I can help on this; because we had
 9 requested that the Council take judicial notice of the
 10 Maycock proceeding, so that's already in the record, I
 11 believe.
 12 MR. MOORE: Thank you.
 13 MS. LORENZON: The entire record?
 14 MS. FOX: Yes. And if Keith wants to
 15 designate particular parts, I would say let him file that
 16 designation but not keep the record open ten more days for
 17 any purpose. That's the part that scares me.
 18 MR. MOORE: Question, Mr. Gordon?
 19 CHAIRMAN GORDON: I'm going to ask you a
 20 question.
 21 I think you were there, maybe, when we were
 22 discussing those back in 2002 and 2003, and I remember the
 23 logic. And I think you're right in the way you
 24 characterized it. But I'm not sure that the presumption
 25 necessarily meets the standard that we might need to have.

1 the Council will be able to take administrative notice,
 2 particularly some of the testimony I believe in the Maycock
 3 contested case, which deals with the issue that
 4 Mr. Lidstone and Mr. Munn commented on concerning the
 5 effects of the water quality changes in the stream and the
 6 effects of water in an ephemeral drainage over a long
 7 period of time.
 8 I think some of that data that was presented in
 9 the testimony there is relevant to this proceeding, and so
 10 we would ask that you keep the record open and allow us to
 11 provide some of that testimony for purposes of the record.
 12 Thank you.
 13 MS. FLITNER: Thank you. I'm -- there are
 14 likely questions, and at this point I'm going to turn the
 15 hearing over to Rick with the note that the DEQ has the
 16 ability to answer some of the questions on credible data,
 17 and in addition to, Kate and Mr. Barker, I believe it is,
 18 would like a little time.
 19 Any questions of Keith?
 20 MR. MOORE: Thank you. I have one question
 21 and that's just due to your last comment.
 22 How much time would you need if we do keep the
 23 record open?
 24 MR. BURRON: I imagine ten days would be
 25 sufficient, sooner if we had to have it. I don't have that

1 For instance, one might presume that cattle would
 2 be running on all pastures in the Powder River Basin at the
 3 time and have the presumption that there are several
 4 people, I know, that are thinking, I gotta feed stock, I
 5 got pieces of pasture, we're cutting down our stock, you
 6 know -- so I guess -- I understand that introduces a buck,
 7 but I guess my point is perhaps in this particular case it
 8 makes some sense to have those statements.
 9 And I guess two questions I have -- one is are
 10 they really burdensome to get, and two, wouldn't they be
 11 helpful in that they would help sort of categorize and
 12 perhaps encapsulate what the water production plan would be
 13 on an individual ranch and wouldn't they be more valuable
 14 than they were in the past?
 15 MR. BURRON: I guess I would say that it --
 16 in terms of the effort that has gone through to get those
 17 statements to the satisfaction of the DEQ to satisfy a
 18 requirement, which, I guess, maybe we disagree on whether
 19 the presumption is appropriate or not; but I think the
 20 burden imposed by that outweighs the benefit of what you
 21 might get, because I don't believe the beneficial use
 22 statements are necessarily utilized in terms of billing a
 23 water management plan for a given project.
 24 And, you know, recognizing that you've addressed
 25 this question to a number of presenters, and I think from

1 that I think maybe a perspective of how you view the
2 issue -- maybe we just don't view it exactly the same way.

3 CHAIRMAN GORDON: Okay. That's fair. I
4 just wanted your opinion.

5 MR. MOORE: Any additional questions?
6 Thank you very much.

7 Jim Barber.

8 MR. BARBER: Good afternoon, Mr. Chairman
9 and members of the Council.

10 My name is Tim Barber, and I'm a regulatory
11 supervisor and I'm employed by Yates Petroleum. I hope
12 today to talk about a few kind of bullet issues that maybe
13 go to some of the questions and concerns maybe that have
14 been expressed by the Council.

15 I wanted to, first of all, talk about the
16 petition as it exists, I think, in its most recent form
17 where it proposed split effluent standards for traditional
18 oil and gas versus coalbed produced waters. I think there
19 are concerns about that, and I want to point out that this
20 is not a -- this is not a Big Horn Basin proposal and a
21 Powder River Basin proposal. It's traditional oil and gas
22 and coalbed.

23 And though it's been discussed a little bit in
24 those terms, keep in mind it's tradition oil and gas and
25 coalbed. And there's traditional oil and gas development

1 in the Powder River Basin, and there may be coalbed
2 development in the Big Horn Basin.

3 I think it would be very difficult to defend and
4 possibly may not even pass the laugh test if the petition
5 went to rule-making, that rule was approved, and that rule
6 said that if I discharge to a reservoir on a landowner's
7 place that he and I agreed to work together to build this
8 reservoir that on the eastern side of this reservoir I
9 could have a coalbed discharge that met these very
10 stringent standards and on the other side of the reservoir
11 I could have an oil treater discharge that met less
12 stringent standards -- that may be very difficult, legally.
13 And I think that DEQ may have a tough time with a rule like
14 that.

15 Second of all, if I may, Mr. Gordon, I wanted to
16 speak, with your permission, towards the statement of the
17 beneficial use question that's come up a number of times.

18 Most of my work and the folks that work with
19 me -- the work that we did do is getting permission two
20 different ways: getting permission to conduct activities
21 on landowners' lands and getting permission from folks like
22 the DEQ to get permits and discharge. And in the course of
23 that work, for many years we got those statements of
24 beneficial use as part of that application process to go to
25 Mr. Wagner and his folks over there.

1 I've heard discussion about, you know, beneficial
2 use before 2004, these statements; and I think -- and I've
3 not had the opportunity to go back and actually research
4 it -- but just based on the age of some of the permits that
5 I know to be the permits that have caused some problems and
6 concern and maybe resulted in the petition, I believe most,
7 if not all, of those permits were old enough that they were
8 in the time frame when statements of beneficial use were
9 part of the deal.

10 And as someone, I think, talked about earlier,
11 there was also the opportunity if there was -- if a
12 landowner did not want to provide that statement of
13 beneficial use, then a qualified wildlife biologist or, I
14 think, sometimes the Fish and Game provided those. I don't
15 think the statement of beneficial use is a means to an end
16 that the Council's trying to solve.

17 To the question of credible data, the question
18 has been asked and attempted to be answered a number of
19 times. I have maybe a little different perspective on the
20 answer. We do, from time to time, attempt to do work --
21 downstream work relating more to Chapter 1, Section 20. I
22 know that's a whole other discussion. I only bring it up
23 because it's a data-gathering effort.

24 And what we look at there is things like flows,
25 downstream soils, vegetation, stream morphology, water

1 quantity, water quality that's been in the stream, what
2 does the stream sort of look like on the ground. And we
3 many times -- when we try to conduct that Chapter 1,
4 Section 20, three-tiered work, we go to landowners and we
5 ask for permission, as is part of my job, to conduct those
6 studies.

7 And it could be soil studies. It could be a
8 number of things. What we run into as an impediment most
9 of the time is private property rights of downstream
10 landowners that simply don't want that work conducted on
11 their land. Three of the petitioners -- and it is their
12 right -- three of the petitioners have denied us access to
13 do that work. That's one impediment to that work.

14 Second of all, I think the quantification of
15 water use is going to be a real challenge. How much water
16 is used by waterfowl? How much water is used to keep open
17 water in winter? How much do invertebrates use? Those are
18 questions that somebody's going to have to ask in order to
19 answer the question that's maybe put out there.

20 I would wrap up with making a statement about a
21 final issue. I think that I've heard anecdotally, though I
22 have not researched this, that during the early times of
23 produced water in the Big Horn Basin, which have been going
24 for a lot of years, there were some issues. There were
25 issues out there.

1 That water discharge and that play has matured to
2 the point where it sounds like the issues, if they're out
3 there, are less. I think that that is what we will see in
4 the Powder River. I think that as time goes on, issues get
5 resolved. I think you've heard today operators who know
6 that there are issues out there are interested in resolving
7 those issues, and I submit that that's what will occur over
8 time.

9 Thank you.

10 MR. MOORE: Thank you.

11 Questions?

12 CHAIRMAN GORDON: Sorry. I had a question
13 for you.

14 Thank you very much for addressing that question
15 I have. In the course of your work, do you prepare water
16 management plans with landowners?

17 MR. BARBER: Yes.

18 CHAIRMAN GORDON: And I guess I'm -- are
19 they part of normal surface use agreements and that sort of
20 thing?

21 MR. BARBER: Yes. Sometimes surface use
22 agreements are negotiated with water discharge agreements
23 as part and parcel, and sometimes they're negotiated as a
24 separate, distinct agreement. And I have, by the way,
25 never worked on a project where I was working -- or not

1 private owner's or just that landowner's land, someone
2 signed a beneficial use statement.

3 CHAIRMAN GORDON: Yeah. But I was talking
4 about the water management plans. If you have a water
5 management plan that you're preparing for somebody and
6 let's say it's on federal minerals, private surface or
7 on -- do you do the same sort of effort for state lands if
8 somebody leases or is that something you --

9 MR. BARBER: They're different, but the
10 efforts are parallel.

11 CHAIRMAN GORDON: Okay. Thank you.

12 MR. MOORE: Ms. Hutchinson.

13 MS. HUTCHINSON: Thank you for being here.

14 You've already made a few comments, but I
15 wondered if you could elaborate any further on -- as you
16 read the proposed rule, how you would go about preparing
17 the necessary documents that you would need to comply with
18 that?

19 MR. BARBER: In a very broad sense, I think
20 it would be extremely difficult. The subjectivity in
21 preparing what I think is being asked for -- though I've
22 not actually seen a description of it, I've simply read the
23 petition portion -- could vary from landowner to landowner.

24 In other words, on one side of the fence the
25 landowner could say, Putting water in a 5-acre-foot

1 there with the surface use agreement.

2 CHAIRMAN GORDON: I guess my -- what I'm
3 curious about is couldn't that be construed as being a
4 statement of beneficial use if you have a water management
5 plan?

6 MR. BARBER: I've actually seen the two not
7 be the same.

8 CHAIRMAN GORDON: Okay.

9 MR. BARBER: We had times when we had a
10 surface use agreement, but we had a landowner that maybe
11 did not want to sign a statement of beneficial use. So
12 I've seen them kind of diverge a little bit.

13 CHAIRMAN GORDON: But I guess just using
14 your professional judgment, if you had a water management
15 plan, it would be some attempt to put to beneficial use,
16 wouldn't it?

17 MR. BARBER: Yes, sir.

18 CHAIRMAN GORDON: And would those also then
19 apply to state lands or BLM lands, leased lands that
20 landowners would have and then -- I'm assuming you're
21 talking about private land, but maybe I'm wrong.

22 MR. BARBER: Typically when there was a
23 water discharge under the old statement of beneficial use,
24 regardless of whether that discharge occurred on federal
25 lands, on state lands, on leased lands from a third party,

1 reservoir is absolutely a beneficial use to me. I'm going
2 to use it for stock water. I want to see waterfowl out
3 there. It's aesthetically pleasing to me. His list could
4 go on and on.

5 On the other side of the fence, that landowner's
6 view of water management might be, The tire tank that
7 overflows in the winter and keeps open water at 5 gallons a
8 minute or something is extremely valuable to me. I don't
9 care if I see any waterfowl. I don't really worry about
10 what's going on there. I don't want to put fish in there.

11 So unfortunately, we could have a situation where
12 the same exact beneficial use -- and I think we would all
13 agree that those are beneficial uses -- could be very
14 easily changed by those perceptions.

15 MS. HUTCHINSON: Okay. Thank you.

16 MR. BARBER: Thank you very much.

17 MR. MOORE: Is there anyone in the audience
18 that wanted to testify that has not had a chance?

19 Thank you very much.

20 I understand that Mr. Wagner and Mr. Corra, you
21 might be wanting to provide some comments or some
22 clarification on credible data that you can offer, so I'd
23 ask you to come up and give us any of your observations
24 that you've heard today or answer specific questions about
25 credible data, if that's all you want to do.