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SEP 22 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

Re: EQC Docket No. 08-3101, WQD Chapter 1, Section 20, Appendix H, Agricultural Water Supply

Dear Chairman Boal:

The Washakie County Commissioners thank you for the opportunity to provide comments on the proposed Water Quality Division Chapter 1, Appendix H, which is currently being considered by the Council.

Washakie County would be significantly impacted by the proposed rule and any changes to the rules currently in place for the regulation of water produced in association with oil and gas ("produced water"). According to the Wyoming Oil and Gas Conservation Commission, there was 774,901 barrels of oil, 2,575,949 MCF of natural gas, and 9,801,964 barrels of water produced in Washakie County in 2008. Of the approximately 26 companies producing oil and gas in our county, at least six hold WYPDES permits for the surface discharge of produced water. Those six companies produced 56% of the oil, 24% of the natural gas, and 52% of the water in the county in 2008.

The production of oil and gas in Washakie County is extremely important to our county. In 2008, Washakie County ranked 21st in the state with an assessed valuation of 130,025,723. A large percentage of that valuation comes from oil and gas. Any action taken that would restrict currently permitted or future permits of produced water to be discharged could limit or prohibit the production of oil and gas in our county. This would have detrimental consequences to the county and its citizens.

The Washakie County Commissioners formally request that you strongly consider the following three requests for action by the EQC:

1. **REQUEST:** That EQC Remand the proposed rule to the Water and Waste Advisory Board (WWAB) for further review and revision if EQC decides changes are needed to Tier 2 of the irrigation standards.
2. **REQUEST:** That EQC insert a “non-severability” provision in the proposed rule saying that EPA must approve or disapprove the rule in its entirety, and if any provision of the rule is struck, then the entire rule is invalid.
3. **REQUEST:** That EQC request that the state Department of Administration and Information, Division of Economic Analysis, collect and analyze data related to:
 - a. The “social and economic value of the source of pollution” (i.e. oil and gas production from which produced water is discharged, and agricultural and other uses and benefits of produced water). WYO. STAT. § 35-11-302(a)(vi)(B).
 - b. “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. §35-11-302(a)(vi)(A). This would study whether produced water discharged under existing water quality standards has actually caused harm—and if so, how much and where—and whether the proposed rule is really necessary.
 - c. Combined, these studies would be the socio-economic impact study and analysis.

In addition to the above requests, Washakie County believes that the EQC should remand the proposed rule to the WWAB for the following reasons:

1. New “Experts” Report

The EQC’s new “experts” (from New Mexico) issued a preliminary report recommending elimination of the Tier 2 irrigation standards. The Tier 2 standards allow calculation of the natural water quality through the use of soil sampling. Since the proposed rule defines “irrigation” as including water flowing in a channel through “naturally irrigated lands” (i.e. bottomlands), the “irrigation” standards would apply to virtually all discharges of produced water in the state.

- a. Elimination of the Tier 2 irrigation standards would require statewide compliance with the Tier 1 numerical default standards.

- b. This would be a wholesale change of both the proposed rule AND the way DEQ has determined effluent limits for produced water in WPDES permits for over 3 years.
- c. Most of the produced water in the state does not meet the Tier 1 irrigation default standards, which were developed under conditions vastly different than those that exist in Wyoming. Therefore, the experts' recommendation would impact existing and future oil and gas operations statewide.
- d. Any substantive changes in the proposed rules must be remanded back to WWAB for review and public comment.
- e. If EQC adopts any substantive revisions to the current proposed rule without allowing public comment on such revisions, the public (including the Counties) will be denied due process.
- f. If the EQC goes forward without changes to Tier 2, we request EQC insert a "non-severability" provision in the proposed rule saying that EPA must approve or disapprove the rule in its entirety, and if any provision of the rule is struck (including Tier 2), then the entire rule is invalid.

2. Changes in the Facts and Circumstances Affecting Produced Water Discharges:

There have been significant changes in the economy, or "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...well being of the people...affected". WYO. STAT. §35-11-302(a)(vi)(A).

- a. Slow down in coalbed natural gas (CBNG) production and development has sharply reduced the amount of produced water being discharged. For July 2009, the water produced in association with CBNG production was down to October 2000 levels, down from the high point in water production by 50%. *Wyoming Oil and Gas Conservation Commission*, <http://wogcc.state.wy.us/coalbedchart.cfm>.
- b. The sharp decline in CBNG production and development is reason to:
 - i. Question the need for new produced water standards (because DEQ wrote the rules in response to concerns from the Powder River Basin related to CBNG), and

- ii. Delay adoption of the proposed rule until DEQ has fully identified and considered “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”. W.S. §35-11-302(a)(vi)(A).

3. DEQ’s Justification for the Proposed Rule is Not Accurate:

DEQ’s claim that “oil & gas development has flourished” under their implementation of the proposed rule is not true. See, DEQ “Analysis of Comments” to WWAB June 15, 2007, p. 6.

- a. CBNG production and development has sharply declined, in significant part due to DEQ’s implementation of the proposed rule.
 - i. Natural gas prices are not the only reason for the decrease in CBNG production and development.
 - ii. The CBNG industry provided numerous comments to DEQ and EQC documenting the adverse impact the proposed rule has already had on costs of production and capital budgets for new development.
- b. DEQ must collect more information to determine the actual impacts the proposed rule will have on existing and future oil and gas operations.
- c. Increased regulatory costs and the cost of new water management facilities could mean the difference between wells being temporarily shut-in due to low market prices, and wells being permanently plugged and abandoned.
 - i. When wells are permanently plugged, recoverable minerals are left in the ground—which results in the waste of valuable resources.

4. DEQ and EQC should complete a socio-economic impact analysis on the rule and any changes they may make to the irrigation standards as a result of the New Mexico “experts” report

- a. Claims of EQC and DEQ that they do not have funds in their budgets to collect data related to the proposed rule is erroneous.
 - i. DEQ spent almost \$100,000 to commission the Raisbeck study
 - ii. EQC spent \$20,000 to commission a study by the New Mexico “experts”

- iii. DEQ spent at least \$15,000 to commission a study by the New Mexico “experts”
 - iv. DEQ spent resources to convene technical experts at several other times throughout the process, including when drafting the policy and prior to the February 2007 EQC hearing
- b. None of these technical reports purchased by EQC and DEQ performed a cost/benefit or risk analyses, so the socio-economic implications of the proposed rules or the technical experts’ conclusions have not been identified or considered. For example, the Raisbeck study focused solely on whether produced water could have adverse impacts on livestock, but failed to identify or consider the benefit and value of providing water to livestock and wildlife. This is exactly the problem the legislature was trying to prevent when it enacted WYO. STAT. § 35-11-302(a)(vi).
 - c. EQC and DEQ have failed to commission a study on (i) whether produced water discharged under existing water quality standards has actually caused harm (and if so, how much and where) and whether the proposed rule is really necessary, and (ii) the socio-economic impacts of the proposed rule. EQC denied the Counties’ request to identify and analyze the impacts of the proposed rule.
 - d. Therefore, EQC should request the above-described studies from the state Department of Administration and Information, Division of Economic Analysis.

Washakie County believes the “Grandfathering” exemption is necessary but uncertain for the following reasons:

1. The Grandfathering Exemption is Necessary:

The exemption of pre-1998 produced water discharges from the proposed rule (“grandfathering”) is essential to existing and future produced water discharges from oil operations in the Big Horn Basin and other areas of the state.

- a. Produced water discharges that have occurred for decades cannot meet the irrigation water standards in the proposed rules or Raisbeck’s proposed livestock water standards which the EQC is considering adopting.
- b. Landowners have testified that the continued use of this produced water is essential to their ranching operations.

- c. Oil producers have testified to DEQ and EQC that, if the proposed rules are applied to their operations, they will cease operations and/or cease water discharges.
- d. Loss of produced water discharges or oil production would significantly impact local businesses, the local economy, and county revenues.
- e. There has been no evidence presented to the EQC of any substantiated measurable decrease to livestock production caused by water discharged from oil and gas production under a WYPDES permit.

2. Legal and Administrative Challenges to the Grandfathering

Exemption:

The grandfathering exemption may not withstand legal and administrative challenges.

- a. If the grandfathering exemption is removed from the proposed rule, then the rule would apply to all produced water discharges statewide, including those in the Big Horn Basin.
- b. The Wyoming Outdoor Council and Powder River Resource Council have challenged the concept of grandfathering in their appeal of the Chapter 1 Water Quality Rules that were passed by EQC in February 2007. They claim DEQ does not have the authority to set water quality limits as based on historic discharges to effluent dependent waters. In addition, the Wyoming Outdoor Council spoke out against grandfathering and advocated the Raisbeck and Tier 1 irrigation standards be applied to all existing discharges at the November 6, 2008 EQC hearing on the Chapter 1 Water Quality Rules in Thermopolis.
- c. The proposed rule must be approved by EPA after it is adopted by EQC. In their comments submitted to EQC by letter dated August 21, 2008, EPA has challenged the grandfathering exemption in the proposed rule, stating, "What is the legal and scientific basis for treating pre-1998 discharge waters differently than post-1998 discharge waters?" This indicates EPA will likely disapprove of the grandfathering exemption provision of the proposed rule.
- d. EPA has the authority to disapprove (remove) some provisions of the rule, while approving other provisions. Therefore, we request EQC insert a "non-severability" provision in the Chapter 2,

Appendix H rule saying that EPA must approve or disapprove the rule in its entirety, and if any provision of the rule is struck (including grandfathering), then the entire rule is invalid.

Washakie County supports the landowner waiver exemptions from the proposed rule. This rule should allow landowners to decide what is best for their livestock and land, and to waive the water quality standards when they think produced water is a benefit.

1. The Wyoming Outdoor Council and Powder River Resource Council have requested any waiver be limited to the application of water on a landowners' own land, and no use of the stream channel be made for conveyance of that water. This would limit the ability of landowners to use water under a waiver.
2. EPA has already challenged the landowner waiver exemption in the proposed rule, indicating EPA will likely disapprove of it if the proposed rule is adopted. Specifically, EPA stated:

“EPA is concerned that the waiver process creates a situation where the agricultural water supply uses are no longer fully protected, in that continued use of water discharged to a water body may cause the areas under irrigation to be substantially less productive, or to be unusable for crop growth in the future.”

3. We again request EQC insert a “non-severability” provision in the Chapter 2, Appendix H rule saying that EPA must approve or disapprove the rule in its entirety, and if any provision of the rule is struck (including landowner waivers), then the entire rule is invalid.

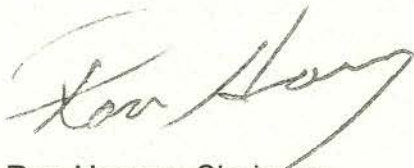
The Washakie County Commissioners urge the Council to adopt the recommendations of the Water and Waste Advisory Board and Department of Environmental Quality regarding livestock water quality standards. These standards should be maintained at current levels: 5,000 mg/l for TDS, 3,000 mg/L sulfate, and 2,000 mg/L chloride. Produced water discharges are important to agricultural operations and wildlife in our arid county. These livestock operations, along with a variety of wildlife, have come to depend on produced water discharges, especially in locations where there is no other water available.

The Commissioners further ask that the EQC not adopt the irrigation standards contained in Appendix H and remand that portion of the rule back to the Water and Waste Advisory Board for evaluation of the proposed rule under the criteria described in WYO. STAT. § 35-11-302(a)(vi). We feel there is inadequate information in the record to determine “the character and degree of injury to or

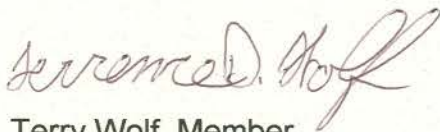
interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected," including the impacts to agriculture if the water were removed from use in Washakie County. Furthermore, the report from Drs. Buchanan and Hendrickx filed with the EQC in May, 2009, did not consider or address any of the uses of produced water for irrigation in the Big Horn Basin.

In conclusion, we thank the Council for this opportunity to comment on the proposed rule. The outcome of the proposed revisions to the rules governing produced water discharges and the Agricultural Water Supply will have long term impacts on our agriculture and mineral industries, along with our wildlife resources. Thank you for your time and consideration.

Sincerely,



Ron Harvey, Chairman
Washakie County Commissioner



Terry Wolf, Member
Washakie County Commissioners



Aaron Anderson, Member
Washakie County Commissioners