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Meeteetse Conservation District

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PO Box 237 • Meeteetse, WY 82433

(307) 868-2484 – office • (307) 868-2489 – fax

mcd@tctwest.net

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FAX COVER SHEET

Jim Ruby, Executive Secretary
Environmental Quality Council

TO: David Waterstreet
Wyoming DEQ/WQD
Herschler Bldg, 4th Floor West
Cheyenne, WY 82002
307-777-5973

PAGES: 8 pages including cover sheet

RE: Comments on proposed revisions of Chapter 1 including Appendix H

COMMENTS:

I will also mail you a hard copy. Please let me know if you have any questions.

Thanks,
Liz Schnackel
District Clerk



Meeteetse Conservation District

P.O. Box 237 • Meeteetse, WY 82433

2103 State Street

(307) 868-2484 • mcd@tctwest.net

August 25, 2008

Via FAX

Mr. David Waterstreet
Wyoming DEQ/WQD and WWAB
Herschler Bldg., 4th Floor West
122 West 25th Street
Cheyenne, WY 82002

RE: Comments on proposed revisions of Chapter 1 of the Wyoming Water Quality Rules and Regulations including Appendix H.

Dear Mr. Waterstreet and Wyoming Environmental Quality Council (EQC):

As locally elected government, the Meeteetse Conservation District (MCD) appreciates the opportunity to provide continuing comment on the proposed revisions to Chapter 1, and Appendix H which has sometimes been referred to as the Agricultural Use Protection document.

The MCD has gone to great effort to provide substantive comments throughout this lengthy process. In addition to those comments previously submitted to the EQC, the MCD hereby incorporates by reference those comments made to WDEQ and the Water and Waste Advisory Board (WWAB) during the time that the process was under the purview of the WWAB. The MCD also incorporates by reference its written responses to the Department of Environmental Quality, Water Quality Division (WDEQ/WQD) regarding WDEQ/WQD analyses of MCD comments. Those document dates and content are summarized and attached at the end of this comment letter.

COMMENT (1) socioeconomic value of resources: Wyoming's citizens benefit through the use of natural resources by the agricultural and petroleum industries. That use must be protected by only adopting properly crafted regulatory policy. All of Wyoming's citizen's benefit from the recirculation in the local economy of dollars initially generated by industry, by additional secondary jobs created due to viable, stable industry, and from state and local government's use of tax revenues, from both the oil and gas industry and agriculture.

COMMENT (2) conditional acceptance of Appendix H: The MCD accepts Appendix H as the product of collaboration between the State's environmental regulatory entities, other State agencies, agricultural (ag) industry, petroleum and CBM industry (industry), citizens, and Non-governmental Organizations (NGOs) to address issues evolving from the discharge of produced water. The MCD urges the EQC to recognize the collaborative efforts and progress made during the WWAB policy and rule development as directed by the EQC.

COMMENT (2.1) continued forward progress and the process: The MCD accepts Appendix H as the product of collaboration and as a work in progress near completion. The MCD urges the EQC to reject the arguments made by of those who voluntarily and strategically chose not to participate in that process that such participation was unnecessary and that renewed argument before the EQC was an appropriate and acceptable strategy.

Acceptable arguments will build on prior dialogue and enhance the ability of the State to regulate in a fair and efficient manner.

COMMENT (2.2) environmental benefits: The MCD urges the EQC to continue to recognize along with the WWAB the tremendous environmental benefits that produced water provides to aquatic life, the riparian zone ecology and its diversity of species, livestock, and non-riparian zone wildlife, including many WG&F Species of Special Concern such as the sage grouse.

COMMENT (2.3) support of the rule: The MCD supports the rule package approved by the WWAB at the March 28, 2008 public hearing including the WWAB recommendation that the current livestock watering standards (3000 mg/L Sulfate, 2000 mg/L Chloride, and 5000 mg/L TDS) not be reduced. The MCD reminds the EQC of the nearly unanimous public support of keeping the existing livestock water quality standards and believes that the existing standards provides adequate protection for livestock production.

COMMENT (2.4) support for "grandfathering": The MCD supports the WWAB recommendation that effluent limits on discharges existing prior to January 1, 1998 be "grandfathered" and not be affected by Chapter 1, Appendix H. Discharges that occurred prior to January 1, 1998 have been demonstrated to have had no net adverse effect on agricultural production or wildlife, as was documented by field tours and the huge body of evidence and testimony.

COMMENT (2.5) support for exemptions and amendments: The MCD supports WWAB's recommendation of exemptions from the water quality standards based on background water quality (where background water is of poorer quality than the discharged water) and for landowner waivers allowing use of water not meeting the standards for livestock watering and irrigation, thus allowing landowners to make beneficial use of otherwise unavailable resources. This support is qualified by subsequent comments herein.

COMMENT (3) potential for amendment: The MCD strongly believes that, while Appendix H could be the final result of the efforts of all involved, there are still significant and important amendments that should be made as were discussed and technically argued before the WWAB:

COMMENT (3.1) cost-benefit analysis: The MCD believes that agricultural use protection is important enough that the State of Wyoming should commission a cost-benefit analysis of the impact of the Agricultural Use Protection document to ensure that agricultural use protection will be achieved. The value of produced water, the potential loss of utilization of range resources and multiplied effects at the whole ranch scale, secondary job creation, and the recycling of dollars in the local economy must be considered.

COMMENT (3.2) rule vs. policy: Whereas the WDEQ/WQD has made its case for rule vs. policy (1, 2), the MCD asserts that the critically important livestock watering provisions related to background water quality and the landowner waiver in the *Agricultural Use Protection Policy* must be therefore promulgated as part of the Appendix H rule. The MCD has discussed this matter with both industry and ag industry representatives and this position has universal support. As policy these livestock watering provisions are disproportionately weak compared to the contents of Appendix H. Therefore, the MCD requests that EQC amend Chapter 1, Appendix H(b) to clarify that, in drainages where there were pre-1998 discharges, background will be considered to be the pre-1998 effluent limits or background water quality, whichever is poorer.

COMMENT (3.3) livestock watering waiver: As a response to WDEQ/WQD analysis of MCD comments (1, 2), the MCD brings before the EQC the proposal that:

(1) The livestock watering waiver provision should be amended to provide clarification that a landowner or livestock producer could provide a written statement accepting the potential risk to livestock.

(2) The provision would provide that the waiver would be granted unless the landowner, not being the livestock producer, submits written objections and provide evidence demonstrating that the discharge will cause probable harm to other livestock on those same landowner's lands that are not under the control of the livestock producer waiver applicant.

(3) The provision would provide that the waiver would be granted unless other landowners or livestock producers, through whose lands the discharge is reasonably expected, without being carried by runoff, to flow, submit written objections and provide evidence demonstrating that the discharge will cause probable harm to their livestock.

This proposed revision will assure that livestock producers who want to use produced water are not denied the use of the valuable water resource as a result of frivolous, groundless objections not properly based on significant potential for the water to actually harm livestock.

COMMENT (3.4) additional effluent limits: Referencing prior discussion and arguments previously presented to the WWAB and WDEQ/WQD (2, 5) as well as further discussion with local agricultural producers, local government, and industry representatives, the MCD requests that the EQC amend Chapter 1, Appendix H(b) to clarify that no additional effluent limits will be incorporated into permits unless it has been demonstrated that a discharge has or will cause a measurable decrease in livestock production and, additionally, no livestock watering waiver has been submitted.

COMMENT (3.5) "naturally irrigated lands": Referencing prior discussion and arguments previously presented to the EQC, in comment (4), herein, and to the WWAB and WDEQ/WQD (2,4) the MCD must continue to oppose any provision that gives a landowner the ability to block the flow down the drainage of produced water meeting livestock watering standards. As presented to the WWAB, local soil and vegetative conditions coupled with the ambiguity and subjectivity of determining and defining measurable decrease in crop production on "naturally irrigated lands" will lead to a myriad of lawsuits and will also lead to a game of controlling watersheds through control of strategic land parcels. This will be exacerbated by the ability of unaffected third parties to sue on behalf or against public land management agencies.

The MCD recognizes the potential of harm to naturally irrigated lands. However, it is important that the EQC balance the environmental and agricultural benefits from having the flow of livestock water through the state's watercourse easement against decreased livestock carrying capacity and distribution across the range before prohibiting the flow of stock water down the drainage. Effects on "naturally irrigated lands" must be determined in some other manner with the ability for local considerations, including livestock production, to be incorporated. Therefore, the MCD asserts that the land classification "naturally irrigated lands" must be removed from Chapter 1, including Appendix H, because not only would it allow a landowner of passively irrigated land without a water right to block the flow of livestock water thus injuring livestock producers who would make beneficial use of that water. Furthermore, in the case of Federal or State land, the same door would be opened for

third party complainants to likewise circumvent Wyoming water law and injure livestock producers.

COMMENT (3.5.1) delineating “naturally irrigated lands”: Comment (3.5) notwithstanding, if a landowner represents to WDEQ/WQD that the landowner does not have naturally irrigated lands in need of protection, then DEQ should accept the landowner’s statement.

COMMENT (3.5.2) delineating “naturally irrigated lands”: Comment (3.5) notwithstanding, the MCD requests that the definition of “naturally irrigated lands” be changed as follows, with the additional italicized qualifying statement:

“Naturally Irrigated Lands” means lands along stream channels that have enhanced vegetative production due to periodic natural flooding or sub-irrigation *from the stream receiving the permitted discharge*.

Rationale: The water creating the “naturally irrigated lands” must be demonstrated to be inclusive of the effluent and not from unrelated springs, aquifers, or tributaries.

Comment (3.6) incremental burdens on ag industry: The MCD continues to believe as it has stated previously (4), that the Agricultural Use Protection document places significant additional and incremental burdens on the agricultural producer, the agricultural community, the local community, and the State of Wyoming. While revision of current policy may be appropriate to ensure practical water quality management, the document must truly protect the agricultural industry and bona fide agricultural producers.

COMMENT (3.7) waiver required to be granted: If a landowner wishes to waive the irrigation effluent limits for EC and SAR, then WDEQ/WQD should be required to accept the waiver. Therefore, the MCD requests that EQC amend the irrigation waiver provision in Chapter 1, Appendix H(c) to say that a waiver *shall* be granted when the affected landowner requests use of the water

COMMENT (3.8) waiver required to be granted: The MCD believes that in order to better protect the livestock producer’s right to use produced water, language regarding the livestock watering waiver should be changed from “An exception to the limits above may be made...” to “An exception to the limits above *shall* be made...”.

COMMENT (4) state watercourse easement: As has previously been brought before the EQC, the state owns a watercourse easement through which waters of the state may flow. When produced water meets livestock watering standards, it becomes a surface water of the state and should be allowed to flow down the watercourse easement so it is available for use by livestock and wildlife. The state’s easement therefore provides legal basis for comment (3.5).

COMMENT (4.1) relative priority of irrigation and stockwater: As supported by comment (3.5) and comment (4), the MCD believes that Appendix H should not be a means of determining the priority of water use or otherwise partitioning use between irrigation and stockwater uses. That determination is to be made under state water law.

COMMENT (4.2) value to the environment: The MCD encourages the EQC to recognize that it is important to proper range management and the management of wildlife populations that livestock and wildlife be able to disperse across the range. This decreases overgrazing, improves the condition of riparian areas, and increases wildlife populations and diversity. The flow of produced water meeting livestock watering standards supplements the surface water

supply, making good water available to livestock and wildlife in areas that seldom have flow. The State of Wyoming should assert its ownership of the watercourse easement due to the value to the environment of water flowing therein.

COMMENT (4.3) net environmental benefits considered during rulemaking: The MCD presents to the EQC for consideration that a net environmental benefit, meaning the benefit to livestock and wildlife and an increased plant diversity, merely by having water provided (by discharge water) outweighs the potential harm to initially existing vegetation in or near the channel. This has been documented by field tours and testimony. The flow of produced water that meets livestock watering standards and that flows down the channel through the watercourse easement therefore generally provides net environmental benefits that should be considered by the State during the regulatory rulemaking process.

COMMENT (5) rule vs. policy: As a result of discussions with affected parties subsequent to the WWAB March 28, 2008 public hearing, the MCD believes that landowners have had the right to waive water quality standards since the 1970s. Therefore, the MCD believes that, in accordance with comment (3.2), the right of a landowner to waive the water quality standards should be incorporated into the Chapter 1, Appendix H as a *rule* and should not merely be a *policy*.

COMMENT (6) protection of property rights: The MCD asserts that DEQ and EQC should make every effort to assure that water quality standards do not infringe upon private property rights. This includes a person's right to accept the potential risk to his private property, including land and livestock, from water that does not meet water quality standards. The owners and lessors of minerals also enjoy property rights. It follows that if property rights are denied there may be reasonable grounds for claims of governmental taking of private property.

COMMENT (7) reservoirs: Reservoirs are vital to ranching and farming operations statewide. Reservoirs:

- Provide a water supply in areas that are without water through much of the year.
- Allow livestock and wildlife to disperse across the range, decrease overgrazing, and improve the condition of riparian areas.
- Increase agricultural production and provide habitat for wildlife.

Natural water supplies in many areas of the state do not meet water quality standards, but that water is essential to the support of livestock, irrigation, and wildlife. Because of their tremendous benefit to agriculture production and wildlife, the MCD requests that water quality rules should be implemented to encourage the use of reservoirs for containment of produced water, that water stored in reservoirs is not a pollutant, and that reservoirs should not be regulated as water treatment facilities.

Comment (8) non-severability: In order to provide proper continuity with the rest of Wyoming's water quality regulations in the intended context, and to honor the intent of the process through which we have participated, the MCD asks that a "non-severability" request be made to the U.S. Environmental Protection Agency (EPA) when the Chapter 1 rules are submitted for final approval.

Comment (9) local issues: The MCD believes that the efforts made by Wyoming's Coal Bed Methane Task force and the coalition of entities and individuals responsible for developing the Wyoming Produced Water Initiative (WPWI) to address issues in the Powder River Basin have delivered a model to the public that can be used to address produced water issues on a local and

MCD Comments to EQC on Proposed Chapter 1 Revisions

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regional basis statewide. The MCD asks the EQC and WDEQ/WQD to finalize the Agricultural Use Protection Policy and Appendix H in a manner that will strategically provide for adaptive management responsive to local needs and regional flexibility and support the creation of locally directed initiatives based on the WPWI model.

Comment (10) EQC hearing to facilitate participation by affected ag producers: The MCD reiterates its prior request that the EQC hold a hearing in the Big Horn Basin to address the Chapter 1 revisions, Section 20 and Appendix H, ~~be held in the Big Horn Basin~~ in order to allow directly affected producers from this area to participate in the Council's proceedings.

In summary: Throughout the course of these proceedings the MCD has had exposure to many viewpoints other than its own. The following points result from collaboration with others. The overwhelming conclusion is that produced water provides benefits to agriculture, wildlife, and enhances the land. On a statewide basis, produced water is not a waste of water. The water is put to many beneficial uses, including stock watering, irrigation, dust mitigation, wildlife watering, and the creation and maintenance of wildlife habitats.

- Overwhelming testimony in the EQC hearings proved the use of produced water is vital to many livestock and farming operations across the state.
- Produced water meets water quality standards and is discharged into stock tanks and pipeline systems, reservoirs, and streams—where it becomes available for use for stock watering, irrigation, and wildlife.
- Produced water supplements the surface water supply, making good water available in many locations that never had water before, allowing livestock and wildlife to disperse across the range, decreasing overgrazing, and improving the condition of riparian areas.
- Produced water makes all the difference to the viability of many agricultural operations, especially in periods of drought.
- Produced water allows ranchers and farmers to be even better stewards of private and public lands, and increases agricultural production as well as wildlife habitat and populations.
- Produced water supplements the surface water supply, sustaining riparian areas along ephemeral and intermittent streams, creating wildlife habitat, and increasing healthy wildlife populations.

Finally, the MCD appreciates the continuing opportunity to comment and actively participate in the development of policies that affect the waters of the State of Wyoming and the economic stability of its agricultural community.

Respectfully submitted,



Steve Jones

Resource Management Coordinator
Meeteetse Conservation District

cc: Governor Dave Freudenthal
Environmental Quality Council

Attachment

MCD Comments to EQC 2008-8-25.doc

Attachment**Referenced Recent Comment and Correspondence History:**

1. March 25, 2008 - Meeteetse Conservation District (MCD) review of [DEQ] "ANALYSIS OF COMMENTS...Public comments and Wyoming DEQ/WQD responses resulting in the 3rd Draft of the Agricultural Use Protection document...prepared for deliberation at the Water and Waste Advisory Board (Board) meeting on March 28, 2008 in Casper, Wyoming." (DHW/8-0155.DOC 2-28-2008) and primarily pertaining to DEQ/WQD response to those comments submitted by the MCD dated 11/30/2007.
2. January 8, 2008 - Meeteetse Conservation District (MCD) review of "Comments received and Wyoming DEQ/WQD responses relative to the 2nd Draft of the Agricultural Use Protection document", pertaining to comments submitted by the MCD for the Water and Waste Advisory Board meetings on June 15 and September 14, 2007.
3. December 7, 2007 - MCD oral comments to WWAB
4. November 30, 2007 - MCD comments regarding the Agricultural Use Protection document and proposed revisions to Section 20 of Chapter 1, including the adoption of Chapter 1, Appendix H as a Rule.
5. September 14, 2007 - MCD comments to WWAB regarding "Water Quality for Wyoming Livestock & Wildlife, A Review of the Literature Pertaining to Health Effects of Inorganic Contaminants".
6. June 13, 2007 - MCD comments regarding Appendix H, Agricultural Use Protection and associated language in Section 20 of Chapter 1