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Chief Deputy Attorney General
Elizabeth C. Gagen

April 12, 2006

Mark Gordon, Chairman
Environmental Quality Council
779 U.S. Highway 16 East
Buffalo, Wyoming 82834

Dear Mark:

Enclosed please find a formal opinion I have issued to the Governor on April 12, 2006. By copy of this letter, I have provided a copy of this opinion to all members of the Environmental Quality Council, John Corra, and Pat Tyrrell. I would be willing to discuss this opinion with you or any members of the EQC either collectively or individually. We do, however, need to insure compliance with the Wyoming Open Meetings Act if the Council wants to collectively discuss this matter.

In that regard, I will make sure I am available to meet with the Council on May 11, 2006. Please forward an agenda at your earliest convenience.

It is my standard practice to withhold publication of a formal opinion for a short period of time to allow my clients to digest the opinion. I will release this opinion for publication and to the public on Tuesday, April 18, 2006.

Thank you and please contact me with any questions.

Regards,

Patrick J. Crank
Attorney General

PJC:cc

c: All Members of the Environmental Quality Council w/ opinion attached
John Corra, Director, Department of Environmental Quality
Pat Tyrrell, State Engineer

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FORMAL OPINION NO. 2006-001

April 12, 2006

Honorable Dave Freudenthal
Governor
State Capitol
Cheyenne, Wyoming 82002

Dear Governor Freudenthal:

Question:

Does the Wyoming Environmental Quality Act (EQA) grant authority to regulate water quantity to ensure that all produced water from coalbed natural gas (CBNG) production is at all times actually used for wildlife or livestock watering or other agricultural uses.

Brief Answer:

No. The EQA allows regulation of the quantity of water if the quantity has an unacceptable effect on the quality of the water.

DISCUSSION

A petition for rulemaking was filed on December 7, 2005, and a subsequent request by letter for revision was filed on March 3, 2006, with the Wyoming Environmental Quality

Council (EQC).[1] It proposes to amend Department of Environmental Quality (DEQ) Water Quality Division Rules (WQD Rules), Chapter 2, Appendix H and add Appendix I to regulate the quantity of surface discharge of produced water from all CBNG production. The existing WQD Rules provide that all produced water meeting basic quality criteria is suitable for use by stock and wildlife and may be discharged to the surface if actually put to such use during periods of discharge. The petition would revise the rule and limit the quantity of produced water discharges to only that amount of water which can be demonstrated to have actually been put to "beneficial use." Petition, Exhibit 1. In other words, it seeks to have the EQC limit the quantity of water which may be discharged from CBNG production to that which is actually "called upon" by agricultural users, regardless of whether the quality of the water which is being discharged meets applicable standards for existing uses.

Petitioners are not using the term "beneficial use" in the same way that DEQ has interpreted or applied it. Instead, they are using the term "beneficial use" to denominate water quantity and an asserted right to only have as much quantity discharged as will actually be used: "The goal of this petition is to amend the regulatory language so that water discharged for 'beneficial use' is truly used, and not simply flushed down Wyoming's watersheds." Petition at 3-4. The Petition wants the EQC to dictate to DEQ that it must consider "how much the cows or antelope will actually drink." Petition at 8. The Petition is clear that it wants DEQ to consider ". . . the impacts to land and water that [are the] result of quantity, **rather than quality**." Petition at 9 (emphasis added). The EQA does not authorize such an action.

The primary objective in interpreting statutory language is to ascertain the Legislature's intent and give it effect. *State v. Curtis*, 2002 WY 120, ¶ 8, 51 P.3d 867, 869 (Wyo. 2002). The intent of the Legislature is to be ascertained, if possible, by the language used, viewed in light of the objects and purposes to be accomplished. *Basin Elec. Power Co-op. v. Bowen*, 979 P.2d 503, 508 (Wyo. 1999). A reading of the EQA shows a legislative intent to require DEQ to regulate water quantity if it is directly tied to unacceptable water quality.

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[1] The original petition sought only to amend Appendix H, resulting in a proposal that would apply to all oil and gas production in Wyoming. By letter dated March 2, 2006, to the EQC, Petitioners changed the wording of the proposed amendments so that they would apply only to water from coalbed methane production. The original petition and letter will be referred to as "Petition."

The purposes of the EQA are specifically set out in statute:

> Whereas pollution of the air, water and land of this state will . . . impair domestic, agricultural, industrial, recreational and other beneficial uses; **it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution**; to preserve, and enhance, the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state[.]

WYO. STAT. § 35-11-102 (emphasis added).

As used in the EQA, the term "pollution" means as applied to water quality:

> . . . contamination or 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 any 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 creates a nuisance **or 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 which degrades the water for its intended use, or adversely affects the environment[.]

WYO. STAT. § 35-11-103(c)(i) (emphasis added).

DEQ has historically interpreted the EQA to allow regulation of water quantity only to the extent it is directly tied to water quality. The applicable classifications of waters which are set out in Chapter 1 of the WQD Rules protect agricultural use, among others, but do so in terms of water quality, not water quantity. The WQD Rules provide: ". . . Wyoming surface waters that have the natural water **quality** potential for use as an agricultural water supply shall be maintained at a **quality** which allows continued use of such waters for agricultural purposes." WQD Rules, Chapter 1, Section 20 (emphasis added). The waters cannot be degraded "to such an extent to cause a measurable decrease in crop or livestock production." *Id.*

WQD Rules also describe technology-based effluent limitations in terms of water quality for permitted discharges from oil and gas production:

> The produced water discharged into surface waters of the state shall have use in agriculture or wildlife propagation. The produced water shall be of good enough quality to be used for wildlife or livestock watering or other agricultural uses and actually be put to such use during periods of discharge.

WQD Rules, Chapter 2, Appendix H(a)(i).

The WQD Rules also have additional permit conditions for coalbed natural gas production facilities:

> Where discharge water is accessible to livestock and/or wildlife; meets the effluent limitations as specified in this appendix; and meets the criteria for the protection of livestock and wildlife as specified in Wyoming Water Quality Rules and Regulations Chapter 1, Wyoming Surface Water Quality Standards, the discharge will be considered in compliance with the requirements of Appendix H(a)(i) of these regulations.

WQD Rules, Chapter 2, Appendix H(d)(i).

DEQ has specifically incorporated parts of the federal regulatory scheme implementing the Clean Water Act for discharge permits issued. WQD Rules, Chapter 2, Section 1(b). One of the federal rules specifically incorporated is 40 C.F.R. § 435.51(c). In 1976, EPA published regulations to establish effluent guidelines for onshore oil and gas extraction industries, and split that segment into subcategories: onshore, coastal, beneficial use, and stripper. The term "beneficial use" was defined as ". . . the produced water is of good enough quality to be used for livestock watering or other agricultural uses and is being put to such uses." 41 Fed. Reg. 44942 (October 13, 1976).

In 1979, EPA, as part of the regulations establishing final effluent guidelines, modified the nomenclature of "beneficial use" to avoid confusion with that term as used in western water law. It stated: "The term 'beneficial use' has a long history of use in the western United States which is unconnected with its meaning in these regulations." 44 Fed. Reg. 22069, 22075 (April 13, 1979). That category of use is now denominated by the term

"use in agriculture or wildlife propagation." 40 C.F.R. § 435.50. The term now has a specialized definition: ". . . the produced water is of **good enough quality** to be used for wildlife or livestock watering or other agricultural uses and that the produced water is actually put to such use during periods of discharge." 40 C.F.R § 435.51(c) (emphasis added).

If a statute is capable of more than one meaning, then administrative interpretation or application of the statute is deferred to when that interpretation will aid in determining the legislative intent of the statute. *Loberg v. State*, 2004 WY 48, ¶ 9, 88 P.3d 1045, 1049 (Wyo. 2004). The EQA, WQD Rules and the federal regulations which DEQ has specifically incorporated into state rules discuss the protection of agricultural use in terms of quality, and those interpretations are entitled to deference.

Contrary to Petitioners' assertions, however, neither the EQA nor the DEQ draws an "artificial line" between regulating water quantity and regulating water quality. The purpose of the EQA is clearly to protect water quality. A declared purpose of the EQA is ". . . to enable the state to prevent, reduce and eliminate pollution . . ." WYO. STAT. § 35-11-102. Therefore, the EQA also provides the authority to regulate water quantity to the extent the quantity is tied to water quality.

DEQ has interpreted the EQA to give DEQ the authority to consider water quantity when establishing water quality limits. Permit applicants are required to submit information on the amount of water they expect to discharge. DEQ uses that information to determine effluent limits, based on the amount of water to be discharged and the dilution which is likely to occur from discharging that water into a waterway. DEQ makes this kind of determination using stream flow conditions, but it does not require the maintenance of any particular stream flow. This interpretation is exemplified by Section 11 of Chapter 1 Rules. The rule provides that for times when stream flows are less than low flow conditions, DEQ may, after consulting with the Wyoming Game and Fish Department and the affected discharger, require permittees to institute operational modifications to insure the protection of aquatic life. This rule then goes on to say: "This section should not be interpreted as requiring the maintenance of any particular stream flow." WQD Rules, Chapter 1, §11. This WQD Rule highlights that DEQ takes water quantity into account when regulating water quality, but that it does not have the authority to require any particular stream flow.

Petitioners want the regulation of water quantity for agricultural use, regardless of the quality of the water. There is no such authority set out in the EQA. "An agency is wholly without power to modify, dilute or change in any way the statutory provisions from which

it derives its authority." *Diamond B Servs., Inc. v. Rohde*, 2005 WY 130, ¶ 60, 120 P.3d 1031, 1048 (Wyo. 2005). This requirement applies both to express and implied authority:

> An administrative rule or regulation which is not expressly or impliedly authorized by statute is without force or effect if it adds to, changes, modifies, or conflicts with an existing statute . . . An agency's "implied powers are only those derived by necessary implication from express statutory authority granted to the agency. . . ."

Id. (internal citations omitted).

There is no express authority, nor is there any implied authority, in the EQA for regulation of water quantity in the absence of a direct tie to water quality. Petitioners are seeking to have a state environmental protection agency assume responsibility for regulating water quantity unrelated to water quality. The EQA does not grant the authority to do so.

Petitioners refer to several federal cases to support their assertion that the Clean Water Act does not draw a line between water quantity and water quality. The cases about what the Clean Water Act allows do not pertain to what the EQA allows. *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994), involved 33 U.S.C. § 1341 of the Clean Water Act, a section which gives authority to states to deny certification for projects requiring a federal license or permit. Here, Wyoming's authority derives from 33 U.S.C. § 1342(b) of the Clean Water Act, allowing states to establish their own pollutant elimination discharge system in lieu of the EPA's National Pollutant Discharge Elimination System (NPDES) permit system, and from WYO. STAT. § 35-11-302(a)(v), establishing the Wyoming Pollutant Discharge Elimination System (WYPDES) permit program. In *PUD No. 1*, Washington had denied certification because of a reduced stream flow which could damage fish. The Court relied upon the language in 33 U.S.C. § 1341(d), providing that a certification requires assurance that any applicant will comply with effluent limitations and with ". . . any other appropriate requirement of State law set forth in such certification." *Id.* at 707-708. The Court noted that 33 U.S.C. § 1341(d) expands a state's authority to impose conditions on the certification of a project. *Id.* at 711. *PUD No. 1* therefore does not apply to the question whether the EQA grants the authority to regulate the quantity of water needed for agricultural uses regardless of the quality of the water.

Petitioners also rely on *Alameda Water and Sanitation Dist. v. Reilly*, 930 F.Supp. 486, 491 (D. Colo. 1996), to support their contention that the EQA allows regulation of downstream effects of changes in water quantity, regardless of the quality of the water.

Once again, an entirely different section of the Clean Water Act was being addressed, that is, 33 U.S.C. § 1344 concerning dredge and fill permits. There, the EPA had vetoed issuance of a permit to be issued by the Secretary of the Army. The permit would have allowed the disposal of dredge and fill material into a river to allow construction of a dam. The Clean Water Act specifically allows the EPA to veto a permit proposed to be issued by the Secretary of the Army if the EPA determines that disposing of dredge and fill material "... will have an adverse effect on municipal water supplies, shellfish beds and fishery areas ... wildlife, or recreational areas." 33 U.S.C. § 1344(c). This power to consider other effects not related to water quality is specific to 33 U.S.C. § 1344. The question in *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985), also involved interpretation of 33 U.S.C. § 1344. The question was whether the Secretary of the Army could deny a general permit under 33 U.S.C. § 1344(e) of the Clean Water Act. The Court held that the denial of the general dredge and fill material permit was lawful, based on the fact that 33 U.S.C. § 1344 focuses not only on water quality, but rather on all effects on the aquatic environment caused by replacing water with fill material. *Id.* at 512. Once again, these cases concerned an entirely different section of the Clean Water Act, one which sets out different criteria concerning water quantity determinations for dredge and fill permits than for permits issued under 33 U.S.C. § 1342(b) of the Clean Water Act and under WYO. STAT. § 35-11-302(a)(v). The cases are inapplicable to agency authority under Wyoming's EQA to regulate water quantity in the absence of a tie to water quality.

Petitioners do refer to three cases which involve NPDES permits issued under 33 U.S.C. § 1342(a), the section of the Clean Water Act providing for discharge permits issued by EPA. However, none of these cases addresses the question of regulating water quantity for agricultural use in the absence of any problem with water quality. Petitioners cite *Northern Plains Resource Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), to argue that the CBNG water is a "pollutant" under the Clean Water Act. The issue in that case was not whether CBNG water quantity could be regulated, but rather whether discharges of the water required the issuance of an NPDES permit. The Court held that a permit was required because discharges of CBNG water altered the quality of the water into which the discharge was occurring. *Id.* at 1162. Petitioners also rely on *Quivera Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), to assert that quantity should be regulated. The question in *Quivera* was whether an NPDES permit was required for discharges into an arroyo and creek. The Court held that they were subject to an NPDES permit, because the arroyo and creek were "waters of the United States" under the Clean Water Act. *Id.* at 129. The question addressed by the Court in *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), another case cited by Petitioners for the proposition that water quantity can be regulated in the absence of a direct effect on water quality, was whether discharges from mining activity were a point source requiring the

issuance of an NPDES permit. *Id.* at 373. None of these cases applies to the issue of authority under the EQA to regulate water quantity which is not directly tied to an unacceptable effect on water quality. More importantly, none of these cases interprets Wyoming statutes concerning regulation of water quality and quantity.

CONCLUSION

The EQA does not provide authority for the EQC or DEQ to regulate water quantity to ensure that all produced water from oil and gas production is at all times actually used for wildlife or livestock watering or other agricultural uses. If the quantity of the water is causing unacceptable water quality or has the potential to cause unacceptable water quality, then the EQA gives DEQ the authority to regulate water quantity. The EQC has jurisdiction to adopt rules concerning environmental issues that are authorized by the EQA. The EQC does not have statutory authority to issue rules regulating water quantity in the absence of some water quality concern recognized in the EQA.

Regards,

Patrick J. Crank
Attorney General

PJC:cc