

FILED

AUG 06 2007

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

**Terri A. Lorenzon, Director
Environmental Quality Council**

**IN THE MATTER OF THE APPEAL OF POWDER)
RIVER BASIN RESOURCE COUNCIL OF THE)
RECLASSIFICATION AND DOWNGRADE OF THREE)
DRAINAGES TO CRAZY WOMAN CREEK (Kennedy)
South Area Addition) AND THEIR TRIBUTARIES)**

Docket No. 06-3804

**DEPARTMENT OF ENVIRONMENTAL QUALITY/WATER
QUALITY DIVISION'S MEMORANDUM IN SUPPORT OF ITS OPPOSITION
TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

The Department of Environmental Quality (DEQ)/ Water Quality Division (WQD) by and through its attorney, John S. Burbridge, Senior Assistant Attorney General, hereby submits its Memorandum in Support of its Opposition to Wyoming Outdoor Council's and Powder River Basin Resource Council's (collectively Petitioners) Motion for Summary Judgment and states to the Environmental Quality Council (EQC) the following:

FACTS

The Division received a Use Attainability Analysis (UAA) petition from Kennedy Oil on August 3, 2005. (Ex. 1, Cover page). The UAA requested that certain draws that drain into Crazy woman Creek in Johnson County be reclassified as class 4B drainages from class 3B drainages. (*Id.*, p. 1-1). 4B classifications remove the aquatic life beneficial use from the drainage. (*Id.*). The UAA includes the evaluation of five small impoundments/wetland areas

with a combined area of nine acres. (*Id.*, p. 2-4 and 2-7). The nine acres represent maximum impoundment size, not actual wetted area at the time of inspection for the UAA. (*Id.*). In addition, the three drainages at issue total approximately forty-three (43) miles of stream channels with less than one (1%) percent of the drainages being wet. The UAA identified and studied one-hundred (100%) percent of the wetlands in the study area. (Ex. 2, Aff. of DiRienzo, p. 2, ¶ 7).

Four of the impoundments are manmade and the fifth is the result of surface runoff backing up against a road fill. (*Id.*, ¶ 6). Wetland vegetation was present along the fringe of each of the impoundments. (*Id.*). The impoundments described do not represent a significant aquatic resource in any of the drainages downgraded to class 4B waters by the DEQ/WQD after review of the UAA. (*Id.*, p.3, ¶ 12). The wetted areas in Morris Draw and the unnamed tributary channels but they are so infrequent that the drainages as a whole lack the hydrologic potential to normally support and sustain aquatic life. (*Id.*, ¶ 10).

The DEQ performed an independent, on site, investigation which confirmed the information contained in the UAA on October 12, 2005. (*Id.*, p. 2, ¶ 5). The DEQ/WQD approved the petition on February 6, 2006. (Ex. 3). That decision was appealed by the Powder River Basin Resource Council (PRBRC) on April 5, 2006 and the Wyoming Outdoor Council (WOC) on April 7, 2006 (collectively Petitioners). The United States Environmental Protection Agency (EPA) approved the UAA to remove the aquatic life designation on September 14, 2006. (Ex. 4).

ISSUE

Do the DEQ's rules and regulations allow the downgrade of drainages to Class 4B waters from Class 3B waters with the existence of nominal amounts of areas capable of supporting aquatic life within or adjacent to the reclassified drainage?

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there are no material issues of fact and the moving party is entitled to judgment as a matter of law. Rule 56, of the Wyoming Rules of Civil Procedure. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." *Long v. Daly*, 2007 WY 69, ¶ 7, 156 P.3d 994, 997 (Wyo. 2007). The evidence offered in support of and in opposition to a motion for summary judgment is view in a light most favorable to the party opposing the motion. *Id.* "A genuine issue of material fact exists when a disputed fact, if proven, would have the effect of establishing or refuting as essential element of a asserted cause of action or defense." *Id.*

APPLICABLE LAW

The law most applicable in illustrating that there is an issue of genuine fact in this case is DEQ/WQD Rules and Regulations, Chapter 1, Sections 4(c)(ii) and 4(d)(ii). (hereinafter WQRR). Section 4(c)(ii) states:

“Class 3B. Class 3B waters are tributary waters including adjacent wetlands that are not know to support fish populations or drinking water supplies and where those uses are not attainable. Class 3B waters are intermittent and ephemeral streams with sufficient hydrology to normally support and sustain communities of aquatic life including invertebrates, amphibians, or other flora and fauna which inhabit water of the state as some stage of their life cycles. In general, 3B waters are characterized by frequent linear wetland occurrences or impoundments within or adjacent to the stream channel over its entire length. Such characteristics will be a primary indicator used in identifying Class 3B waters.”

Section 4(d)(ii) provides with regard to Class 4B waters:

“Class 4B. Class 4B waters are intermittent and ephemeral stream channels that have been determined to lack the hydrologic potential to normally support and sustain aquatic life pursuant to the provisions of Section 33(b)(ii) of these regulations. In general, 4B streams are characterized by only infrequent wetland occurrences or impoundments within or adjacent to the stream channel over its entire length. Such characteristics will be a primary indicator used in identifying Class 4B waters.”

Both Sections contemplate reclassifications of drainages from 3B to 4B in situations where there may be small areas of the drainage that could support aquatic life. Such is the case in this matter currently before the EQC.

ARGUMENT

DEQ/WQD's rules allow downgrading drainages.

The DEQ/WQD readily admits that there are minimal wet areas in the drainages at issue leading to Crazy Woman Creek, but assert that natural ephemeral, intermittent or low

flow conditions prevent the attainment of a 3B classification capable of supporting aquatic life uses. (Ex. 5, p. 6). Contrary to Plaintiffs' argument, the law cited above gives the DEQ/WQD the authority to downgrade a drainage if the UAA shows infrequent occurrences of wetland areas. WQRR, Chapter 1, Section 4(d)(ii), set forth above, does not envision that class 4B drainages to be only those with a complete absence of wetlands, but is intended to include drainages with infrequent wetland occurrences and impoundments. Plaintiffs also argue that the frequency of wetted areas in the drainages matters little when evaluating a UAA. (*Id.*, pp. 6-7). In fact, when properly applying Section 4(d), the frequency of wetted areas is important to the DEQ/WQD. The drainages in this case fit that description.

Plaintiffs' argument that the UAA must show that the drainages do not support aquatic life and that an aquatic life use can not be attained is misguided and incorrect. Plaintiffs' rely on WQRR, Chapter 1, Section 33(a)(b)(ii), which states:

(a) Any person at any time may petition the department or the Environmental Quality Council (Council) to change the classification, add or remove a designated use or establish site specific criteria on any surface water.

(b) The Water Quality Administrator may lower a classification, remove a designated use **which is not an existing use or an attainable use**, establish ambient-based criteria on effluent dependent waters, or make a recommendation to the Environmental Quality Council to establish sub-categories of a use, or establish site-specific criteria if it can be demonstrated through a Use Attainability Analysis (UAA) that the original classification and/or designated use or water quality criteria are not feasible because:

(ii) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated

for by the discharge of sufficient volume of effluent discharges without violating state water conservation requirements to enable uses to be met;

(Emphasis added).

Plaintiffs want the EQC to believe that the DEQ/WQD cannot downgrade a drainage classification from 3B to 4B when there is the presence or indication of any areas in the drainage capable of supporting aquatic life, no matter how small that area is compared to the to the whole drainage. The DEQ/WQD does not interpret and apply its rules as the Plaintiffs suggest the EQC should apply them. Section 4 is important when determining existing and attainable uses contained within drainages throughout the State. When the DEQ/WQD reviews a UAA it does consider existing uses and attainable uses, however when the drainage is lacking so much in hydrologic occurrences or tendencies that an aquatic life use is not normally attainable the appropriate classification is applied. (*Id.*, p. 2). In addition, a UAA does not assume that there is going to be any discharges in the future, but rather studies the current condition of a drainage in order to figure out what degree of aquatic life is supported by the drainage so that the DEQ/WQD can properly set discharge limits to protect the drainage in its current state. (Ex. 2, p.1, ¶ 3). In the instant case, that classification is 4B.

DEQ/WQD can consider the significance of aquatic life.

The DEQ/WQD can consider the significance of aquatic life when reviewing a UAA. Plaintiffs' incorrectly argue that the DEQ/WQD is applying policy regarding UAAs rather

than its rules and regulations. Decisions made by the DEQ/WQD are based on its rules and regulations as adopted by the EQC and approved by the EPA. (*Id.*, p. 2, ¶ 4 and Ex. 6). UAAs use a hydrologic test to satisfy the requirements of WQRR, Chapter 1, Section 33(b)(ii). The occurrences of wet areas in the drainages at issue, as a whole, lack the hydrologic potential to normally support and sustain aquatic life. (*Id.*, p. 3, ¶ 10). The drainages are predominantly dry and have a naturally ephemeral, low flow condition preventing the attainment of any significant level of aquatic life use. (*Id.*, ¶ 11). DEQ/WQD rules allow the downgrade of a drainage classification when “it can be demonstrated through a Use Attainability Analysis (UAA) that the original classification and/or designated use or water quality criteria are not feasible because: (ii) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use[.]” WQRR, Chapter 1, Section 33(b)(ii)

According to Bill DiRienzo,

“The relative occurrence of wetlands in or along stream channels is used as a surrogate measurement for actual hydrological conditions or flow frequencies in arid areas. Wetland indicators such as hydrophytic vegetation and hydric soils will present themselves after short periods of inundation or saturation (7-14 days in the growing season) and will persist and can be identified through dry periods. This study identified 100% of the wetland areas and demonstrated that less than 1% of the total stream length exhibited wetland characteristics. We believe this meets the standard expressed in Section 33(b)(ii).” (Ex. 5, p. 4).

In fact, the EPA approved the reclassification and downgrade of the three tributaries to Crazy Woman Creek from 3B to 4B on September 14, 2006. (Ex. 4).

The Clean Water Act does not prevent the elimination of an existing use.

Plaintiffs' argument that the Clean Water Act prohibits the DEQ/WQD from downgrading the drainages at issue in this case is without merit. Plaintiffs' ignore 40 CFR 131.10(g) which allows a state to downgrade a drainage if it can be shown that attaining the a designated use is not feasible. 40 CFR 131.10(g) states:

(g) States may remove a designated use which is not an existing use, as defined in Sec. 131.3, or establish sub-categories of a use **if the State can demonstrate that attaining the designated use is not feasible because:**

(2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; Emphasis added.

The federal language is similar to the language found in WQRR, Chapter 1, Section 33(b)(ii).

In fact, the EPA approved WQRR, Chapter 1 and the reclassification of the three tributaries to Crazy Woman Creek. Exhibits 4 and 6. Specifically, the EPA commended "the Environmental Quality Council and the Department of Environmental Quality for adopting significant improvements to the State's water quality standards. ... [including] development of an approach that would allow the Department to administratively amend use classifications in a manner consistent with federal requirements." (Ex. 6, pp.1-2). In addition, the EPA approved the downgrade and reclassification at issue in this case stating: "Pursuant to CWA [Clean Water Act] Section 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency is to notify the State or authorized

Tribe and specify the changes to meet such requirements.” (Ex. 4, p. 2). The EPA went on to say:

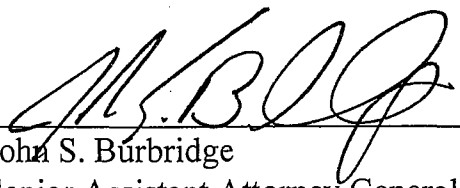
The revisions reclassify specific stream segments within these watersheds from Class 3B to Class 4B, removing the aquatic life use designation. The aquatic life use removals are based on a finding, in each case, that the naturally ephemeral nature of these stream segments, unaltered by regulated discharges, prevent the attainment of the aquatic life use. EPA agrees with this finding and has concluded that these revisions are consistent with the requirements of the Clean Water Act and EPA’s implementing regulation at 40 CFR Section 131.10. Accordingly, the following revisions are approved: Classification change from Class 3B to Class 4B for three mainstream drainages to Crazy Woman Creek in the Powder River Basin.” *Id.*

Apparently, the EPA disagrees with Plaintiffs’ assessment as well. As such, the DEQ/WQD’s decision to downgrade and reclassify the drainages at issue to 4B from 3B is supported by the Clean Water Act.

CONCLUSION

Plaintiffs’ have failed to show that summary judgment should be granted in their favor. For the reasons set forth above, the Department of Environmental Quality/Water Quality Division requests that the Environmental Quality Council deny Plaintiffs’ motion for summary judgment.

DATED this 6th day of August, 2007.



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CERTIFICATE OF SERVICE

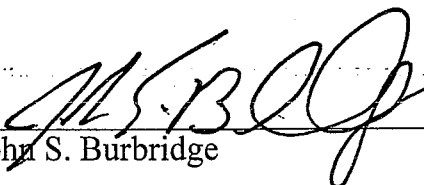
I, John S. Burbridge, certify that on this 6th day of August, 2007 the foregoing PRE-HEARING DISCLOSURES was served by United States Mail, postage prepaid, as follows:

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