

BEFORE THE
WYOMING ENVIRONMENTAL QUALITY COUNCIL

FILED

NOV 30 2007

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATER OF THE APPEAL OF)
WYOMING OUTDOOR COUNCIL AND)
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

ORDER GRANTING PETITIONERS'
MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Environmental Quality Council (EQC) for a decision on September 26, 2007, in Casper Wyoming. The EQC members present were Sara M. Flitner, Presiding Officer, Dennis M. Boal, Mark Gifford, John Morris, Kirby L. Hendrick, F. David Searle, and Richard C. Moore P.E. Also present for the EQC were Terri A. Lorenzon, Esq., and Bridget Hill, Assistant Attorney General. The Petitioners, Wyoming Outdoor Council and Powder River Basin Resource Council, represented by Steve Jones and the Respondent, the Wyoming Department of Environmental Quality (DEQ), represented by John S. Burbridge, Senior Assistant Attorney General, were present.

The Petitioners filed their Motion for Summary Judgment on July 23, 2007. The Respondent filed its Response to the Motion on August 6, 2007. On September 5, 2007, the EQC heard oral arguments from the parties and took the matter under advisement.

FINDINGS OF FACT

1. This matter challenges a decision by the Respondent DEQ to reclassify three tributary drainages to Crazy Woman Creek in Johnson County, Wyoming, referred to as Morris Draw, Unnamed Draw, and Short Unnamed Draw. That decision was issued by the Wyoming Department of Environmental Quality, Water Quality Division on Feb. 6, 2006.

2. A Petition to reclassify the aforementioned three draws was filed with the DEQ by Kennedy Oil on August 3, 2005.
3. The DEQ concluded that it was appropriate to reclassify these three tributaries to Class 4B, from Class 3B (see Para. 11 and 12 below for definitions).
4. The Use Attainability Analysis (UAA) study conducted in this matter was attached to the petitioners' Summary Judgment Motion as Exhibit 2. It revealed that there are existing reservoirs in two of the three tributaries.
5. The UAA study revealed that there were five impoundments/wetland areas. The total combined area affected by the impoundments within the three drainage areas is approximately nine acres. The three drainages combined contain about 69 miles of stream channels, and less than one percent of that total stream length of the three drainages was identified as "wet."
6. The UAA study was based upon a field study conducted on July 19, 2005.
7. The DEQ admitted in its Response to Request for Admissions, that there were several wetlands and "impoundments" identified by the UAA in the three tributaries, and that they all support aquatic life, are capable of supporting aquatic life and are capable of attaining an aquatic life use.
8. The UAA study revealed that the natural conditions of the three tributaries, whether described as ephemeral, intermittent or low flow conditions, do not prevent the attainment of an aquatic life use in those drainages.

CONCLUSIONS OF LAW

1. The EQC has jurisdiction over the subject matter and the parties to this proceeding.
2. The Environmental Quality Act, Wyo. Stat. § 35-11-112(b)(iii) grants the EQC authority to conduct hearings in cases contesting the administration of rule or regulation, and Wyo. Stat. § 35-11-112(c)(i) provides authority to approve, disapprove or modify any rule or regulation. The EQC conducts de novo hearings pursuant to the DEQ Rules of Practice and Procedure, the Wyoming Rules of Evidence, and the Wyoming Rules of Civil Procedure.

3. There is no genuine issue of material fact preventing the EQC from ruling on this matter, as a matter of law, in favor of the Petitioners in this case.

4. Class 3B waters of the state are defined in Chapter 1, Section 4(c)(ii), WWQR&R, as:

Class 3B. Class 3B waters are tributary waters including adjacent wetlands that are not known 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.

3. Class 4B waters of the state are defined in Chapter 1, Section 4(c)(ii), WWQR&R as:

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.

4. A Use Attainability Analysis is required to be conducted before a stream may be reclassified to a lower classification. See Chapter 1, Section 33(b), Wyoming Water Quality Rules and Regulations (WWQR&R).

5. The version of Chapter 1 applicable to this matter was adopted by the State of Wyoming on July 16, 2001.

6. The DEQ classified the three tributaries at issue in this matter as Class 3B when it adopted Chapter 1, WWQR&R on July 16, 2001.

7. The DEQ is required to comply with Sections 33 and 34 of Chapter 1, WWQR&R in reclassifying a water of the state.

8. Chapter 1, Section 33, WWQR&R, as in effect on the date of the DEQ's decision, reads, in pertinent part, as follows:

(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, 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; or ...

9. The DEQ did not claim any other basis for lowering the classification of the three tributaries to Class 4B, other than that set forth in Chapter 1, Section 33(b)(ii), WWQR&R.

10. One designated use for Class 3B waters of the state is an aquatic life use. Class 4B waters of the state are not designated to support an aquatic life use. Thus, the effect of DEQ's decision to lower the classification for these three streams was to remove the aquatic life use as a designated use for the three tributaries at issue in this matter.

11. The DEQ's decision to lower the classification of the three tributaries from Class 3B to Class 4B was not proper in that it violated the provisions of Chapter 1, Section 33(b)(ii). It was not appropriate for the DEQ to have lowered the classification for the three tributaries, given the facts relied upon by the DEQ, as set forth in the UAA, from Class 3B to Class 4B.

12. The law and rules and regulations, as applied to the undisputed facts in this matter, warrant the granting of the Petitioners' Motion for Summary Judgment.

ORDER

Based upon the foregoing findings of Fact and Conclusion of Law, the EQC hereby Orders that:

- A. The Summary Judgment Motion of the Petitioners is hereby granted.
- B. The decision of the DEQ to lower the classification of Morris Draw, Unnamed Draw, and Short Unnamed Draw to Class 4B is hereby revoked and rescinded.
- C. The classification of Morris Draw, Unnamed Draw, and Short Unnamed Draw is hereby restored to Class 3B.
- D. The DEQ is hereby directed to take all necessary steps to effectuate this Order and shall list the foregoing three tributaries as having a Class 3B classification in all its publications, and postings on its official web site.

Dated this 29 day of November, 2007.



Sara M. Flitner, Presiding Officer
Environmental Quality Council

CERTIFICATE OF SERVICE

I, Kim McGee, certify that at Cheyenne, Wyoming, on the 30th day of November, 2007, I served a copy of the foregoing **ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT** by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

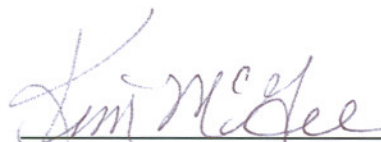
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