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

RESPONSE OF PETITIONERS TO DEPARTMENT OF ENVIRONMENTAL QUALITY'S PETITION FOR REHEARING

Comes now the Wyoming Outdoor Council and Powder River Basin Resource Council, (hereinafter the Petitioners) and hereby present their response to the "Petition for Rehearing" of the Wyoming Department of Environmental Quality, Water Quality Division (DEQ).

STANDARD OF REVIEW

Chapter IV, Section 1, of the DEQ Rules of Practice and Procedure, provides as follows:

> Section 1. Petition for Rehearing.
> (a) Any party seeking any change in any decision of the Council may file a petition for rehearing within twenty (20) days after the written decision of the Council has been issued.
> (b) Any petition for rehearing filed under this section must be confined to new questions raised by the decision and upon which the petitioner had no opportunity to argue before the Council.
> (c) Any petition for rehearing must specify whether the prayer is for reconsideration, rehearing, further hearing, modification of effective date, vacation, suspension or otherwise.
> (d) Except as the Council may otherwise direct, the filing of a petition under this section shall not stay the effectiveness of any decision respecting the promulgation, amendment, or repeal of any rule or rules.

This rule also reflects case law in Wyoming, which does not allow a rehearing simply to reiterate the arguments made during the initial hearing. State Board of Equalization v. Jackson Hole Ski Corp., 745 P. 2d 58, 60 (Wyo. 1987); Elmer vs. State, 466 P. 2d 375, 376 (Wyo. 1970). As noted in Elmer, "Rehearings will not be granted ... where all the facts have been duly considered by the court and the application presents no new facts but simply reiterates the arguments made on the hearing." Elmer vs. State, 466 P. 2d 375, 376 (Wyo. 1970).

ARGUMENT

It must first be pointed out that there has been no hearing in this matter. The Petitioners were granted summary judgment in this case, based upon the facts as presented by the parties that were not in dispute. It is therefore questionable whether the DEQ has cited the correct rule, Chapter IV, Section 1, of the Rules of Practice and Procedure of the Department of Environmental Quality, which is entitled "Petition for Rehearing." The DEQ does not seek a rehearing in this matter. Rather, the DEQ seeks a reversal of the Environmental Quality Council's (EQC's) decision to grant the Petitioners' Motion for Summary Judgment, which would then lead to an initial hearing in this matter.

Chapter IV, Section 1(b) of the Rules of Practice and Procedure of the Department of Environmental Quality provides, in part, that:

> Any petition for rehearing filed under this section must be confined to new questions raised by the decision and upon which petitioner had no opportunity to argue before the Council.

The DEQ's motion for rehearing does not meet this standard. The issue that DEQ wants to rehear is the same. There is no new question. It was fully presented to the EQC in their pleadings and in DEQ's Response to Petitioners' Motion for Summary Judgment. At all stages prior to the EQC order granting summary judgment, DEQ had ample opportunity to present its arguments and reasoning. And that it did. The DEQ has not argued anything new in its Petition for Rehearing. The DEQ does not point to anything in its Petition for Rehearing that relates to "new questions" that have come up as a result of the EQC decision, for which the DEQ had no opportunity to argue at the time that the Motion for Summary Judgment was being argued. The DEQ's petition is really a rehash of arguments they have already been made.

As further discussed below, the EQC order does not raise "new questions" of fact or law that the DEQ did not have an opportunity to refute. Instead, the order acts in the manner that any order for summary judgment should – it decides the issues as a matter of law, based upon facts that are undisputed.

The DEQ specifically complains of only one paragraph in the Order entered by the EQC in this matter: Paragraph 9 of the Conclusions of Law portion of the Order. It appears that Paragraph 9 of the Order contains no reference to Sections 3, 4 and 34 of Chapter 1, which, the DEQ points out, formed the basis for the Water Quality Administrator's conclusion that the three

tributaries to Crazy Woman Creek should be reclassified from Class 3B to Class 4B. The DEQ objects to this omission.

Paragraphs 8 and 9 of the Conclusions of Law portion of the Order provide:

> 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.

Paragraph 9 immediately followed Paragraph 8, which quoted the relevant subsections of Section 33(b). Section 33(b) states that no reclassification can occur (if it results in a lower classification), and no designated use can be removed, unless the requirements of Section 33(b) have been met. The point of Paragraph 9 was to make it clear that the DEQ was not relying on any of the other "factors" set forth in Section 33(b), other than Section 33(b)(ii). In other words, the DEQ did not rely on either Section 33(b)(i), (iii), (iv), (v), or (vi) in claiming that the lowering of the classification, and the removal of a designated use, for the three tributaries, was justified.

Paragraph 9 does not imply that the DEQ did not consider other provisions of Chapter 1. Notably, portions of Chapter 1 Section 4 are quoted elsewhere in the Order, setting forth the

definitions of Class 3B and Class 4B waters. Also Chapter 1, Section 34 is referred to in Paragraph 7 of the Order. Nowhere in the Order does it say that the DEQ ignored or did not properly apply the provisions of Sections 3, 4, and 34.

The overall point of the EQC decision is this: The DEQ decided to lower the classification and remove a designated use of the three tributaries despite the unequivocal prohibition of such a decision where, as here, there is an existing use (aquatic life) and an attainable use (aquatic life) present within the drainages. But Section 33(b) is clear and unequivocal that a water classification can only be lowered, or a designated use removed, if the use in question is not an existing use or an attainable use. In Paragraph 8 of the Findings of Fact portion of the Order, the EQC found 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.

It is this finding, which is quite obviously true, based upon a review of the Use Attainability Analysis prepared by RETEC, that rankles DEQ. Yet it is very apparent not only from the photographs of the sizeable reservoirs, found in the UAA, but also from DEQ's own admissions, that aquatic life can exist and be sustained in these drainages. (See the UAA study, attached as Exhibit 2 to the Petitioners' Brief in Support of Motion for Summary Judgment.)

While it is not entirely clear, the DEQ is apparently arguing that Section 33(b) needs to be read in *pari materia* with other provisions of Chapter 1, and when that is done, it somehow allows the DEQ to ignore or get around the clear prohibition of Section 33(b) regarding the down-grading of an existing or attainable use.

But the undisputed facts are these: the DEQ acted to lower a designated use (i. e. aquatic life) which is a protected and designated use, for the three drainages despite the fact that the three drainages contain nine (9) acres of wetlands and impoundments which support, and will continue to support on a sustainable basis, aquatic life. The DEQ attempted to argue that these 9 acres of wetlands were, in effect, insignificant. (The DEQ attempts to make the same argument in their Petition for Rehearing. See DEQ's Memorandum in Support at pp. 4 - 5.) But there is no provision for "significance" or "frequency of occurrence" in Section 33. If there is an existing use, or an attainable use, in a watershed, the water classification cannot be lowered by the Water Quality Administrator in such a way as to eliminate those uses. That much is clear. The EQC

acted in accordance with the provisions of Chapter 1, and its Order in this matter sets forth a very straightforward reading and interpretation of the law and the applicable rules and regulations.

It must be remembered that the definition of Class 3B waters, which is quoted in the Order itself, includes this sentence:

> 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.

Despite the fact that the undisputed facts also clearly demonstrate that the tributaries do have sufficient hydrology to support aquatic life -- at least in those portions of the drainages that contain wetlands (even according to the inadequate UAA survey that was conducted) -- the DEQ apparently expects the EQC to ignore this portion of the definition of Class 3B waters as well.

The DEQ is only focused on one part of the definition of Class 3B waters, which says:

> In general, 3B waters are characterized by frequent linear wetland occurrences or impoundments within or adjacent to the stream channel over its entire length.

Whether this would apply to the three tributaries might be a matter of some debate. But it is only a guideline, in any event. It is not an absolute criterion. It merely says that "in general," Class 3B water will have certain characteristics, which include frequent linear wetland occurrences. "Frequent" is not defined. Contrast this with the more certain language in the definition that requires Class 3B waters to normally support aquatic life during some stage of their life cycle. Contrast it further with the clear <u>prohibition</u> set forth in Section 33(b) that an existing use or an attainable use cannot be lowered or removed.

The DEQ wants the EQC to ignore the clear prohibitions of Section 33(b). The UAA that DEQ accepted uncritically, was a slipshod job that amounted to only a one-day "windshield survey" done in July during a very dry drought period. <u>Yet neither the DEQ nor the consultant hired by Kennedy Oil to do the survey (RETEC) either visually looked for or sampled for the presence of aquatic life.</u> It was a wholly inadequate analysis, but even so it revealed the presence of wetlands and aquatic life -- and DEQ conceded that point. (See DEQ's Response to Petitioners First Set of Requests for Admission, Para. #14 through #21, attached to the Petitioners Brief in Support of Their Motion for Summary Judgment as Exhibit 3.)

CONCLUSION

The message that the DEQ should take away from this decision by the EQC to rant the Petitioners' Motion for Summary Judgment is twofold:

a. The DEQ cannot ignore certain clear prohibitions of the rules and regulations, just because they do not like the terms thereof.

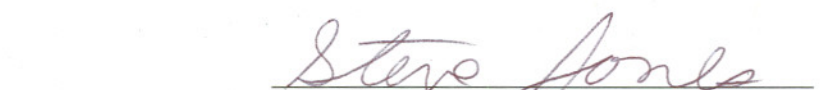
b. The DEQ must learn to take the task of conducting a UAA seriously and make sure it thoroughly and carefully develops the facts necessary to satisfy the requirements of the rules. A UAA that sets out to support a pre-determined conclusion is clearly biased and should never be considered adequate to justify a down-grade of a water of the state.

For the foregoing reasons, the Petition for Rehearing of the DEQ should be denied by the Environmental Quality Council as being wholly without merit.

NOTE:

Please note: This Response Of Petitioners To Department Of Environmental Quality's Petition For Rehearing, is not in any way a response to the Petroleum Association of Wyoming's Memorandum in Support of Petition for Rehearing, dated January 8, 2008, which the Petitioners did not receive until Jan. 10, 2008. The Petitioners will only
respond to that latter document if the Petroleum Association of Wyoming is allowed in Intervene in this matter.

Respectfully submitted this 11th day of January 2008.



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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Response of Petitioners to Department of Environmental Quality's Petition for Rehearing, by placing a copy of the same in the U.S. mail, postage prepaid, on the 11th day of January, 2008, addressed to the following:

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