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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE PETITION TO AMEND THE WYOMING WATER QUALITY RULES AND REGULATIONS, CHAPTER 2, APPENDIX H	))))	Docket No. 05-3102

INDUSTRY RESPONDENTS' COMMENTS TO PETITIONERS' PROPOSED APPENDICIES "H" AND "I" AS PUBLIC NOTICED FOR THE JANUARY 17-18, 2007 RULEMAKING HEARING

The undersigned Respondents[1] submit these comments to the Environmental Quality Council ("EQC" or "Council") for the record in the referenced rulemaking proceeding. These comments supplement the comments previously submitted jointly or individually by Respondents in prior proceedings in this matter. To avoid duplication Respondents incorporate by reference all of their comments and exhibits previously submitted in this rulemaking proceeding from its inception.

These comments address both the proposed *water quantity* provisions contained in Section (a) of Appendix I and the *water quality* effluent limits proposed in Section (b) of Appendix I.

I. Introduction and Summary of Respondents' Position

While the comments in this submittal urge the EQC to not adopt the rules proposed by Petitioners, the coalbed natural gas ("CBNG" or "CBM") industry is neither minimizing nor turning a blind eye to the conflicts that can arise over surface discharge of produced water. Nor are Respondents suggesting that these conflicts should go unresolved. Instead, Respondent's

[1] "Respondents" as used herein refers to the following companies: Marathon Oil Company, Devon Energy Production, LP, Yates Petroleum Corporation, Petro-Canada Resources (USA) Inc., Anadarko Petroleum Corporation, Fidelity Exploration & Production Company, Bill Barrett Corporation, and Williams Production (RMT) Company.

position is that these conflicts are best resolved on a case-by-case basis cooperatively between industry and affected landowners.

The particularized conflicts that arise simply do not lend themselves to resolution by a statewide rule of general application that jeopardizes the future of CBNG production and strips away significant benefits currently being derived by many landowners who rely on produced water in their agricultural production. The Wyoming Stock Growers Association, known as the "Guardian of Wyoming's Cow Country" recognized the need for cooperative solutions in their February 15, 2006 comments to the EQC in this rulemaking effort:

> WSGA does not believe that a one-size-fits-all regulatory approach to addressing produced water flows is appropriate. Significant progress on this matter has been made since the early days of CBM development through proactive planning and the fostering of cooperative relationships between landowners and CBM producers. Unfortunately, not all producers and not all landowners have come to the table in good faith. Increased regulation that can impact all landowners and producers is not an acceptable method to address these cases.

Respondents agree that cooperative solutions are the only effective mechanism for resolving disputes that arise in the CBNG water arena. The Powder River Basin Resource Council's ("PRBRC" or "Petitioners") proposed solution does nothing to foster cooperative resolution of issues, but instead polarizes the issue by attempting to undermine longstanding policies and legal rights held by the state and relied upon by industry. To address a few situations where a landowner does not want water flowing in a drainage across his or her land, this rule would simply prohibit all discharges of CBNG produced water in all locations and under all circumstances, even though the other landowners in that drainage want the use of the produced water. This is a hopelessly overbroad "solution" to a limited problem, and one that will do extensive damage to the majority of landowners, to the CBNG industry, and to the

public. Moreover, Respondents do not believe that the law allows the EQC to construct a regulation that would eliminate the right to use natural waterways to flow produced water.

Respondents remain interested and engaged in solving CBNG water conflicts when they arise in a responsible, cooperative and effective manner. By contrast, the proposal offered by the PRBRC is a "nuclear option" and does not foster effective resolution of such issues. Respondents therefore urge the EQC to not adopt a regulation that will serve the interests of a few at the expense of a great many. In that context, Respondents offer the following comments on the proposed rules.

II. The EQC, the Department of Environmental Quality ("DEQ") and the Attorney General have recognized that the Petition is Unworkable and Inadvisable.

The record to date reveals that the EQC, the DEQ, the Governor's Office and the Attorney General have provided ample reason to reject the proposed Appendix I. In particular, the record discloses that Petitioners' proposed Appendix I is not a good starting point for a rule addressing the issues the EQC has identified as ripe for rulemaking. Respondents direct the EQC to the following portions of the record which militate against adoption of the proposed rule:

A. Prior EQC Consideration of the Petition

Statements of EQC members in transcripts of prior proceedings highlight the major problems with Petitioners' proposed rule. Respondents point the EQC to the following portions of the record wherein the EQC discusses the Petitioners' Proposed Appendix I:

1. July 17, 2006 Hearing ("July hearing")

At the July hearing, the EQC considered whether to proceed with rulemaking on the original petition or the revised petition. The motion that was ultimately made was to move forward with rulemaking on Appendix H from the PRBRC's March 2, 2006 submittal and

Appendix I from PRBRC's May 11, 2006 submittal. (**Exhibit A**, July 17, 2006 Transcript, p. 113). The motion carried, but not without major reservations from some EQC members.

In particular, Mr. Boal, who voted against the motion, expressed a desire to start over because he found "that language [Petitioners' Appendix I] to be too amorphous, too unworkable.... [I]t doesn't meet your standard at all to practical solutions to known problems." (Id., p. 81.) These sentiments were shared by Ms. Hutchinson, who stated "I don't like the revised rule either…And I don't know necessarily that we can write an environmental rule that's going to apply statewide…" Ms. Hutchinson went on to state "I'm still struggling, and I'm not sure there's a workable solution." (Id., pp. 97-98). Chairman Gordon, although voting to proceed, noted that "it pains me" to vote in favor, presumably because of the problems with the proposed Appendix I.

2. November 11, 2006 Hearing ("November hearing")

The November hearing transcript reveals that many on the EQC recognize Appendix I is seriously defective, and if any rule is to be promulgated, it will have to be considerably different than what Petitioners have proposed. A review of pages 52 through 77 of the July 17, 2006 transcript demonstrates that there is significant concern about the Petitioners' use of the statutory definition of "pollution" in Appendix I because it is unclear how the language would be interpreted in the context of a rule. (*See, e.g.*, Ms. Hutchinson, p. 52: "if this language already appears in the statute, I don't think we want it to be regurgitated in the rules;" Assistant AG Colgan, p. 53: "It looks to me like it's sort of a mush of several statutes. I think that's kind of dangerous…. I'm thinking that this doesn't help the cause of clarity;" Mr. Moore, pp. 58-59: "I really do concur that if all it's doing is preparing (sic) the statutory language, it's dangerous."

Taken as a whole, it appears from the transcript that the EQC recognized the serious problems with Petitioners' Appendix I. Notably, counsel for PRBRC also tacitly admitted the problems with PRBRC's proposed Appendix I language and attempted at the November hearing to provide yet another proposal to cure the obvious defects. (**Exhibit B**, November 13, 2006 Transcript, p. 54). The EQC recognized, however, that "the train left the station" in the July hearing, and there was no other option but to proceed to the public hearing on the rule that PRBRC proposed, even in light of these serious concerns. Based on the glaring problems with the proposed Appendix I, the EQC should now reject the proposed rule.

B. DEQ/WQD Advice Concerning the Petition

The recommendation of the DEQ/WQD to reject the petition further highlights the glaring problems with the Petition. (*See* January 5, 2007 Letter from John Wagner to Mark Gordon). First and foremost among these problems is that, by importing the definition of "pollution" from the Environmental Quality Act ("EQA") into this rule and converting it to an effluent limit, subsection (a)(iii) of Appendix I would preclude DEQ's issuance of any permit for any discharge of CBNG produced water. Thus, the first clause of subsection (a)(iii) of Appendix I bans any discharge unless the permit applicant demonstrates that it would not "cause contamination or other alteration of the physical, chemical, or biological properties of any waters of the state." This provision would preclude DEQ from issuing any permit for discharge of any produced water whose chemistry was not identical to that in the receiving stream – effectively no discharge could ever be permitted. As DEQ -- the agency that would administer Appendix I if it were adopted -- has stated: "Petitioners have taken the definition of 'pollution' from sections 35-11-103(c)(i) of the EQA, put it in the regulation, and have essentially stated that no CBM operator can discharge effluent which meets the definition of 'pollution' or would cause

'pollution' in the stream." Letter from John Wagner to Mark Gordon (Jan. 5, 2007) at 1. This provision, DEQ says, "would prohibit any CBM discharge if there were any physical, chemical or biological alterations to the receiving waters caused by the discharge." *Id.* at 2.

DEQ's stated view is that "there is probably no case where a CBM discharge would be able to meet all of the conditions of this section of the proposed rule. It is a standard to which no other industry or type of discharger is being held." (Id., p. 2). As Mr. Wagner pointed out, such a provision is not consistent with the intent of the EQA and if adopted, "would essentially prohibit CBM discharges to the surface...." At least two EQC members read Appendix I the same way—as a ban on the discharge of any pollution from CBNG operations. (*See* November Transcript at p. 60-61, comments of Ms. Hutchinson and Mr. Moore to the effect that "...the permit is a permit to discharge of pollution, so you can't have a regulation that says you can't have pollution, then have a discharge permit that's allowable.")

This ban is contrary to the intent of the EQA. As noted in the producers' prior comments, and as echoed by Mr. Wagner in DEQ's recent comments:

> The primary purpose of the EQA is to require the DEQ to control environmental degradation by establishing permitting rules, regulations, processes, guidance and policy that allow 'pollution' or changes to the environment to occur, but within clear and defined boundaries. . . . [I]t is not the intent [of the EQA] to prohibit every discharge or activity which meets the definition of 'pollution,' but to adequately control such discharges.

Id. at 2. As such, Appendix I is contrary to law and must be rejected as exceeding EQC's and DEQ's authority under the EQA to regulate—but not categorically ban—point source discharges.

Moreover, Appendix I should be rejected because it is internally inconsistent and incoherent. In addition to an absolute ban on discharges of pollutants, the proposed rule includes revised numerical effluent limits for TDS, sulfates and barium, as well as existing limits on chloride and pH, along with provisions for sampling those parameters. Quite apart from the

absence of any scientific foundation for the particular TDS, sulfates and barium limits,[2] the inclusion of these numerical limits is an authorization to discharge CBNG produced water that contains "pollutants" at or below these effluent limits. As Mr. Wagner notes in his letter, this cannot be reconciled with subsection (a)(iii)'s requirement that the permittee demonstrate "that the produced water shall not cause contamination or other alteration of the physical, chemical or biological properties of any waters of the state." [3] He goes on to state that, under the DEQ's interpretation, "should the Council adopt part (a) of Appendix I in its current form, it would essentially prohibit CBM discharges to the surface and there is probably no need for the remainder of the Appendix [addressing effluent limits]."

Appendix I is so internally inconsistent that it will provide no meaningful guidance to DEQ in issuing WPDES permits, will invite litigation, and is arbitrary and capricious. Stated differently, a rational effluent standard cannot simultaneously ban all discharges of pollutants and also prescribe numerical effluent limits for some pollutants. A regulation that includes such irrelevant and facially contradictory provisions would be arbitrary and capricious (not to mention impossible for DEQ to rationally implement).[4]

Finally, assuming Petitioners seek at the eleventh hour to recharacterize their language as something other than a categorical ban, under any lawful reading of Appendix I that recognizes

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[2] DEQ has recommended against adoption of the revised effluent limits in Appendix I in the face of scientific uncertainty, and pending completion of scientific research for which DEQ has contracted with the University of Wyoming, a recommendation which CBNG producers had previously advanced.

[3] The absolute ban also makes nonsense of subsection (a)(ii) of Appendix I, which purports to require a permittee to demonstrate that "the quantity of produced water shall not cause, or have the potential to cause, unacceptable water quality." Because subsection (a)(iii) forbids any discharge that will alter receiving water quality, this language – like the numerical limits – cannot be reconciled with that ban.

[4] A categorical ban on discharges of CBNG produced water that would alter stream chemistry in any way also is at odds with the Section 20 agricultural use rulemaking that the EQC has set for hearing on February 15-16, 2007. The proposed Section 20 rule would retain existing effluent limits for total dissolved solids and sulfates and prescribe a limit for barium. It is difficult to see how a permit writer could implement differing numerical limits on these parameters prescribed by these two rules. To adopt these conflicting standards would be arbitrary and capricious.

DEQ's lack of authority to regulate quantity of discharges, Appendix I simply restates how WYPDES permits are issued today for CBNG discharges. That is, DEQ already requires permit applicants to provide information about the quality of their discharges and the projected quantity, so that the impact on water quality in receiving waters can be predicted. DEQ then places limits on the pollutant concentration of the discharge, and sometimes on the flow rates at that concentration, in order to preserve water quality in the receiving waters in accordance with the State's water quality standards. Thus, WYPDES permits are currently written to prevent "unacceptable" water quality, i.e., water quality that, as a result of a given discharge, does not meet the relevant water quality standard or will harm the environment. Appendix I adds nothing to DEQ's current authority to prevent "unacceptable" effects on water quality in waters that receive CBNG discharges.

C. The Attorney General's Advice Regarding the Petition

Because the EQC is well aware of the Attorney General's advice relating to this rulemaking, Respondents will refrain from reiterating the Attorney General's legal assessment. Suffice it to say that Respondents concur with the Attorney General's numerous concerns with the Petition. In particular, the Attorney General has expressed his opinion that the underlying objective of the Petition is to have the DEQ regulate water quantity, not water quality. Despite the Petitioners' attempt to parse the Attorney General's opinions and word-smith their Appendix to craft a proposal that maneuvers around the Attorney General's advice, the motivation behind the Petition remains the same—to regulate quantity for quantity's sake and without regard to the quality of the discharge or the receiving waters.

III. Appendix I's Absolute Ban on Pollution from CBNG Produced Water Impermissibly Discriminates Against the CBNG Industry As Compared With All Other Wyoming Dischargers.

As DEQ notes in its comments, the no-pollution standard that Appendix I would impose on CBNG produced water discharges "is a standard to which no other industry or type of discharger is being held." Letter from John Wagner to Mark Gordon (Jan. 5, 2007) at 2. In addition, under Appendix I a proposed CBNG discharger must demonstrate that it will meet the "no pollution" standard by "credible evidence," a standard that PRBRC wrenches out of its proper statutory context, and which would apply to no other discharge permit applicant in Wyoming. Nothing in the record regarding either quantity of CBNG produced water or composition of those discharges would justify distinguishing CBNG discharges from all other effluent discharges in Wyoming for what is effectively a no-discharge standard. Total volumes of water discharged by Wyoming industry and POTWs dwarf the volume of water discharged by CBNG producers to surface waters. Yet no other class of dischargers is subject to an absolute ban on discharge of "pollutants."

Because it singles out and bars CBNG discharges without a rational basis, Appendix I could not survive scrutiny by a court. Appendix I fails to meet the requirement that regulations that apply to a single industry must be reviewed and recommended by the Water and Waste Advisory Board. [5] And, by imposing without justification, and without the required Advisory

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[5] Even if there were some basis in the record for singling out CBNG produced water discharges, the EQC could not lawfully adopt Appendix I as a rule at this time. Under EQA, any rule that applies only to certain types of dischargers can only be adopted after review by the Water and Waste Advisory Board and upon recommendation of DEQ. Thus, one of the powers and responsibilities of the Administrator of the Water Quality Divsion is --:

> To recommend to the director, after consultation with the appropriate advisory board, that any rule, regulation or standard or any amendment adopted hereunder may differ in its terms and provisions as between particular types, characteristics, quantities, conditions and circumstances of air, water or land pollution and its duration, as between particular air, water and land pollution services and as between particular areas of the state

WYO. STAT. ANN. § 35-11-110(a)(ix) (Lexis 2005). In this case, Appendix I has never been reviewed and evaluated by the Advisory Board and, to the extent that DEQ has commented on the proposed rule, it recommends rejection.

Board review, a heavy and unique burden on CBNG discharges -- one that applies to no other industrial or municipal discharger -- Appendix I fails to meet basic principles of fairness and equal protection of the laws.

IV. Constitutional Considerations Relating to Water Administration and the State's Watercourse Easement Preclude Adoption of the Petitioners' Proposed Rule.

Beyond the fact that the rules proposed by Petitioners are completely unworkable and contrary to the purpose of the EQA, the purposes for which the Petitioners propose Appendix I(a) are simply not matters within the jurisdiction of the Council or DEQ. Petitioners have plainly stated they are seeking to force DEQ to restrict the quantity of water discharges regardless of the quality of water discharged. DEQ clearly does not have such authority. The Wyoming Constitution, the state legislature, the Attorney General, and even the DEQ itself, are all in agreement on this point.[6]

More importantly, however, is that the issue for which the Petitioners claim to seek redress does not fall within the jurisdiction of the EQC or DEQ – namely, whether there is a right to flow water in the natural watercourses of the state. Evidence already of record in this proceeding makes it clear that Petitioners' main purpose in proposing Appendix I(a) is to prevent *any* CBNG produced water from being discharged into the stream channels that cross the complaining Petitioners' land.

This issue has come to be referred to as a "private property rights" issue in these proceedings. However, it is not that at all. Rather, this is an issue of constitutional law and

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[6] *See* WYO. CONST. art. 8 (vesting the State Engineer with the supervision of the waters of the state and of their appropriation, distribution and diversion and defining the standards by which waters are to be administered); WYO. STAT. ANN. §35-11-1104(a)(iii) (Lexis 2005) (wherein the legislature specifically limited DEQ's authority to regulate water quality, providing that nothing in the EQA "limits or interferes with the jurisdiction, duties or authority of the state engineer, [or] the state board of control."); DEQ Water Quality Rules and Regulations Ch. 2 §1(a) (wherein DEQ acknowledges that it does not have the authority to determine what constitutes a "beneficial use" of the state's waters and states that nothing in the regulations shall "supersede or abrogate the authority of the state to appropriate quantities of water for beneficial uses).

water law, involving the most basic rights of the state to flow water in natural streams and watercourses. Furthermore, it is an issue of water rights, and the rights that water rights owners have to use a natural watercourse for the conveyance of water to fulfill their water rights. Petitioners are asking the EQC to ignore two basic tenets of Wyoming water law: 1) Any water within a natural stream belongs to the state; and 2) The state has a right of way for its waters to flow through watercourses.

These water law issues were recently addressed in decisions from the Sixth Judicial District in *Williams Production RMT Company v. William P. Maycock, II*, Campbell County Civil Action No. 26099 ("*Maycock*"). In *Maycock*, the court decided that "water legally placed in natural watercourses, even water produced from CBM, is water belonging to the state" and **"as a matter of law, CBM water is water belonging to the state once that water is legally placed in a watercourse."** DECISION LETTER dated October 11, 2005 at p. 5, *Williams Production RMT Company v. William P. Maycock, II*, Campbell County Civil Action No. 26099, Sixth Judicial District Court (hereinafter, "DECISION LETTER 2005"). Because CBNG water belongs to the state the court found that it "enjoys an easement for that water to flow within the natural watercourse." DECISION LETTER dated March 16, 2006 at p. 1, *Williams Production RMT Company v. William P. Maycock, II*, Campbell County Civil Action No. 26099, Sixth Judicial District Court (hereinafter, "DECISION LETTER 2006"). Consequently, a landowner cannot claim a violation of a property interest when water flows in a natural watercourse because he does not have a "property right" to have the watercourse be free from water.

The EQC simply does not have the jurisdiction to promulgate rules that may have the effect of impairing or forfeiting these basic rights of the state and water rights holders. If the EQC allows the Petitioners to block flow in the ephemeral streams that cross their property, it

will turn over 100 years of Wyoming water law on its head. However, this mischaracterized issue seems to be a significant factor leading the EQC to accept the petition for rulemaking.[7] Therefore, the analysis below offers a brief review of the reasoning behind Wyoming's water law and the importance of its watercourse easement for the purpose of explaining the reasons the EQC must not make the sweeping changes advocated by the Petitioners in their proposed Appendix I(a).

A. Waters of the State

1. Public Ownership of Waters, Subject to Appropriation

To understand why it is imperative that the state have an easement in all natural watercourses, it is important to first understand how the state came to be in control over all waters of natural streams. The first attention directed to the issue of water distribution in Wyoming was in 1875, when the territorial Legislature declared that those having a "possessory right to or title to land 'on the bank, margin or neighborhood of any stream' should be entitled to the use of the water thereof for the purpose of irrigation, ***and to a right of way over the lands of others for the construction of irrigating ditches.***" *Farm Inv. Co. v. Carpenter*, 61 P.2d 258,

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[7] *See*, Chairman Gordon's statements from the July 17, 2006 meeting of the EQC:

> "It seems to me a property rights issue is at stake[.]" (**Ex. A**, p. 67, l. 20-21).
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> "And my big concern is that we make sure we proceed to a good, equitable solution, which serves, to the best of our ability, the private property rights and the opportunity for industry to flourish and thrive, and good things happen in Wyoming that ends where we are." (**Ex. A**, p. 107, l. 3-8)
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> "I will vote in favor. It pains me, too, but the reason I do is because I do believe private-property rights are at stake, and they are sacred, not Appendix H." (**Ex. A**, p. 114, l. 21 – p. 115, l. 1).

See also, EQC Member Hutchinson's statement from the July 17, 2006 meeting of the EQC:

> "So, I'll still say I don't like the revised Rule either. I think that somehow we, we've got a lot of people here that are mainly concerned with their private-property rights. They want the right to develop the water and use it. And there's people that want the right to refuse the water on their property. To me, that's the crux of the issue. And I don't know necessarily how we can write an environmental Rule that's going to apply statewide that's going to respect that private property right." (**Ex. A**, p. 97, l. 9-19)

See also, EQC Member Flitner's statement

> "I really want the people who are benefiting from the water to keep benefiting, and the people who aren't, to have some power to say, 'We don't want it.'" (**Ex. A**, p. 113, l. 5-8)

259-60 (Wyo. 1900) (emphasis added). However, with a growing population and settlement for both agricultural and industrial activities, the policy of granting all riparian owners the right to use water soon proved difficult in this arid state. If a landowner on the downstream end of the creek had expended capital and labor to develop his land for mining, irrigation, or other industry, it seemed unfair for another to move in upstream and divert the water in a manner that prevented the previously developed use. *See generally Farm Inv. Co.*, 61 P.2d 258 (describing the early development of Wyoming water law). It was obvious that the state needed more adequate laws "to duly protect this important industrial interest, give stability to its values, assist in a desirable conservation of the waters, and avoid confusion and difficulty in their distribution." *Id.* at 260.

In response, the territorial Legislature began the development of the prior appropriation system by declaring in 1886 that "the water of every natural stream was the property of the public and dedicated to the use of the people, subject to appropriation[.]" *Id.* at 260. This prior appropriation doctrine "prevails that a right to the use of water may be acquired by priority of appropriation for beneficial purpose, in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands." *Id.*, at 259. However, while an appropriator secures a right to use the water, title to the water is not conveyed: "The title of the appropriator fastens not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes, in pursuance of an appropriation lawfully made and continued." *Id.* at 265. This system of water distribution proved to be a more "economical and orderly regulation of the use of the waters of the public streams." *Id.* at 260.

The principles of state ownership and control of water were of such importance to the orderly settlement and development of the state that they were included in Wyoming's

Constitution when it was granted statehood. The Wyoming Constitution establishes that "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." WYO. CONST. art. 8 § 1; *See also* WYO. CONST. art. 8, §§ 2-5. These waters are owned and controlled by the state for the benefit of the public trust.

Thus, by constitution, the State Engineer and Board of Control govern water appropriation, distribution and diversion—which includes the flow and use of all waters of the state. The State Engineer is a "state officer" with special qualifications and duties. *See generally* Wyo. Stat. Ann. § 9-1-901, *et seq*. Nowhere in the constitution or statutes of the State are these powers delegated to the DEQ. In fact, just the opposite is true. In enacting the EQA, the legislature specifically mandated that nothing in the act "limits or interferes with the jurisdiction, duties or authority of the state engineer [or] the state board of control." WYO. STAT. ANN. § 35-11-1104(a)(iii).

2. Water Belongs to the State, Regardless of its Source

The Wyoming Constitution does not differentiate ownership of water existing in natural streams based upon its source. "Any water within a natural stream belongs to the state, whatever the source of that water." DECISION LETTER 2005, pp. 4-5. This is true, whether the water comes from "rainfall, snowmelt, seepage, irrigation waste, sewage, pumped groundwater, collection of rain on pavement, or any other source." *Id.* (citing *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764 (Wyo. 1925); *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980); and *Bower v. Big Horn Canal Association*, 307 P.2d 593 (Wyo. 1957)) (emphasis added).

The cases cited by the *Maycock* court in support of this finding illustrate efforts of water appropriators throughout history to use and obtain rights to water, even when the source of water

is seepage, irrigation waste, or sewage. For example, in *Wyoming Hereford Ranch*, the plaintiff ranch company sought to enjoin the City of Cheyenne from separately contracting with the defendant packing company for the use of its *sewage*, which had previously been discharged to the watercourse where it became available for use by water appropriators, including Wyoming Hereford Ranch. The court found, "all the authorities agree that when the appropriated waters have been used to the full extent intended by the appropriation, ***the quantity unconsumed and returned to the stream is then a part of the waters of the state.***" *Wyoming Hereford Ranch*, 236 P. at 773 (emphasis added). In *Fuss v. Franks*, the court similarly found, "When the water leaves the land for which it was appropriated and would, if left to flow uninterrupted, reach a natural stream, it becomes eligible to other and separate appropriation for other and different uses." *Fuss*, 610 P.2d at 20. In the context of case law addressing this point, CBNG water discharged into a natural watercourse is no different.

B. The State's "Watercourse" Easement

The state's easement for the flow of its water through watercourses is also a well established tenet of our water law. *Day v. Armstrong,* 362 P.2d 137 (Wyo. 1961), is the case most commonly cited for this principle of law, in which the court stated,

> In conclusion...we hold: That...riparian owners have title to the bed and channel of the river, but that ***this title is subject to an easement for a right of way*** of the river's waters in their natural channel through, over and across [the riparian owners'] lands; ***that the waters of the river are the property of the State and are held by it in trust for the equal use and benefit of the public***[.]

Id. at 151 (emphasis added). *Day* specifically addressed the state's ownership in waters of non-navigable streams and the public's right to float on waters of the state and to incidental uses of the bed and banks. Its determination that a riparian owner's title "is subject to an easement for a right of way" for the flow of waters of the State was a necessary component of its decision.

In *Maycock*, the court upheld the finding in *Day* regarding the state's easement in watercourses, recognizing the importance of discharged water, return flows, and the rights of downstream water appropriators:

> The state has a right of way for its waters to flow through watercourses. *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961). ***Such a right of way is essential to our system of prior appropriation. Water users can count on water flowing down watercourses to diversion points only because the state has such an easement.*** The state's easement applies to all of its water in watercourses, whether from CBM development or otherwise.

DECISION LETTER 2005, p. 6 (emphasis added).

As owner of the easement, the State of Wyoming is entitled to all rights incident or necessary to its proper enjoyment of the easement. *Bard Ranch Co. v. Weber*, 557 P.2d 722, 730 (Wyo. 1976); (*See also Lamb v. Wyo. Game and Fish Comm'n*, 985 P.2d 433 (Wyo. 1999), the owner of an easement has the right to use the full width or area of the easement unhampered by any obstructions). In *Maycock*, the court described these rights by stating: "The state's easement for its water flowing down watercourses ***necessarily extends to the normal carrying capacity of the watercourse, and extends to all seasons. Any other rule would negate the development and use of water.***" DECISION LETTER 2005, p. 5 (emphasis added).

However, *Day* was not the first case to recognize this easement. Over a century ago, the importance of this state's right-of-way was recognized in the context of water appropriation and beneficial use: "The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch and co-extensive with his right to the ditch itself." *Willey v. Decker*, 11 Wyo. 496, 544 (Wyo. 1903).

Petitioners may argue that CBNG water is "artificially produced" and, therefore, cannot be returned to waters of the state. However, there is simply no support for such contention. The ground water produced in association with natural gas production is no different than the water

produced by landowners from water wells to water their stock and irrigate. In fact, the Wyoming State Engineer has designated the production of water for purposes of producing CBNG as a beneficial use of groundwater and CBNG producers have appropriated water rights to produce ground water in association with natural gas through groundwater permits issued by the State Engineer's Office. *See* Wyoming State Engineer's Office, GUIDANCE: CBM/GROUND WATER PERMITS, March 2004, p. 1.

Furthermore, numerous landowners also acquired water rights in the wells from which CBNG is produced. These landowners put the ground water to beneficial use for stock watering and irrigation. The portion of water from these wells that is not consumed is returned to the state's surface water supply for appropriation as a *return flow*. As such, it becomes waters of the state when it is returned to a natural stream or watercourse.

The EQC simply does not have the authority to forfeit these basic water rights or reverse more than a century of water law. To the contrary, the EQC must *protect* these rights of the state. Indeed, the EQA dictates that the policy and purpose of the act is, in part, "to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air, land and water[.]" WYO. STAT. ANN. § 35-11-102 (Lexis 2005).

In conclusion, the EQC should reject the rules proposed by Petitioners because Appendix I(a) is aimed at areas outside of the EQC's and DEQ's jurisdiction. The premise behind the rules is the elimination of the most efficient means of conveying water for beneficial and productive uses – natural watercourses. The EQC must not allow Petitioners to prevent the flow of discharge water in natural watercourses because it would impair or possibly forfeit the state's easement in such streams, thereby also impairing or abrogating the property rights of those citizens with *water rights* in these steams. It is simply not appropriate for the EQC to engage in

rulemaking at the request of a handful of residents in the Powder River Basin, when the rules have the possibility of jeopardizing the water uses of hundreds of other citizens in the state.

V. ***Mandatory Balancing of Considerations under Section 302 of the EQA Has Not Occurred.***

The EQC should not go forward with the rules proposed by the Petitioners because it has not conducted the balancing review required by the EQA. Recognizing that environmental rules, standards, and permit systems can significantly and adversely impact other interests in the state, the Wyoming Legislature expressly required that the before rules are promulgated, their *reasonableness* and all of their intended—as well as unintended—consequences be considered. The law requires a "reasonableness" test, or a balancing of interests and values, and the legislature prescribed some of the facts and circumstances that must be evaluated and considered. Clearly, the legislature intended the reasonableness test to apply in a situation such as this, where rules are being considered that have the potential of significantly and adversely affecting many other interests in the state.

Wyoming Statute §35-11-302(a) provides as follows:

> The administrator, after receiving public comment and after consultation with the advisory board, shall recommend to the director rules, regulations, standards and ***permit systems*** to promote the purposes of this act. Such rules, regulations, standards and ***permit systems*** shall prescribe:
>
> * * *
>
> (vi) ***In recommending any standards, rules, regulations***, or permits, the administrator and advisory board shall consider ***all the facts and circumstances bearing upon the reasonableness*** of the pollution involved including:
>
> (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
>
> (B) The social and economic value of the source of pollution;
>
> (C) The priority of location in the area involved;
>
> (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and

(E) The effect upon the environment.

WYO. STAT. ANN. § 35-11-302(a) (Lexis 2005) (emphasis added).

The Petitioners have not presented evidence of any facts or circumstances evaluated or considered that bear upon the reasonableness of their proposed rules. Nor has the EQC evaluated or considered any of the balancing criteria required by law.[8]

The first balancing criterion requires the EQC to evaluate and consider "...the character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected[.]" WYO. STAT. ANN. §35-11-302(a)(vi)(A) (Lexis 2005). However, these interests and values have not been identified, evaluated, or considered. While the EQC has heard some testimony and is taking comments from people who might be positively or negatively affected by the proposed rules, nothing has been done to compile this information to adequately evaluate, analyze, or quantify the true character and degree of alleged injuries. The EQC has not adequately considered the impacts to wildlife and its habitat, nor has it considered, quantified, or otherwise evaluated the environmental *loss* that would result from its recommended action. Clearly, prohibiting the flow of water in ephemeral drainages that is suitable for wildlife will result in an injury to wildlife health. Similarly, the EQC has not quantified or otherwise evaluated the degree of injury to or interference with the wellbeing of livestock that depend upon the flow of produced water in ephemeral streams for survival. Also, the flow and use of produced water in ephemeral drainages is critical to the economic viability of many ranching operations across the state, and the Department must quantify and evaluate the character and degree of injury to or interference with the wellbeing of those people. It should be clear from the testimony received to date, that ranchers highly value the flow of water for

[8] While the statute expressly delegates the § 302 balancing to the administrator and the advisory board to undertake, by deciding not to engage the advisory board and administrator in this task it appears the EQC has clearly taken the burden of the balancing criteria upon itself, which is legally suspect in light of the statutory mandate.

livestock and wildlife through their properties, and that the benefits from such flows far outweigh any potential negative impacts.

According to the Wyoming Department of Agriculture, many landowners want to use produced water and have acquired water rights in it. For example, landowners in the Powder River Basin have acquired 13,741 stock water permits, 3,491 stock reservoir permits, and 61 irrigation permits to use CBNG water. *See* Presentation to CBM Task Force, Grant Stumbough, Dept. Agriculture, July 2006 at http://cbm.moose.wy.gov/Information_Presented_to_the_Task_Force.htm. Landowners benefit from the installation of water pipelines, stock tanks, and reservoirs that improve the distribution of livestock over range lands and increase stock productivity. Produced water improves the health of wildlife and its habitat by increasing forage production, reducing overgrazing, and enhancing riparian areas and wetlands. If this analysis were performed, the EQC would most likely find that the surface discharge of oil and gas produced water results in a net environmental benefit, and is an asset to ranchers and their stock. The EQC must identify, evaluate, and consider these facts and circumstances prior to recommending any rules that would change how WYPDES permits will be issued.

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

- ***Injury to and interference with*** landowners' existing water rights in wells, reservoirs, and stock tanks; landowners' need for the flow of produced water in the channel for stock and wildlife; the needs of downstream landowners to use the flow of produced water for stock water and irrigation; and the State's right to flow waters of the state down its watercourse easements.

- ***Injury*** to mineral owners resulting from increased oil and gas production costs that reduce royalties and may render leases uneconomic. This includes the State of Wyoming, which receives mineral royalties from state and federal mineral lands.

- ***Injury*** to oil and gas operators resulting from increased production costs and the loss of capital investments.

The second balancing criterion requires the EQC to evaluate and consider "the social and economic value of the source of pollution", which includes social values associated with jobs, agriculture, and wildlife, and economic values of state and private royalties, state and local taxes, salaries, and increases in agriculture production. WYO. STAT. ANN. §35-11-302(a)(vi)(B) (Lexis 2005). Geomega Inc. provides a description of some of these factors in its report, including the impact on agricultural producers if produced water could no longer be discharged to the surface from CBNG operations and, thus, ceases to be, or never becomes, available for agricultural use. *See* Water Quality Effects and Beneficial Uses of Wyoming Coal Bed Natural Gas Produced Water Surface Discharges, by Geomega Inc. (submitted to EQC January 17, 2007). Additionally, mineral taxes and royalty payments provide unique socioeconomic benefits to the state, which will not be realized if development of CBNG is curtailed by Appendix I. Mineral taxes and royalties allow Wyoming to rank first in the nation in federal revenues, first in non-property tax revenues, second in general revenue and interest income, fourth in tax revenues, and fourth in sales tax revenues. Were it not for the taxes paid on minerals, Wyoming would rank 48th in property tax revenues; instead, it ranks tenth[9].

CBNG production already provides huge benefits to the counties in which it is currently produced the most:

- In 2006, CBNG producers paid 62% of the property taxes in Johnson and Sheridan Counties. Agriculture accounted for only 3% of the taxable valuation in Johnson County, and 1% in Sheridan County. The taxable value of minerals increased by 1559% in Sheridan County since 1999, and by 1329% in Johnson County since 1998[10].

- Oil and gas producers paid an average of nearly half (48.26 %) of the property taxes paid in 2005 in the counties where CBNG is produced[11]:

[9] Wyoming Taxpayers Association, *How Wyoming Compares*, 2006 ed., FY2004.

[10] Kerns, *Coalbed Natural Gas*, presentation to EQC, January 18, 2007.

[11] Petroleum Association of Wyoming, *Oil & Gas Facts.*

- Campbell 41.03%
- Johnson 63.79%
- Sheridan 47.10%
- Converse 41.11%

The EQC should also consider the beneficial socioeconomic impacts of the oil and gas industry as a whole, since the rules proposed by the Petitioner have the potential to adversely affect oil and gas operations throughout the state, if they are ultimately extended to non-CBNG operations, as some no doubt will advocate if Appendix I is adopted. Oil and gas production provides tremendous social and economic value to the state, as well as to counties and local production areas.

- In 2005, Wyoming ranked third in the nation in natural gas production (2 trillion cubic feet) and seventh in crude oil production (51.6 million barrels). Campbell County led the state in crude oil production, followed by Park County. Campbell County was the second highest in natural gas production[12].

- There are 523 companies engaged in the production of crude oil and natural gas in the state, and 48 companies operating petroleum pipelines. In 2005, there were 45 operating gas plants and four crude oil refineries. Oil and gas companies in the state directly employ approximately 20,000 people with an annual payroll of over $950 million[13].

- In 2005, the total taxes and royalties paid by oil and gas producers in the state was $1.693 billion, which constitutes a direct payment of nearly $3,257 for each person living in Wyoming. Oil and gas producers pay royalties and lease bonuses to the state and federal government, and the state receives half of the royalties paid to the federal government. In 2005, oil and gas producers paid $422 million in federal royalties and $101 million in state royalties[14]. In 2004, the state received approximately $554 million in federal mineral royalties and lease bonus payments[15].

- In 2004, oil and gas companies paid over $540 million in property tax revenues to the state, of which nearly $434 million was paid on natural gas. Oil and gas producers paid over 52% of the total property taxes paid in the state (more than 79% of the property taxes paid on all minerals). Minerals are the only class of property in the state that is taxed at 100% of their value, as well as the only class that is required to pay two direct

[12] Petroleum Association of Wyoming, *Oil & Gas Facts.*

[13] Petroleum Association of Wyoming, *Oil & Gas Facts.*

[14] Petroleum Association of Wyoming, *Oil & Gas Facts.*

[15] Wyoming Taxpayers Association, *How Wyoming Compares*, 2006 ed.

taxes (property and severance)[16]. In contrast, only 4% of the state's revenue was paid by other property taxpayers, including agriculture and residential and commercial property owners[17]. Also, oil and gas producers paid $497 million in severance taxes, of which $408 million was paid on natural gas. And, in addition to property and severance taxes, oil and gas companies paid $129 million in sales and use taxes, and $5 million under the conservation mill levy, in 2005[18].

- In the counties where conventional oil and gas operators produce water that is discharged under WYPDES permits, oil and gas producers paid an average of 58.4% of the property taxes paid in 2005[19].
    - Big Horn 46.73%
    - Fremont 79.82%
    - Hot Springs 78.23%
    - Natrona 48.10%
    - Park 57.20%
    - Washakie 40.56%

The third balancing criterion requires the EQC to evaluate and consider "the priority of location of the area involved[.]" WYO. STAT. ANN. §35-11-302(a)(vi)(C) (Lexis 2005). The rules proposed by Petitioners involve the discharge of produced water in all areas of the state, not just the Powder River Basin. It creates a permitting system that would affect existing and future discharges of water produced in association with CBNG statewide, including areas of the Big Horn Basin that want more water. The EQC should not promulgate a rule based on the complaints from the owners of ten (10) properties in the Powder River Basin to the detriment of properties near current or future CBNG production in the Powder River Basin or other areas of the state.

The fourth balancing criterion requires the EQC to evaluate and consider "the technical practicability and economic reasonableness of reducing or eliminating the source of pollution[.]" WYO. STAT. ANN. §35-11-302(a)(vi)(D) (Lexis 2005). The Petitioners have not submitted

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[16] Petroleum Association of Wyoming, *Oil & Gas Facts.*

[17] Wyoming Taxpayers Association, *How Wyoming Compares*, 2006 ed.

[18] Petroleum Association of Wyoming, *Oil & Gas Facts.*

[19] Petroleum Association of Wyoming, *Oil & Gas Facts.*

relevant or reliable scientific evidence to demonstrate that the standards which they are proposing are even necessary, let alone technically practical or economically reasonable. The natural water quality in most ephemeral drainages does not meet the effluent limits proposed by the Petitioners, particularly in gaining stretches where water from the shallow water table pools and stagnates, and in low-flow runoff events. However, the EQC has received comments and testimony regarding the technical impracticability of alternative means of water disposal, including the geological impracticability of reinjection in most areas of the Powder River Basin and the prohibitive costs of water treatment, as well as the additional environmental costs of alternative measures.[20]

The fifth and final balancing criterion requires the EQC to evaluate and consider "the effect upon the environment." WYO. STAT. ANN. §35-11-302(a)(vi)(E) (Lexis 2005). The Petitioners' proposal to limit the quantity of water discharged will have a negative effect upon the environment because it will limit the amount of water that would otherwise be available to livestock and wildlife and other agricultural uses. The EQC has received numerous comments explaining that the surface discharge of water produced in association with oil and gas operations results in a net environmental gain and provides a vital resource to wildlife, livestock, and other agricultural uses.[21] It sustains and enhances habitat for wildlife, including endangered and threatened species, big game, birds, rodents, etc. In high plains, semi-arid desert areas where surface water sources and supplies are very scarce, the discharge of produced water suitable for wildlife is extremely beneficial to the environment. Produced water discharges sustain livestock

[20] *See, e.g.*, Comments submitted by Merit Energy Company (February 14, 2006), Presentation by Williams Production RMT Company (February 16, 2006), Presentation by Anadarko Petroleum Company (February 16, 2006).

[21] *See, e.g.*, Comments submitted by Hot Springs County Commissioners (February 14, 2006), Benefits to Wildlife from the Application of Water Produced by Coal Bed Natural Gas Development, by Larry Hayden-Wing, Ph.D., submitted by Yates Petroleum (February 13, 2006), Presentation by Larry Hayden-Wing, Ph.D. and Benjamin Parkhurst, Ph.D. (February 16, 2006), Presentation by Bjorn Bjorkman (February 16, 2006).

and reduce overgrazing of riparian areas and rangeland. Reducing the availability of produced water will harm wildlife and livestock, and promote overgrazing. The potential harm from prohibiting the flow of produced water down ephemeral drainages is exacerbated by the current prolonged drought. The Petitioners have provided no evidence to the contrary. The EQC must consider and quantify these facts before voting to enact a rule that would deprive the environment of these benefits.

In sum, there has been no showing by the Petitioners of the factors that the EQA mandates be considered under Section 302. In the absence of such an analysis and balancing of the statutory factors, the proposed rules should not be adopted.

VI. Procedural Concerns:

Respondents continue to be concerned with the procedures employed in this rulemaking, which call into question the legality of any action that the EQC may ultimately take with regard to the proposed rule. In particular, as noted in the August 8, 2006 letter from Chairman Gordon to interested parties, the proposed rule "will not go through the advisory board process as there has been a thorough vetting of these rules at two previous public meetings." Respondents believe this is a fatal procedural error, as the EQA clearly contemplates that all rules promulgated under the EQA will proceed to the EQC only after they have been addressed by the Water and Waste Advisory Board, the Administrator and the DEQ Director.

The Attorney General has also commented on this defect, noting that the EQA establishes a process encompassing "several layers of review and examination" under WYO. STAT. ANN. §§ 35-11-110 and 114 before rules may be adopted. (Memorandum from Pat Crank, Attorney General to Kip Krofts, Counsel to the Governor, December 6, 2006).

Respondents are also concerned that the notice of this rulemaking does not comply with the requirements of the Administrative Procedure Act, in that it did not include the information

mandated by WYO. STAT. ANN. § 16-3-103. In particular, it is unclear whether the EQC considers the adoption of the proposed rule to be necessary in order to comply with federal law or regulatory requirements, and if so, what law or regulation is implicated. The public notice for this proceeding states that the revision is being proposed to provide for regulation ... that complies with ... the federal Clean Water Act." In the event that the EQC believes adoption of Appendix I is necessary to comply with federal law, Respondents object and request the EQC to provide the information mandated under WYO. STAT. ANN. § 16-3-103 (ii)(C)(I) and (II).

Respondents respectfully urge the EQC to dismiss these rulemaking proceedings because the Petitioners' proposal is improvident, inconsistent with the EQA and unworkable. If the EQC desires to proceed with rulemaking on this issue, the proper course would be to identify those issues the EQC believes should be addressed and present them to the DEQ to run through the review process contemplated by the EQA. Otherwise, the EQC is left with an unworkable rule and with what one EQC member has already opined is a "cobbled mess" for a rulemaking procedure. (Comments of Mr. Boal at July 17, 2006 hearing, **Exhibit A**, p. 81).

VII. Conclusion

For the foregoing reasons, Respondents respectfully request that the EQC reject the proposed rules submitted by Petitioners and terminate this rulemaking proceeding.

RESPECTFULLY SUBMITTED, this 17th day of January, 2007.

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