

DEC 19 2007

Terri A. Lorenzon, Director  
Environmental Quality Council

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

**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**

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**DEPARTMENT OF ENVIRONMENTAL QUALITY  
WATER QUALITY DIVISION'S MEMORANDUM IN SUPPORT OF  
PETITION FOR REHEARING**

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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 the DEQ/WQD's Petition for Rehearing 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. The UAA Petition requested that certain draws that drain into Crazy Woman Creek in Johnson County be reclassified as class 4B drainages from class 3B drainages. The DEQ/WQD approved the petition on February 6, 2006. (Ex. 1). On April 5, 2006 the Powder River Basin Resource Council and on April 7, 2006 the Wyoming Outdoor Council (collectively PRBRC) filed petitions requesting review of the

Administrator's decision. On July 20, 2007, PRBRC filed a Motion for Summary Judgment which was granted by Order of the EQC on the 30<sup>th</sup> day of November 2007.

### **QUESTION RAISED BY THE EQC'S ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

By granting Powder River Basin Resource Council's Motion for Summary Judgment, did the EQC reach an erroneous conclusion by misapplying DEQ/WQD rules and regulations, Chapter 1 regarding Use Attainability Analysis Petitions?

### **STANDARD FOR PETITION FOR REHEARING**

"As a general rule, a rehearing cannot be had on matters or questions which were not urged at the original hearing or for the purpose of affording an opportunity to present new questions or issues." *State Bd. of Equalization v. Jackson Hole Ski Corp.*, 745 P.2d 58, 60 (Wyo. 1987). "[A] rehearing will not be allowed merely for the purpose of reargument unless there is a reasonable probability that the court may have arrived at an erroneous conclusion or overlooked some important question or matter necessary to a correct decision." *Elmer v. State*, 466 P.2d 375, 376 (Wyo. 1970). "[R]ehearings will not be granted, ... where all the facts presented have been duly considered by the court and the application presents no new facts but simply reiterates the arguments made on the hearing[.]" (*Id.*).

### **ARGUMENT**

The EQC granted PRBRC's Motion for Summary Judgment based on an erroneous conclusion that the DEQ/WQD only considered Chapter 1, Section 33 of its rules and

regulations. (See Order Granting Petitioners' Motion For Summary Judgment, EQC Docket No. 06-3804, p. 4, ¶ 9, filed November 30, 2007). Contrary to the EQC's Order, the DEQ/WQD also considered Chapter 1, Sections 3, 4 and 34. (Ex. 1). Chapter 1, Sections 4(c)(ii) and 4(d)(ii) are important to the DEQ/WQD's final decision in granting the UAA petition in this matter. 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 waters of the state at 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.

Wyoming Surface Water Quality Standards (Water Quality Rules and Regulations) Ch. 1, § 4(c)(ii).

Section 4(d)(ii) provides:

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.

Wyoming Surface Water Quality Standards (Water Quality Rules and Regulations) Ch. 1, § 4(d)(ii).

Both sections served as a basis for the DEQ/WQD's decision reclassifying the Crazy Woman Creek drainages from 3B to 4B. (Ex. 1). The DEQ/WQD also relied on Chapter 1, Sections 33(a) and (b)(ii). Sections 33(a) and (b)(ii) state:

(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[.]

Wyoming Surface Water Quality Standards (Water Quality Rules and Regulations) Ch. 1, §§ 33(a) and (b)(ii).

Contrary to the EQC's Order, the rules cited above give the DEQ/WQD authority to downgrade a drainage if a UAA shows infrequent occurrences of wetland areas. WQRR, Chapter 1, Section 4(d)(ii) 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. (Ex. 2, p. 3, ¶ 8). In fact, the infrequency of wetted areas is an important factor when the DEQ/WQD analyzes UAA petitions requesting the downgrade of a drainage. (*Id.*).

The EQC's Order prevents the DEQ/WQD from downgrading 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 whole drainage. The DEQ/WQD does not interpret and apply its rules as the EQC Order suggests the DEQ/WQD should apply them. Chapter 1, Section 4 is important when the DEQ/WQD determines 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 or reasonably attainable the appropriate classification is applied. (*Id.*, ¶ 9). While the DEQ/WQD rules allow the downgrade of a drainage classification when it can be demonstrated through a UAA that the original classification and/or designated use or water quality criteria are not feasible, the Order effectively prevents the DEQ/WQD from downgrading any drainage if it involves the removal of an existing use.

Lastly, the EQC's Order fails to properly implement the intent of the EQC when it originally adopted WQRR, Chapter 1 allowing the downgrade of drainages in 2001. The EQC's Statement of Principal Reasons for Chapter 1, dated June 21, 2001 shows the intent of the EQC when it adopted the rules. Prior to the existing method of determining stream

classification, the DEQ/WQD utilized the tributary rule. According to the Statement of Principle Reasons, “[t]he ‘tributary rule’ approach is no longer proposed in favor of a method that more closely ties classifications to the uses that can be **reasonably attained** on each water.” (Ex. 3, p. 5). (Emphasis added). The tributary approach is described by the EQC as “waters that were named on a 1:500,000 hydrologic map of the state were assigned an appropriate classification and listed in Appendix A of the regulations. All other waters were given the same classification as the first listed water to which they flowed.” (*Id.*, p. 5). It is important to note that the EQC described class 4B waters as:

Class 4B waters are essentially ephemeral streams, dry washes, arroyos etc. where aquatic life uses cannot be attained because of low flow conditions. Though there is only one stream classified as 4B in this rule making, there are many stream channels which can potentially fall within this classification. Each, however, must first be individually identified through the requisite UAA. **The relative occurrence of wetlands within or along the stream channels can be used as an indicator of whether there is normally sufficient hydrology to support and sustain species of aquatic life, however, the extent and occurrence of wetlands may not be the only indicator.**” (*Id.*, p. 7). (emphasis added).

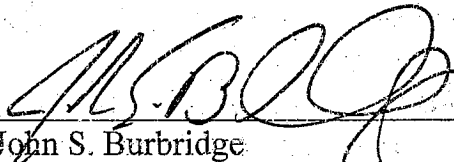
The Statement of Principle Reasons show that it was the intent of the EQC to allow water to be designated as Class 4B even when there is the presence of wetlands in or along the drainage. The key to understanding and applying the EQC’s original intent when it adopted WQRR, Chapter 1, is to apply the facts presented in a UAA to determine “reasonable attainment” of a use. In this case, facts contained in the UAA show that the three tributaries to Crazy Woman Creek do not reasonably sustain an aquatic life use designation. As such,

the Order of the EQC in this case erroneously grants PRBRC's Motion for Summary Judgment and fails to properly apply its own intent behind the rules by determining that any presence of wetland areas in a drainage prevents the downgrade of a classification and the removal of a designated use such as aquatic life.

### CONCLUSION

For the reasons set forth above, the Department of Environmental Quality/Water Quality Division requests that the Environmental Quality Council vacate its Order Granting Petitioners' Motion for Summary Judgment and set the above captioned matter for contested case hearing.

DATED this 19<sup>th</sup> day of December, 2007.



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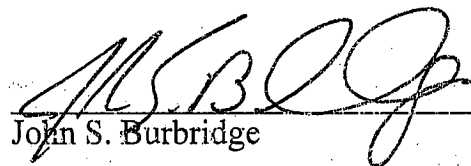
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## CERTIFICATE OF SERVICE

I, John S. Burbridge, certify that on this 19<sup>th</sup> day of December, 2007 the foregoing DEPARTMENT OF ENVIRONMENTAL QUALITY WATER QUALITY DIVISION'S MEMORANDUM IN SUPPORT OF ITS PETITION FOR REHEARING was served by United States Mail, postage prepaid, as follows:

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John S. Burbridge