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' SUPPLEMENTAL COMMENTS TO RECORD OF JANUARY 17-18, 2007 RULEMAKING HEARING

Introduction and Summary

In accordance with the Council's January 18, 2007 order that the record of this rulemaking remain open for ten (10) days thereafter, the undersigned Respondents[1] submit these comments for the record. Respondents urge the Council to reject the proposed rule because key provisions of the rule are so ambiguous as to be impossible for DEQ to implement and are bound to breed uncertainty and litigation. Specifically, it is more apparent than ever that section (a)(iii) of Appendix I is subject to at least two radically different interpretations. Under one interpretation, the language of section (a)(iii) includes a complete ban on discharges of CBNG produced water that would cause change, in any respect to, water quality in receiving waters. This was DEQ's interpretation of the rule prior to and at the hearing, and one of the interpretations shared by industry and other commenters. Under another interpretation, section (a)(iii) only bans discharges that create a nuisance, render receiving waters harmful or injurious, degrade water quality for its intended

[1] The following Respondents join in these comments: Bill Barrett Corporation; Devon Energy Production, L.P.; Fidelity Exploration & Production Company; Marathon Oil Company, Merit Energy Company; Petro-Canada Resources (USA) Inc.; Yates Petroleum Corporation; Williams Production (RMT) Company.

use, or cause other adverse environmental effects. PRBRC's counsel first advanced this interpretation at the eleventh hour, in her closing remarks concluding the two-day hearing.

In light of the great uncertainty that now exists about what section (a)(iii) means, the Council should reject the petition and terminate this proceeding. Petitioners have not met their responsibility to provide the Council with clear regulatory language. Should Petitioners wish to pursue rulemaking, it is their burden to submit clear and workable regulatory language. It would be arbitrary and capricious for the Council to proceed to adopt a rule that does not mean what it says, or as to the meaning of which no one can be sure.

If the Council does not reject the Petition, Respondents object to any further action by the Council to adopt the current petition unless the Council provides the public notice of and an opportunity to comment on the new interpretation advanced by PRBRC's counsel, which differs fundamentally from what the public assumed to be the meaning of the rule that that the Council noticed for hearing on December 1, 2006. The public has never had an opportunity to comment on Appendix I with clear notice of what Petitioners now say is its intended meaning. For the reasons set forth below, should the Council decide to proceed with this rulemaking, it must republish the proposal, with an explanation of the "true" meaning of section (a)(iii), and give the public an opportunity to comment on *that* rule.

Discussion

1. The Public and DEQ Reasonably Believed Before and During the Hearing That Appendix I As Noticed For Hearing Bans All "Pollution" From CBNG Discharges.

Proposed section (a)(iii) of Appendix I, as noticed for hearing, provides:

> (a) Applications for produced water discharges from coal bed methane gas production facilities . . . shall include . . . credible data establishing each of the following: . . .
>
> > (iii) *That the produced water shall not cause contamination or other alteration of the physical, chemical or biological properties of any waters of the state, including*

> *change in temperature, taste, color, turbidity or odor of the waters*; or shall not cause the discharge of any acid or toxic material, chemical or chemical compound, whether it be liquid, gaseous, solid, radioactive or other substance, including wastes, into any waters of the state which:
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> > (a) creates a nuisance, or
> > (b) renders any waters harmful, detrimental or injurious to public health, safety or welfare, to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife or aquatic life, or
> > (c) degrades the water for its intended use, or
> > (d) adversely affects the environment

Prior to the hearing, the public had been led to believe that the italicized first clause of subsection (a)(iii) must be read to flatly ban any discharge that "cause[s] contamination or other alteration of the physical, chemical, or biological properties of any waters of the state" – without regard to the rest of the text in subsection (a)(iii), including the four factors in paragraphs (a) through (d). Even DEQ, the agency that is charged with interpreting the Environmental Quality Act believed that the italicized language stands alone and would operate as a ban on all discharges, and for that reason recommended that the Council not adopt the rule. Letter from John Wagner to Mark Gordon (Jan. 5, 2007).

DEQ and other commenters had good reason to interpret the first clause of section (a)(iii) as stand-alone language that is independent of the language that follows that clause and, therefore, as a ban on permitting any discharge of CBNG produced water. The drafters' punctuation dictates DEQ's interpretation.[2]

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[2] On its face, the semi-colon that appears at the end of the first clause serves in lieu of a comma, presumably because there are commas in the second clause from which the semicolon separates the first clause. In other words, this punctuation denotes two separate clauses. *See* Columbia University Press, The Columbia Guide to Standard American English (1993) at http://www.bartleby.com/68/73/5373.html:

> This punctuation mark (;) has two important uses in written English. (1) It coordinates (separates yet connects evenhandedly) two independent clauses not joined by a coordinating conjunction: *I ran to the door; no one was there.* . . . (2) The

At the hearing before the EQC on November 13, 2006, counsel for PRBRC also appeared to concede that, unless modified, section (a)(iii) broadly covered any discharge that fell within the first clause of PRBRC's proposed rule:

> MS FOX: A couple of things; one, I do agree – this is the language of the AG's opinion, which is taken from the Environmental Quality Act. The A(3) is the definition of pollution, and I do understand that it is – covers so much as to perhaps not be – so I have a suggestion, which is simply to go right to B so that it would read under A(3), "that the produced water shall not render" – are you with me – "or have a potential to render . . ." I think we should use that language, because, again, it is the AG's language; and then go on with what's there, "water's harmful, detrimental," et cetera.

Transcript (Nov. 13, 2006), p. 53, lines 24-25; p. 54, lines 1-10. Chairman Gordon restated Ms. Fox's proposal as follows:

> CHAIRMAN GORDON: Well, just so I understand what Kate's suggestion was, you're suggesting strike from "cause contamination" down to "renders"?
>
> MS. FOX: Yes.

Id., p. 55, lines 17-20. The Council ultimately determined, however, that it would not make any changes to the language of the rule, and that the rule would go forward as proposed by

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> *semicolon* also serves to separate clauses or phrases in series constructions when these already contain commas (*He had a tall, black horse; a wagon, which someone had given him after the battle; and a threadbare, tattered carpetbag*) and elsewhere where there are already other commas.

Moreover, in the second clause, the absence of a comma or semicolon after "state" and before "which" indicates that the language following "which" – the four paragraphs (a) through (d) – is a part of the second clause, but not of the separate first clause. (Interestingly, the semicolon in question, which determines the meaning of the first clause in Petitioners' language, does not appear in the definition of 'pollution" in the Environmental Quality Act. *See* Wyo. Stat. § 35-11-103(c)(i).)

PRBRC on May 11, 2006, and as accepted for rulemaking on July 17, 2006.[3]

Thus the proposed language of (a)(iii), which Petitioners' counsel admitted "covers so much," was unchanged when noticed for public comment and hearing. Understandably, in light of counsel's efforts to eliminate the first clause of (a)(iii), DEQ and Respondents believed that the clause, if adopted, would be read in accordance with its plain meaning and, therefore, would ban any discharge that would cause "contamination or other alteration" of the properties of receiving water.

Consistent with everyone's interpretation of section (a)(iii) as noticed for hearing, counsel for PRBRC, in her opening presentation on January 17, 2007, again tried to revise the petition to cut out the first clause of section (a)(iii).[4] She acknowledged that "(A)(3) is too long and it is too repetitive of the statutory language" and suggested that the Council look back at her proposals for amending section (a)(iii) at the November 13, 2006 hearing and "work this language" (without, however, attempting to articulate or restate those changes for the benefit of those in attendance at this hearing). Hearing Transcript (Jan. 17, 2007) (Unedited Rough Real Time Rough Draft) at p. 61, lines 17-25; p. 62, lines 1-3.

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[3] As Councilmember Hutchinson stated: "I would leave – this was the language we adopted at the meeting in Casper, so I would suggest that we make no changes, except [where there is] a typographical issue." *Id.*, p. 65, lines 7-10.

Counsel for the EQC confirmed at that hearing that Ms. Fox's proposed revision of (a)(iii) could not be entertained:

> MS. HILL: If you read the APA on citizens' petitions, it says you decide whether you accept or deny it. Once you accept it, you initiate rule-making on what the citizen has presented you with. . . . [Y]ou move forward with rule-making on the petition.

Id., p. 69, lines 7-10; p. 70, lines 1-2. Ultimately, the Council rejected all changes to the original language, save one typographical correction (see *id.*, p. 71-72), and published notice that the Council would consider the original rule with that correction at its January 17-18, 2007 hearing.

[4] Respondents have not yet received a copy of the final transcript of the January 17-18, 2007, hearing from EQC's court reporter. When the transcript is received, Respondents will supplement these comments with transcript citations, if the citations from the draft transcript are no longer accurate.

2. PRBRC Offered a Radically Different Interpretation of the Rule At the End of the Hearing.

During the remaining two days of hearing, DEQ and many other members of the public presented testimony premised on everyone's understanding of the language of the first clause of (a)(iii) as barring WYPDES permits for any CBNG discharge that would cause *any* alteration of receiving waters. Counsel for Petitioners heard all this testimony, then in the final hour of the hearing, after all members of the public had testified (and after many had to leave), abruptly reversed field and stated, contrary to her earlier statements, that no changes to the language of section (a)(iii) are necessary because the first clause of (a)(iii) really should be read to allow DEQ to issue a permit for some "contamination or other alteration" of receiving waters, provided the applicant demonstrates that none of four factors in paragraphs (a) through (d) is associated with the discharge. Counsel asserted that:

> Appendix I says that the produced water shall not cause contamination or other alteration and then goes on, and then – and then that is exactly qualified by the word, "which" with a colon, and then is says "creates a nuisance or renders any waters harmful, detrimental or injurious to public," etc.

Hearing Transcript (Jan. 18, 2007) (Unedited Rough Real Time Rough Draft) at p. 274, lines 15-20. She acknowledged that "nobody who has commented in the last day and a half has recognized the existence of the second part which defines that alteration that should be prohibited as an alteration which creates a nuisance or renders waters harmful." *Id.*, p. 274, lines 23-25; p. 275, lines 1-2. Explaining further, she noted:

> [If] it's not a nuisance or harmful or injurious [to a specific landowner] . . ., that gives the DEQ the regulatory leeway to allow the discharge of this water . . . . Nobody who's commented against this rule has recognized the existence of this language . . . .

Id., p. 275, lines 12-16.

In effect, Counsel for PRBRC said, DEQ and numerous witnesses had completely misread that language, and clause (a)(iii) does not, after all, mean what it clearly says.

3. The Council Must Reject Appendix I Because Its Text is Fundamentally Flawed and Unclear.

Although the text of the rule on which the EQC sought public comment and on which it held the hearing on January 17-18 is facially the same text that PRBRC advanced in May 2006, the meaning of a key portion of that text – section (a)(iii) – changed dramatically as a result of the hearing, at least as interpreted by its proponents. As a result of PRBRC's revisionist interpretation of section (a)(iii), no one can be sure about what section (a)(iii) means. At this juncture, if the Council were to adopt this rule, DEQ would have no way to know whether it should follow Petitioners' eleventh hour interpretation or its own interpretation. Adoption of the rule now would spawn a host of legal questions: Is a petitioner entitled to determine how an ambiguous rule should be interpreted? Would a reviewing court defer to a petitioner's interpretation of a rule or instead reject this as a usurpation of an executive branch function? If DEQ were to issue WYPDES permits allowing some "contamination," as PRBRC now says would be proper, who is to say that any such permit would not be challenged by other interest groups as contrary to the plain meaning of the first clause of section (a)(iii)?

The amorphous language in PRBRC's petition raises the same concerns as the language at issue in *Matter of Bessemer Mt.*, 856 P.2d 450 (Wyo. 1993). In *Bessemer*, the statute directed the EQC to "[d]esignate . . . those areas of the state which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical, or scenic value." *Id.* at 452 (quoting Wyo. Stat. § 35-11-112(a)(v) (Supp. 1992) (internal quotation marks omitted). Pursuant to that directive, the EQC designated certain

sections of land as "rare and uncommon." *Id.* at 451. The EQC, however, did not establish any regulatory "criteria and factors [that would] set the standard for that classification." *Id.* at 453. Without such criteria and factors, the court found that the phrase "rare and uncommon" was "too amorphous to permit judicial review of the action of the EQC." *Id.* at 453. Consequently, the EQC's adoption of this language, which simply repeated the statute, was "inherently arbitrary and capricious." *Id.*

As in *Bessemer*, the Council's adoption of the "no nuisance" standard for WYPDES permitting would require DEQ to "develop standards on a case by case basis, which is time-consuming; may lead to inconsistent results; and severely inhibits judicial review." *Id.* Without criteria and factors for determining "nuisance" – which, as discussed below, is a fact-intensive inquiry – the regulated community and other interested public have no notice of how the agency will determine nuisance. The EQC's adoption of this amorphous "no nuisance" standard therefore would be arbitrary and capricious and contrary to law, in violation of the Wyoming Administrative Procedure Act ("WAPA"). *See* Wyo. Stat. § 16-3-114(c)(ii)(A).

It is Petitioners' responsibility to provide clear regulatory language, and they have failed to do so. It is not the Council's job to rewrite Petitioners' rule or to provide some "legislative history" as to why otherwise plain regulatory language should be disregarded. Petitioners have demonstrated great creativity in crafting and interpreting their proposed regulatory language, both in writing and "on the fly" during hearings. This "moving target" approach, however, does not comport with rulemaking requirements and does not provide the clear and workable regulatory language required for the Council's consideration.

4. At A Minimum, the Council Should Re-Notice the "New" Appendix I for Public Comment and a Hearing.

If the Council does not reject the Petition, Respondents object to any further action by the Council on the current petition unless and until the Council has given the public notice of and an opportunity to comment on the text of the proposed rule in light of what PRBRC now says is the true meaning of section (a)(iii). Clearly, as of January 17-18, commenters were not adequately apprised of what Petitioners apparently contend is the "true" meaning of the rule. Although the text of the rule has not changed from its proposal, its meaning has fundamentally changed. Notice of the proposed rule, as now interpreted by Petitioners, did not satisfy the requirements of the Administrative Procedure Act. Under the WAPA, Wyo. Stat. § 16-3-106, any rulemaking that an agency undertakes in response to a petition from a citizen must conform to the procedures for rulemaking in Wyo. Stat. § 16-3-103, under which:

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

The agency is further required to "consider fully all written and oral submissions respecting the proposed rule" and to "either prior to adoption or within thirty (30) days thereafter, . . .

issue a concise statement of the principal reasons for overruling the consideration urged against its adoption." Wyo. Stat. § 16-3-103(a)(ii)(B),(D).

The Legislature enacted these requirements as quality-control measures in rulemaking and to ensure due process for those who may be affected by new or amended rules. As the Supreme Court explained in *Laughter v. Board of County Com'rs for Sweetwater County*, 110 P.3d 875 (Wyo. 2005), proper notice of a rule entails notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 110 P.3d at 882 (citing *Pfeil v. Amax Coal West, Inc.,* 908 P.2d 956, 960-61 (Wyo. 1995)). Procedural due process is satisfied only "if a person is afforded adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner." 110 P.3d at 882. (citing *Pfeil .,* 908 P.2d at 960-61 , *Amoco Production Co. v. Wyoming State Bd. of Equalization,* 882 P.2d 866, 872 (Wyo. 1994)).

In light of the vague and ambiguous construction of Appendix I, and PRBRC's evolving interpretation of section (a)(iii), EQC cannot meet these requirements unless Appendix I is noticed for public comment. Were EQC to adopt Appendix I, and PRBRC's interpretation of section (a)(iii), without further notice-and-comment, the public will not have had an opportunity to "be heard at a meaningful time and in a meaningful manner" on the "new" rule and, potentially, to urge "considerations against its adoption." Nor will the Council have gone through the beneficial process, required by the statute, of fully considering those comments. For the Council to adopt the proposed rule without affording the public a full 45-day period in which to comment on the implications of a fundamentally changed Appendix I would be contrary to the Legislature's desire for careful adoption of

high-quality rules and would be arbitrary and capricious as well as a denial of constitutional guarantees of due process.

Comment on the proposed rule as now interpreted by PRBRC would not be an academic exercise. In at least one respect, public comment is vitally necessary to inform the Council's decision whether to adopt Appendix I. That is whether it would be sound policy to subject DEQ's decision whether to issue a WYPDES permit for a discharge of CBNG produced water to some or all of the four factors enumerated in section (a)(iii)(a), (b), (c), and (d). Respondents did not address these factors in their January 17, 2007 joint comments because the factors were superfluous under DEQ's interpretation of section (a)(iii) as a complete ban on discharges of CBNG produced water. Additional time for public comment on the new interpretation, under which these factors would now become *determinative* of DEQ's permitting decisions, would be warranted. Preliminarily, of particular concern to the CBNG industry is that, under this reading, paragraph (a)(iii)(d) of Appendix I establishes "shall not create a nuisance" as a separate and distinct factor that DEQ must consider on an ad hoc basis in deciding whether to issue a permit for a proposed CBNG produced water discharge.

Apparently DEQ would be compelled to apply a broad and ambiguous "no nuisance" standard in evaluating permit applications. Under Appendix I, almost every DEQ permitting decision – whether the Department grants or denies a permit – could be challenged either by the applicant or its opponents on the ground that DEQ did not correctly apply a free-floating "no nuisance" standard. DEQ would find itself in the role of arbiter of the common law of "nuisance," a role for which DEQ is not well suited nor authorized to fill.

Generally, a nuisance is a wrong that "arises from an unreasonable, unwarranted, or unlawful use by a person of his own property," and which works an obstruction or injury to the right of another. *Bowers Welding & Hotshot, Inc. v. Bromley*, 699 P.2d 299, 306 (Wyo.1985). If the PRBRC petition is adopted, DEQ would be directed to apply an ambiguous "no nuisance" test to permitting decisions, perhaps including private nuisances,[5] requiring DEQ to determine whether a nuisance might arise from a particular discharge. "Whether a thing is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to circumstances." *Erickson v. Hudson*, 70 Wyo. 317, 335 (1952). "Nuisance" is an inherently broad standard unsuited for administrative agency determinations, and all too prone to yield inconsistent determinations.

This "nuisance" standard contrasts markedly with the objective and clear criteria that DEQ applies in making WYPDES permitting decisions under the current rules. DEQ currently sets effluent limits in WYPDES permits at levels necessary to meet state water quality standards. Moreover, Appendix I implies that a discharge could be prohibited as a "nuisance" even though the discharge meets all applicable effluent limits in section (b)(vii)[6] and neither "renders any waters harmful, detrimental or injurious to public health, safety or welfare, to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wildlife or aquatic life," nor "degrades the water for its intended use," nor "adversely affects the environment." Essentially, requiring DEQ to make

[5] A private nuisance affects one or a limited number of individuals and is based on the unreasonable and substantial interference with the person or persons' interest in the use and enjoyment of land or property. 58 Am. Jur. 2d, "Nuisances" §§ 31, 42, 48, 64, 256.

[6] The Council voted on January 18, 2007 to defer consideration of revised effluent limits for CBNG produced water in section (b)(vii) until Dr. Raisbeck completes the University of Wyoming's study of safe levels for sulfates and barium in water for stock and wildlife. We assume that if the Council adopts Appendix I, the rule would include the "old" limits set forth in section (b)(vii). If not, the absence of any numerical limits for these parameters would make DEQ's application of the "no nuisance" requirement even more difficult and, potentially, arbitrary.

ambiguous "no nuisance" determinations will expose the Department to legal challenges in connection with every permitting decision, as DEQ struggles to make rational determinations that do not fall within its ambit of statutory or regulatory authority.[7]

Additional comment on this aspect of the proposed rule is further warranted in light of the fact that PRBRC's counsel, in proposing revisions to section (a)(iii) at the November 13, 2006 hearing, would have excluded the "creates a nuisance" factor in section (a)(iii)(a):

> CHAIRMAN GORDON: Well, just so I understand what Kate's suggestion was, you're suggesting strike from "cause contamination" down to "renders"?
>
> MS. FOX: Yes.

Transcript, p. 55, lines 17-20. The word "renders" is the first word in (a)(iii)(b), so under this proposal (a)(iii)(a) – the "nuisance" language – would have been excluded. On January 18, 2007, however, counsel for PRBRC asserted that no change should be made to any of the language of section (a)(iii), so now the nuisance language would remain in the rule.

The uncertainty, even on the part of Petitioners, as to the proper construction of Appendix I illustrates why it is an unworkable and improvident proposed regulation. If the Council is intent upon proceeding with some form of a rule along the lines of what Petitioners have proposed, or *intended* to propose, new language must be crafted and published for comment. Only in this way could EQC both afford the public due process and ensure that any rule finally adopted has a rational basis and will allow for workable DEQ decisions in issuing WYPDES permits.

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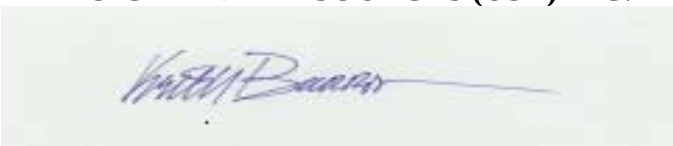
[7] The "no nuisance" standard, and the other "prove the negative" factors in section (a)(iii)(a-d) also are unconstitutional. As described in the Respondents' joint comments submitted on January 17, 2007, the proposed regulatory language, including application of the "credible data" burden of proof and the "no nuisance" standard *only* to dischargers of CBNG produced water and to no other type of discharge in Wyoming, violates the Equal Protection clause in Article 1, Section 2 of the Wyoming Constitution and the Fourteenth Amendment of the U.S. Constitution.

Conclusion

For the foregoing reasons, Respondents respectfully requests that the EQC reject the proposed rules submitted by Petitioners and terminate this rulemaking proceeding or, alternatively, republish notice of the proposed Appendix I for further public comment.

RESPECTFULLY SUBMITTED, this 29th day of January, 2007.

RESPONDENTS:
PETRO-CANADA RESOURCES (USA) INC.



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