

FILED

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Terri A. Lorenzon, Director
Environmental Quality Council

**BEFORE THE
WYOMING ENVIRONMENTAL QUALITY COUNCIL**

In the Matter 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

PETITIONERS' RESPONSE TO MOTION TO INTERVENE

Comes now the Wyoming Outdoor Council and the Powder River Basin Resource Council (hereinafter "Petitioners"), and for Petitioners' Response To Motion To Intervene, hereby presents the following:

BACKGROUND

The Wyoming Department of Environmental Quality, Water Quality Division (DEQ/WQD) reclassified three tributaries, known as Unnamed Draw, Short Unnamed Draw, and Morris Draw (hereinafter "the three tributaries") from Class 3B waters of the state to Class 4B waters of the state. The Petitioners Wyoming Outdoor Council and Powder River Basin Resource Council brought this case as a challenge to that reclassification.

On July 19, 2005, a consultant (known as RETEC) hired by Kennedy Oil Company conducted a Use Attainability Analysis (UAA) for the three tributaries. Subsequently, the DEQ/WQD reviewed the UAA report of RETEC, dated August 3, 2005, just two weeks later, and announced its intention to reclassify the three tributaries from Class 3B to Class 4B in a public notice dated November 15, 2005. Various commenters submitted comments. Subsequently, after reviewing the comments, 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," 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. This was exactly what Kennedy Oil had asked DEQ to do.

While Kennedy Oil paid for the Use Attainability Analysis conducted by RETEC, it has never been a party to this case, nor have any of its successors in interest.

Petitions challenging the reclassification of the three tributaries were filed by Powder River Basin Resource Council on April 5, 2006, and by Wyoming Outdoor Council on April 6, 2006. A Scheduling Order was subsequently issued by the EQC on March 16, 2007. Kennedy Oil Company was sent copies of all three documents. In addition, Randall T. Cox, Attorney at Law, was sent a copy of the Scheduling Order.

On July 20, 2007, the Petitioners filed their Motion for Summary Judgment in this matter. The DEQ responded to that Motion on August 6, 2007. The Pre-Hearing Order was issued on August 10, 2007, and a Pre-Hearing conference was held on September 5, 2007, at which time the Petitioners' Motion for Summary Judgment was argued before the EQC. The hearing date was set for September 26, 2007, at which time the EQC ruled in favor of the Petitioners and granted Summary Judgment, requiring the DEQ to revoke its Class 4B classification for the three tributaries, and restore them to Class 3B

classification. While the Petitioners prepared a proposed order for the EQC, the DEQ would not agree to approve it as to form. Ultimately, the Order Granting Petitioners' Motion for Summary Judgment was filed in this matter on November 30, 2007.

On January 3, 2008, more than 30 days after the entry of the final Order in this matter, the Petroleum Association of Wyoming filed its Motion to Intervene.

During the entire proceeding, neither Kennedy Oil Company, nor its successors in interest, (upon information and belief: Lance Energy and then later Pennaco Oil), nor the Petroleum Association of Wyoming ever expressed any interest in joining or intervening in this case. Upon information and belief, all of the documents filed in this matter were available for public inspection at the EQC internet web site, from the initiation of the proceeding in April 2006, to the present.

The Petroleum Association of Wyoming has not disclosed whether Kennedy Oil or any of its successors in interest are or were members of their association at any relevant time in the past two and a half years.

ARGUMENT

PAW'S MOTION WAS NOT TIMELY FILED

Chapter 2, Section 7 of the Rules of Practice and Procedure of the Department of Environmental Quality provides as follows:

Section 7. Intervention.

(a) Any person interested in obtaining the relief sought by a party or otherwise interested in the determination of a proceeding relating to other than surface coal mining operations pending before the Council may petition for leave to intervene in such proceeding prior to or at the date of hearing, but not thereafter except for good cause shown. The petition shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and if affirmative relief is sought, the same should conform to the requirements for a formal petition. Leave will not be granted unless Council shall determine that the party requesting to

intervene is adversely affected by the action, has a legal right under the Environmental Quality Act or the Wyoming Administrative Procedure Act.

As noted above, intervention by a party is not allowed after the hearing has taken place in a case, "except for good cause shown." The Petroleum Association of Wyoming has not shown any good cause which would permit it to intervene at such a late date -- after the case has been concluded and the final order entered, with the only thing even pending being the DEQ's Petition for Reconsideration. They do not even attempt to make any arguments about why they should be allowed to intervene at such a late date, in such an untimely fashion. PAW's only argument is that PAW would be adversely affected by the ruling. That is not sufficient to allow an intervention under the circumstances. PAW does not allege that it was not aware that this case was pending. PAW's motion is clearly untimely and must be denied for that reason alone.

At any point before the September 26, 2007 hearing date, which was set in this matter on March 16, 2007, PAW could have filed a motion to intervene. They did not do so, even though the arguments laid out by the Petitioners were well known. Any concern about being adversely affected by a potential adverse ruling in the case were readily apparent from a review of either of the Petitions of the Petitioners, or from their Motion for Summary Judgment and Brief in Support. Despite this, PAW failed to move to intervene. They sat on their rights. They should not be allowed to complain at this late date.

PAW does not allege anything that would constitute a "good cause shown" for being so late. PAW does not even give us a hint. What could possibly justify such tardiness? PAW does not even attempt to make a case or come up with an excuse. PAW just says, in effect: "Our interests are adversely affected. Let us in." If the EQC allows this intervention, it will set a precedent such that every potential intervenor will come to the conclusion that it can just wait until an EQC order is entered, read it over, and then decide whether they like it or not. If they don't like it then they can just intervene at that time. The EQC has enough to worry about without having to deal with after-the-fact intervenors.

PAW does not cite any cases in Wyoming, or in any of the other 49 states, nor in the federal court system, that have allowed an intervention after the final order has been issued in a case. It is not surprising. We could not find any either.

PAW'S INTERESTS ARE BEING ADEQUATELY REPRESENTED

Rule 24(a), Wyoming Rules of Civil Procedure, which applies to this matter by virtue of the Rules of Practice and Procedure of the Wyoming Department of Environmental Quality, to the extent it is not inconsistent with the administrative rules, provides:

(a) Intervention of right. - Upon timely application anyone shall be permitted to intervene in an action:

- (1) When a statute confers an unconditional right to intervene; or
- (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a) provides that where "the applicant's interest is adequately represented by existing parties" there is no right to intervene. Such is the case in this matter. The Wyoming Department of Environmental Quality has sought to uphold its decision to reclassify the three tributaries to Class 4B. It persisted in this case, and vigorously defended its decision to reclassify, even after the applicant, Kennedy Oil Company, had dropped out of the case. The PAW wants exactly the same thing as the DEQ in this case: to see the DEQ's decision to down-grade the three tributaries to Class 4B upheld. Their interests are identical in this regard.

There is, therefore, no need to involve third parties such as the PAW at this stage of the litigation when PAW's interests have been fully and adequately represented by the Wyoming Department of Environmental Quality and their able attorneys.

As some courts have noted, if "the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate

representation.” Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006). The PAW has not made any such compelling showing. The DEQ has represented the interests of PAW quite well. The DEQ granted completely the proposal of Kennedy Oil to downgrade the entire length of all three tributaries. The DEQ did not settle the matter prior to hearing, and gave no indication that it wavered even in the slightest manner from its original position -- to defend the entire reclassification, with no exceptions. This demonstrated a thorough determination on the part of DEQ to do the bidding of the oil and gas industry. So PAW cannot now be heard to complain that DEQ did not do a good job. It took the same position as the PAW would have been expected to take, and defended that position vigorously.

In any event, the burden rests with the PAW to demonstrate that they have a right to intervene, and they have failed to so demonstrate. Do any of PAW's members have a direct interest in the classification of these particular three tributaries at issue in this case? We do not know. PAW has not bothered to tell us. Is Kennedy Oil, or its successor in interest, a member of PAW? Again, we do not know. They have therefore failed to meet their burden of showing a right to intervene, and PAW's petition should therefore be denied.

THE PETITIONERS' INTERESTS WOULD BE PREJUDICED

The PAW seeks, ultimately, to re-open this case. They want the EQC to reverse its Summary Judgment, granted in favor of the Petitioners, and then have a full contested-case hearing in this matter. This would be prejudicial to the Petitioners in this matter, since the availability of witnesses to testify has changed.

It turns out that one of the Petitioners witnesses, Bill Turner, a herpetologist and employee of the Wyoming Game and Fish Department at the time of the hearing, was subpoenaed, was present at the hearing on September 26, 2007, and was prepared to testify about the presence of frogs and other amphibians in the Crazy Woman Creek drainage, and their habitat during their various life cycle stages. Now, however, he no

longer works for the Wyoming Game and Fish Department and is beyond the subpoena power of the EQC, since he now lives in Florida. The Petitioners would be forced to hire him at considerable expense to come to a future hearing in this matter, and would have to fly him up from Florida to Wyoming for the hearing -- even assuming he would agree to come, since, without a subpoena, he would be under no obligation to do so. He may not want to come or be able to come in any event since he was present at the last scheduled hearing in this matter only due to the issuance of a subpoena by the EQC for him to testify.

WHEREFORE, the Petitioners, Wyoming Outdoor Council and Powder River Basin Resource Council move that the Environmental Quality Council:

A. Deny the Motion to Intervene of the Petroleum Association of Wyoming.

Dated: January 25, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petitioners' Response to Motion to Intervene, by placing a copy of the same in the U.S. mail, postage prepaid, on the 25th day of January, 2008, addressed to the following:

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Steve Jones

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