

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' PRE-HEARING MEMORANDUM

Comes now the Petitioners in this matter, Wyoming Outdoor Council and Powder River Basin Resource Council, by and through their attorney, Steve Jones, and hereby present their Pre-Hearing Memorandum, as follows:

Summation of the Facts

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 brought this case as a challenge to this reclassification.

On July 19, 2005, a consultant (known as The RETEC Group, Inc.) 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, 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," (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.

Two of the three drainages have reservoirs in them, and had them there at the time that the Use Attainability Analysis was conducted, on July __, 2005. There are a total of five wetlands in the three drainages. These reservoirs, it is admitted by all parties, support aquatic life, are capable of supporting aquatic life, and are capable of attaining an aquatic life use, which is a Class 3 water standard classification. While Kennedy Oil paid for the Use Attainability Analysis, it is not a party to this case, nor is its successor in interest.

Legal Issues

The legal questions to be resolved by the Environmental Quality Council are:

1. Were the three tributaries properly reclassified as Class 4B Streams?

2. Can the DEQ/WQD reclassify a stream to eliminate aquatic life protections (Class 3) where, as here, there are portions of the stream that support aquatic life, and are capable of supporting aquatic life?

3. Can DEQ/WQD rely, as it did in this case, on a UAA study conducted by a consultant that is paid for by the proponent of the reclassification, without conducting its own study?

4. Does the UAA study conducted in this case meet the requirements of state and federal law?

5. Is DEQ/WQD allowed to eliminate a water use classification for a stream, as it did here, where that water use already exists within the water (stream) in question?

6. Can DEQ/WQD eliminate a water use classification for a stream on the ground that there is not significant aquatic life use within the drainages in question?

Witnesses

The Petitioners will call the following witness:

Bill DiRienzo
Supervisor, Wyoming Pollutant Discharge Elimination System
Department of Environmental Quality
Water Quality Division
122 W. 25th St.
4th Floor West
Cheyenne, WY 82002
307-777-7781

Mr. DiRienzo reviewed the Kennedy Oil petition for a change of classification for the three tributaries, and reviewed the UAA prepared by RETEC, on behalf of Kennedy Oil. Mr. DiRienzo will be cross-examined regarding his knowledge and understanding of the Kennedy Oil petition, the UAA study, and whatever actions he took (or did not take)

or additional investigation he made (or did not make) into the matter before concluding that the reclassification of the three tributaries was proper under state law.

The Petitioners may call the following witnesses:

John Wagner
Administrator, Water Quality Division
Department of Environmental Quality
122 W. 25th St.
4th Floor West
Cheyenne, WY 82002
307-777-7781

Kimberly Dickerson
U.S. Fish and Wildlife Service
Ecological Services
4000 Airport Parkway
Cheyenne, WY 82001
(307) 772-2374 ext. 230

Brian T. Kelly
Field Supervisor, Wyoming State Office
U.S. Fish and Wildlife Service
Ecological Services
4000 Airport Parkway
Cheyenne, WY 82001
(307) 772-2374 ext. 234

Nikki Lohse
District Manager
Lake DeSmet Conservation District
760 W. Fetterman
Buffalo, WY 82834
(307) 684-2526 ext. 3

Dave Fraley
Lake DeSmet Conservation District
760 W. Fetterman
Buffalo, WY 82834
(307) 684-2526

Phillip Gonzales
National Resource Conservation Service
621 W. Fetterman
Buffalo, WY 82834
(307) 684-2526 ext. 106

John Amos
SkyTruth
P.O. Box 3283

Shepherdstown, WV 25443-3283
304-260-8886

Mr. Wagner would be expected to testify, if called, about his reasoning and justifications used in arriving at his conclusion that a reclassification of the three tributaries to Class 4B was in accordance with state and federal law.

Ms. Dickerson and Mr. Kelly would be expected to testify, if called, about the information set forth in the comment letter of the U. S. Fish and Wildlife Service dated Dec. 12, 2005, concerning the reclassification of the three tributaries. More generally, they are expected to testify about the adequacy of the UAA to determine the presence or absence of aquatic life, and about whether these drainages are capable of supporting aquatic life.

Ms. Lohse is expected to testify, if called, about the information set forth in the comment letter of the Lake DeSmet Conservation District to DEQ/WQD dated Dec. 20, 2005, concerning the reclassification of the three tributaries. More generally, she is expected to testify about the adequacy of the UAA as a structured scientific study and whether adequate information was developed as part of that study, or whether more information is needed.

Mr. Fraley is expected to testify, if called, about the information set forth in the comment letter of the Lake DeSmet Conservation District to DEQ/WQD dated Dec. 20, 2005, concerning the reclassification of the three tributaries. More generally, he is expected to testify about the adequacy of the UAA as a structured scientific study about his concerns as a landowner with protecting the aquatic life values of tributaries to Crazy Woman Creek and the Powder River.

Mr. Gonzales is expected to testify, if called, about the adequacy of the UAA as a structured scientific study and whether adequate information was developed as part of that study, or whether more information is needed in the form of a survey, an inventory, on-site sampling, or other forms of information development and investigation. More generally he is expected to testify about the importance of protecting aquatic life values in the Powder River basin.

Mr. John Amos is an expert in remote sensing technology, aerial photography and remote mapping. He has a Bachelors of Science degree in Geological Sciences from Cornell University, and a Masters of Science degree in Geology and Geophysics from the University of Wyoming. He is expected to testify, if called, about aerial photographs which he has examined in the area of the three drainages and what it reveals in terms of the presence or absence of aquatic life, and the need for a more detailed investigation of the area to determine the presence or absence of wetlands or other evidence of the ability of the 69 stream miles contained in three tributaries to support aquatic life.

Additionally, the Petitioners may call any witness listed by the DEQ/WQD, and may also call any witness that may be needed for rebuttal testimony, if allowed.

Exhibits

The Petitioners expect to use the following exhibits during the course of the hearing:

Exhibit 1. DEQ Proposed Reclassification of Three Drainages to Crazy Woman Creek (Kennedy Oil South Area Addition), Johnson County, Wyoming, dated November 15, 2006

Exhibit 2. Use Attainability Analysis, Kennedy Oil South Area addition, Johnson County, Wyoming, dated August 3, 2005.

Exhibit 3. Respondent's Response to Petitioners' First Set of Requests for Admission, filed May 11, 2007.

Exhibit 4. Response of the Department of Environmental Quality to Petitioner's First Set of Interrogatories, filed June 29, 2007.

Exhibit 5. Letter from Nikki Lohse at Lake DeSmet Conservation District to Bill DiRienzo at Wyoming DEQ, dated December 20, 2005.

Exhibit 6. Letter from Bill Wuerthele at United States Environmental Protection Agency to Bill DiRienzo at Wyoming DEQ, dated December 19, 2005.

Exhibit 7. Letter from Brian T. Kelly at United States Department of the Interior to Bill DiRienzo at Wyoming DEQ, dated December 12, 2005.

Exhibit 8. Letter from John S. Burbridge at Office of the Attorney General to Robert E. Roberts at U.S. Environmental Protection Agency, dated April 14, 2006.

Exhibit 9. Letter from Robert E. Roberts at U.S. Environmental Protection Agency to John V. Corra at Wyoming Department of Environmental

Exhibit 10. Letter to Robbie Roberts from DEQ/WQD dated April 17, 2006.

Exhibits 11 to __:

These exhibits are a number of infra-red aerial photography maps showing the area of the three tributaries. They were taken from publicly available data, and were taken during the late summer of 2001 and 2002, during which the area was under extreme drought conditions. They can be found at the following web site urls:

July 2001: <http://www.drought.unl.edu/dm/archive/2001/drmon0731.htm>

July 2002: <http://www.drought.unl.edu/dm/archive/2002/drmon0730.htm>

Exhibit __

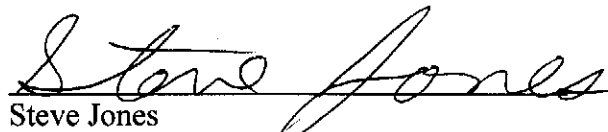
The Petitioners will also use a drought condition map for July of 2002 that includes Wyoming, which can be found at:

http://www.drought.unl.edu/dm/dmconus_archive.htm

Additionally, the Petitioners may use as an exhibit any document found in the file of the DEQ/WQD on this matter, any document referenced by the DEQ/WQD in their Responses to Interrogatories or Requests for Admission, any exhibit listed or used by the DEQ/WQD, and may use other evidence or documents developed or discovered after the date of this Pre-Hearing Memorandum.

Dated this 10th day of August 2007.

Respectfully submitted,

A handwritten signature in cursive script that reads "Steve Jones". The signature is written in black ink and is positioned above a horizontal line.

Steve Jones
Watershed Protection Program Attorney
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307-332-6899 (fax)
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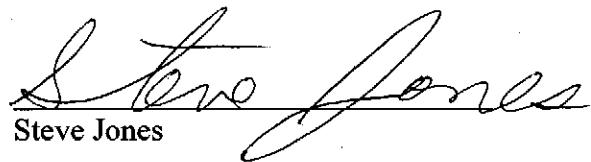
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Petitioners' Pre-Hearing Memorandum, by placing a copy of the same in the U.S. mail, postage prepaid, on the 10th day of August, 2007, and by forwarding to them an electronic version of the same, addressed to the following:

John Burbridge
Assistant Attorney General
Wyoming Attorney General's Office
123 Capitol Bldg.
Cheyenne, WY 82002
jburbl@state.wy.us

Kim McGee
Environmental Quality Council
Herschler Bldg., Room 1715
122 W. 25th St.
Cheyenne, WY 82002
kmcgee@state.wy.us

Jill Morrison
Powder River Basin Resource Council
934 Main St.
Sheridan, WY 82801
jillm@powderriverbasin.org


Steve Jones