

BEFORE THE
WYOMING ENVIRONMENTAL QUALITY COUNCIL

Wyoming Outdoor Council and)
Powder River Basin Resource Council,)
)
Petitioners,)
)
vs.)
)
Wyoming Department of Environmental)
Quality, Water Quality Division,)
)
Respondent.)

Docket No. 06-3804

**PETITIONERS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY
JUDGMENT ON THE RECLASSIFICATION OF THREE DRAINAGES OF
CRAZY WOMAN CREEK AND THEIR TRIBUTARIES**

Comes now the Petitioners in this matter, Wyoming Outdoor Council and Powder River Basin Resource Council, by and through their attorney, and for their Brief in this matter, hereby present the following:

BACKGROUND

On February 6, 2006 the DEQ/WQD Administrator, John Wagner, made a final determination of the reclassification of three drainages to Crazy Woman Creek (Kennedy South Area Addition) and their tributaries. The determination was made after consideration of the "Use Attainability Analysis Kennedy Oil South Area Addition Johnson County, August 3, 2005," (attached hereto as Exhibit 2) and related public comments on the proposal.

This reclassification decision downgrades each of these tributaries to Crazy Woman Creek, referred to as Unnamed Draw, Short Unnamed Draw and Morris Draw

and all of their mapped and unmapped tributaries (hereinafter sometimes referred to collectively as "the three tributaries"), from Class 3B to Class 4B. The proposed Reclassification is attached hereto as Exhibit 1.

The Standard for Granting of Summary Judgments

Summary judgments may be granted based upon the standard set forth in Rule 56, Wyoming Rules of Civil Procedure (W.R.C.P.). See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The W.R.C.P. have been made applicable to proceedings before the Environmental Quality Council by The Rules of Practice and Procedure of the Department of Environmental Quality. Summary judgment is appropriate where there is no genuine issue of material fact and the movants (Wyoming Outdoor Council and Powder River Basin Resource Council in this case) are entitled to judgment as a matter of law. Rule 56(c), W.R.C.P.; Treemont, Inc. v. Hawley, 886 P. 2d 589 (Wyo., 1994). The issues presented below do not present a genuine issue of material fact and are matters of the interpretation of laws or regulations applicable to this case, specifically the Wyoming Administrative Procedure Act, the Wyoming Environmental Quality Act, and Chapter 1, Sections 33 and 34, Wyoming Water Quality Rules and Regulations (WWQR&R).

ISSUE PRESENTED

The Environmental Quality Council must decide in this case whether three tributaries of Crazy Woman Creek in Johnson County, Wyoming, were properly downgraded from Class 3B to Class 4B by the Wyoming Department of Environmental Quality, Water Quality Division. In order for the Department of Environmental Quality to do this, it is a requirement that they conduct a Use Attainability Analysis (a structured

scientific study as defined in Chapter 1, Sec. 2(b)(liv), Wyoming Water Quality Rules and Regulations) of the streams in question and determine whether such a downgrade in stream classification is justified pursuant to the requirements for such a downgrade, as set forth in Chapter 1, Sec. 33, Wyoming Water Quality Rules and Regulations (WWQR&R).

The issue thus presented for review to the EQC as part of this Motion for Summary Judgment is whether the DEQ/WQD can lower the classification of a stream, and thereby remove a designated use (in this case, an aquatic life use), when that designated use is already an existing and an attainable use present within the drainage in question. If answered in the negative, this matter would be completely resolved, and there would be no need to conduct a hearing in this matter.

Aquatic Life is an Existing Use in the Three Tributaries and Therefore the Downgrading of the Three Tributaries to Class 4B Is Not Allowed Under the Rule

The decision to reclassify three drainages to Crazy Woman Creek (Kennedy South Area Addition) and their tributaries should be struck by the Environmental Quality Council. There are five wetlands/impoundments that were documented in the Use Attainability Analysis (UAA) that was conducted by RETEC on behalf of Kennedy Oil. Each of these five wetlands/impoundments support aquatic life. In order to reclassify these drainages and their tributaries from Class 3B to 4B, the UAA must show that the drainages do not support aquatic life and that an aquatic life use cannot be attained within the drainage. In this case, it has been shown that the drainages do, in fact, support aquatic life and therefore should not have been reclassified as Class 4B waters.

The specific language that dictates the reclassification of waters in Wyoming is found in Wyoming Water Quality Rules and Regulations (WWQR&R), Chapter 1, Sec.

33. The applicable language in this case 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; or

...

WWQR&R, Chapter 1 Section 33.

The above language plainly states that the Water Quality Administrator may only remove a designated use when it is *not an existing use or an attainable use*. Id.

“Existing use” means “those uses actually attained in the water body on or after

November 28, 1975, whether or not they are included in the water quality standards.”

Chapter 1, Section 2(b)(xx), WWQR&R. In the present case, two of the three drainages,

Unnamed Draw and Morris Draw, support aquatic life according to both RETEC and the

DEQ/WQD. These drainages support aquatic life. A Class 3B classification for these

tributaries supports that aquatic life use. But by removing that designated use of aquatic

life from these three tributaries, the Water Quality Administrator has removed an existing

use, and also (obviously) an attainable use. But Section 33(b) specifically prohibits the Administrator from doing this. Therefore, as a matter of law, the DEQ should not have approved Kennedy Oil's proposal for the reclassification of these drainages to 4B waters.

The following are the definitions of Class 3B and 4B waters respectively:

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.

WWQR&R, Chapter 1, Section 4(c)(ii).

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.

WWQR&R, Chapter 1, Section 4(d)(ii).

The three tributaries meet the definition of Class 3B waters since they contain "sufficient hydrology to normally support and sustain communities of aquatic life including invertebrates, amphibians, or other flora and fauna." There is no dispute about this. As reported in the RETEC UAA, Ex. 2, pp. 2-4, 2-7, and as stated by DEQ/WQD in their Response to Interrogatories, Ex. 4, p. 1, #1, there are about nine acres of wetlands within these drainages. It may be, in fact, that these tributaries meet the definition of Class 2B waters, since they may have the capability of supporting fish as well. While

DEQ/WQD may be heard to argue that there are infrequent wetlands in these three drainages, it matters little, since an existing use (aquatic life) has already been documented and is admitted. Therefore a downgrade to eliminate that existing use violates the regulations.

The three drainages were erroneously downgraded. They meet the standards of Class 3B waters, as stated in WWQR&R, Chapter 1, Section 4(c)(ii) and thus should not have been reclassified to 4B. "Aquatic Life" is defined for these purposes as "fish, invertebrates, amphibians, and other flora and fauna which inhabit waters of the state at some stage of their life cycles." WWQR&R, Chapter 1, Section 2(b)(iv). The RETEC UAA documents the existence of impoundments. See Ex. 2, Appendix B. This implicitly acknowledges the existence of "aquatic life" in those impoundments. The DEQ/WQD has also acknowledged that the five wetlands/impoundments support "aquatic life." Ex. 3, Request for Admissions, #14-21.

Specifically, the DEQ responded in the affirmative when asked the following questions during discovery:

Request for admission No. 14: "The four wetlands identified by the UAA as present in the Unnamed drainage support aquatic life." Response: "Affirmative." Ex. 3, p. 3, #14.

Request for admission No. 16: "The wetland identified by the UAA as present in the Morris Draw drainage support aquatic life." Response: "Affirmative." Ex. 3, p. 3 #16.

Request for admission No. 18: "The three impoundments identified by the UAA study as present in Unnamed Draw all support aquatic life." Response: "Affirmative." Ex. 3, p. 3, #18.

The DEQ's responses to the above requests for admissions plainly show that there is absolutely no confusion as to whether the five wetland/impoundments located in Unnamed Draw and Morris Draw support aquatic life. Since the wetlands/impoundments do support aquatic life, the drainages clearly meet the requirements of 3B waters and should not have been reclassified to 4B waters.

As noted above, 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." WWQR&R, Chapter 1, Section 4(d)(ii). The field component of the RETEC UAA was completed during a single day in July, 2005. If the five wetlands/impoundments can support aquatic life in the middle of summer, in the midst of a serious multi-year drought, then certainly they can be categorized as capable of having the "hydrologic potential to normally sustain aquatic life...." Id.

**DEQ Cannot Use "Significance" as a Standard
to Justify the Downgrade of a Stream**

In this case the DEQ is relying on its policy, rather than on the rule itself, to make its determination that the three tributaries to Crazy Woman Creek all qualify for a "downgrade" to Class 4B, -- a stream classification for streams that do not support aquatic life. This is based upon the flawed analysis that within the tributaries there is no "significant" aquatic life present in the streams or wetlands of the drainages. Oddly,

neither the DEQ/WQD nor RETEC tested for the presence or absence of aquatic life in the tributaries. They have assumed that there is aquatic life in the drainages, in and around where the reservoirs are located. But such aquatic life is not "significant," according to DEQ/WQD. How do they know if it is significant or not, since they do not know what aquatic life exists in the drainages? More to the point, why is "significance" the criteria for determining the appropriateness of a Class 4B designation? By designating these streams as Class 4, the DEQ/WQD automatically condemns the wetlands and reservoirs that they have identified in the drainages to no protection for the aquatic life uses that they acknowledge exist in the drainages.

We are not talking about a few isolated puddles here. There are more than 4.49 acres of wetlands and reservoirs in Unnamed Draw, and another 4.5 acres of wetlands and reservoir in Morris Draw. DEQ/WQD admits this: "The total combined area affected by the impoundments within the 3 drainage areas is approximately 9 acres." Ex. 3, page 1. Yet, inexplicably, the DEQ/WQD rationalizes this substantial presence of wetlands and man-made lakes as being "insignificant" because such wetlands and reservoirs comprise "less than 1% of the total stream length." Ex.1, page 3, # 6. This is an embarrassingly preposterous rationale. DEQ/WQD appears to be basing its decision on percentages. Because those areas that do support aquatic life are less than 1% of the total stream miles, they are somehow not worthy of protection. DEQ/WQD does this despite the clear requirement of Chapter 1, Sec. 33(b), WWQR&R, that they may only remove a designated use which is not an existing use or an attainable use.

DEQ/WQD does not produce any evidence of having even looked for the presence of aquatic life. They did not sample for aquatic life. They do not know what

lives in these reservoirs or wetlands. Yet they have determined that whatever is there, even though they do not know what is there, is not a "significant aquatic resource." Ex. 4, page 2, question 2.

To base a determination of "significance" simply upon a percentage is stultifyingly obtuse, and shows a total lack of study on the part of DEQ/WQD. If the stream had been 100 miles long and there was one mile of flowing stream and wetlands (1%), could that one mile be condemned to a "no aquatic life" classification simply because the other 99 miles did not show the presence of aquatic life? This flies in the face of reality. Such an approach would condemn a mile of perfectly viable aquatic life habitat, simply because it happens to find itself in an otherwise dry stream channel. This makes no sense. Yellowstone Lake is the largest freshwater lake in North America, for its elevation. It is 136 square miles. North America is 9,355,000 square miles. That makes Yellowstone Lake .00145% of the total aerial extent of North America. That is between 1/1000th and 2/1000th of 1%. Yet who would try to claim that Yellowstone Lake is not a significant aquatic life resource for North America.

One look at the photographs of the reservoirs in Morris Draw and Unnamed Draw reveals significant man-made lakes that clearly will support aquatic life. See Ex. 2, Appendix B. Perhaps these reservoirs support endangered species or unique species of interest as defined by the Wyoming Game and Fish Department. But we don't know because DEQ did not even deem it worthy of investigation.

Even by its own rather loose standards, the DEQ/WQD admits that the notion of "significance" is rather vague: "Significance is not precisely defined and will be determined on a case-by-case basis after consideration of the ratio of wetland acres to

stream length in addition to wetland functions and values." See Implementation Policies for Antidegradation, Mixing Zones, Turbidity and Use Attainability Analysis, at p. 33. (That policy document can be viewed at deq.state.wy.us/wqd/watershed/surfacestandards/Downloads/Standards/11968-doc.pdf). The policy also states that "The extent of wetland occurrence cannot be used to remove aquatic life protections from waterbodies that are known to normally contain water for extended periods even though they do not exhibit a significant amount of wetlands." See Implementation Policies for Antidegradation, Mixing Zones, Turbidity and Use Attainability Analysis, at p. 33. So the DEQ/WQD policy would seem to rule out the downgrading of reservoirs that are present year-round in any event.

But the larger point is that DEQ/WQD should not be allowed to use simply a "percentage" calculation to determine significance, without any investigation or evaluation as to whether a wetland or a water body is significant in a qualitative, rather than a quantitative, way.

Clean Water Act Regulations Prohibit DEQ/WQD From Eliminating an Existing Use

The federal rules regarding Use Attainability Analyses are very similar to the state regulations. See 40 CFR 131.10(g), which is very similar to Chapter 1, Sec. 33, WWQR&R. Note that 40 CFR 131.10(g)(2) is almost identical to Chapter 1, Sec. 33(b)(ii) -- the provision chiefly relied on by DEQ/WQD in this case. It is noteworthy that the federal rules, which DEQ has attempted to replicate, are similarly void of any "insignificance" exception to the requirement that no water body may be downgraded if there is an existing use present in the water body and the proposed reclassification is not

designed to support that existing use. The wording of Chapter 1, Sec. 33(b), WWQR&R is fairly similar to the wording of the federal regulation. The federal regulation says:

(h) States may not remove designated uses if:

(1) They are existing uses, as defined in Section 131.3, unless a use requiring more stringent criteria is added; or

(2) Such uses will be attained by implementing effluent limits required under Sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.

-- 40 CFR 131.10(h)

The federal regulations go on to further require that:

(i) Where existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained.

-- 40 CFR Sec. 131.10(i)

Thus, even if this downgrade of the three tributaries were to be upheld by the EQC, the DEQ/WQD would be required to "revise its standards to reflect the uses actually being attained," since it is already a known fact that these drainages contain nine acres of wetlands and reservoirs.

When There is a Conflict Between the Rule and the Policy, the Rule Governs

There is also the question of whether the DEQ/WQD can rely on its Implementation Policy for Anti-Degradation, Mixing Zones and Use Attainability Analysis. Considering the fact that the Wyoming Administrative Procedure Act defines a rule as any "agency statement of general applicability that implements, interprets and prescribes law....," W.S. 16-3-101 (b)(ix) [emphasis added], perhaps DEQ should have promulgated its "Implementation Policy" and having failed to do so, it should be ignored by the EQC in deciding this matter.

This also raises the larger question of whether any policy can modify, rather than simply explain or amplify upon, existing rules and regulations. Clearly, policies cannot modify rules. Rules have the force and effect of law. Policies do not. Where there is a conflict between the two, the rule controls, and the policy must be ignored. "If an administrative policy conflicts with a statute, rule, or court decision, the policy must be repudiated." Davis v. Taylor & Bogus Foundry, 2003 WL 1849172 (Ohio App., April 10, 2003); Burrows v. Industrial Commission 78 Ohio St.3d 78, 676 N.E.2d 519. In this case the DEQ is relying on its policy, rather than the rule itself, in making its determination that the three tributaries to Crazy Woman Creek all qualify for a "downgrade" to Class 4B, -- stream classifications that do not support aquatic life. But the rule itself, Chapter 1, Sec. 33(b), clearly does not allow for such an action where an existing designated use is present within the stream(s) in question (as it is here for aquatic life), and would be eliminated by the reclassification.

Any policy that conflicts with a rule remains invalid. Lorenc v. Call, 789 P.2d 46, 49 (Utah App., 1990). Therefore, the EQC should simply ignore the Implementation Policy in this case, and restore the classification of the three tributaries to Class 3B, as the rule dictates. See also Pacific Gas and Electric Co. v Federal Power Commission, 506 F.2d 33, 40 (D.C. Cir., 1974)

The UAA conducted by the contractor RETEC (Ex. 2), on behalf of Kennedy Oil is, without doubt, a biased document written to achieve the pre-determined outcome of supporting the reclassification of the three drainages in question from 3B to 4B waters. The "Purpose" statement of the UAA states, "[t]he purpose of this UAA is to *support* the petition to reclassify from the current 3B classification to Class 4B the following

drainages...” Ex. 2, p. 1-1. Can such a document truly be considered a "structured scientific study?" RETEC uses the fact that the three drainages were once categorized as Class 4 waters as a reason why they should once again be classified as Class 4 waters. See Ex. 2, p. 1-1. This is faulty logic. Regardless of what the drainages *were* classified as, they are now Class 3B waters (and deservedly so, given the presence of nine acres of wetlands and impoundments) and demand that level of protection. Further, it is important to remember that the classification system has changed and the classification system that was used prior to July, 2001, is no longer applicable. Finally, RETEC zeros right in on the language contained in the “DEQ Implementation Policy for Anti-Degradation, Mixing Zones and Use Attainability Analysis” rather than the language contained in the actual regulation, which is stated in WWQR&R, Chapter 1, Section 33(b). See discussion *supra*. RETEC bases its reclassification on this language. Because the language contained in the “Implementation Policy” is in direct conflict with the language in the actual law, the language stated in the law is controlling. When the language from WWQR&R, Chapter 1, Section 33(b) is applied to the instant case, the outcome is necessarily that the Environmental Quality Council restore the 3B Classification for the drainages in question.

Conclusion

This proposal to reclassify the three drainages to Class 4B waters serves no other purpose than to make it cheaper for an oil and gas company to dispose of CBM produced water. This monetary benefit for the oil company comes at a significant detriment to the Wyoming public and this State’s environment and natural landscape. The bottom line is that the Class 4B classification would allow significantly more pollutants in discharge

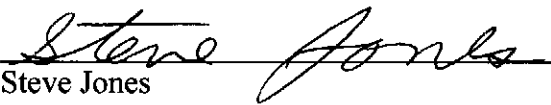
water, without appropriate limitations, than the 3B classification. The irony here is that Class 4B waters are not supposed to protect for aquatic life uses, but the DEQ still happily categorizes these same waters as safe for recreational purposes. Even with a Class 3B classification, the oil company will still be able to develop the proposed 128 CBM wells and discharge the produced water associated with those wells into the drainages in question, albeit (perhaps) at a higher disposal or treatment cost to them, but more importantly, without doing unnecessary environmental damage to Wyoming.

SUMMARY

There being no genuine issue of material fact with respect to the issues set forth above, the Petitioners ask that the EQC reverse and set aside the Reclassification of Morris Draw, Unnamed Draw and Short Unnamed Draw, restore their classification as Class 3B waters, and issue such further orders to the DEQ/WQD as it may deem just and equitable.

WHEREFORE, Petitioners move that their Motion for Summary Judgment be granted.

Dated this 20th day of July, 2007.


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