

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

MAY 06 2003

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF)
CONDITION 7 OF CHANGE NUMBER 4) DOCKET NO. 01-4601
TO THE THUNDERCLOUD AMENDMENT,)
PERMIT 233-T6, BLACK THUNDER MINE)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 18 and 19, 2002, the Environmental Quality Council ("Council") held a public hearing on Thunder Basin Coal Company LLC's ("TBCC") appeal of a condition the Wyoming Department of Environmental Quality ("DEQ"), Land Quality Division ("LQD") placed on the Thundercloud Amendment to the Black Thunder Mine subject to Permit No. 233-T6. TBCC was represented by Alexandra B. Klass of Dorsey & Whitney LLP and DEQ was represented by John Burbridge, Assistant Attorney General. Council members present at the hearing were Nick Bettas, Thomas Dunn, John N. Morris, Robert Rawlings, Dr. Jason Shogren and Olin D. Sims. Also present for the Council was Terri A. Lorenzon, attorney for the Council, who acted as Hearing Examiner for the proceedings.

At the conclusion of the hearing, on November 19, 2002, the Council, having reviewed the evidence and being advised in the premises, convened a meeting and reached a decision in this matter. In accordance with that decision, the Council hereby issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Thunder Basin Coal Company LLC ("TBCC") operates the Black Thunder Mine in Campbell County, Wyoming. The Black Thunder Mine operates on approximately 21,243 acres subject to Permit No. 233-T6, Change Number 4 (Thundercloud Amendment), approved with conditions on December 15, 2000. The Thundercloud Amendment consisted of adding approximately 5,247 acres to the permitted mine area.
2. Based on vegetation studies of the premine condition, TBCC determined that approximately 760 acres of the 5,247 acres contained in the Thundercloud Amendment

were seeded to crested wheatgrass and thus should be classified as "pastureland" under the DEQ-LQD Coal Rules, even though these acres contained a shrub component. Under the current mine plan, only 514 acres of the 760 acres will be affected by mining. The majority of the remainder of the Thundercloud Amendment was classified as "grazingland."

3. The relevant definitions in Ch. 1, Sec. 2 (ac) and (bc) are as follows:

(ac) "Eligible land" means all land to be affected by a mining operation after August 6, 1996. Cropland, pastureland or treated grazingland approved by the Administrator which is to be affected by a mining operation after August 6, 1996 is not "eligible land".

(bc) "Land use" means for surface coal mining operations, specific uses or management-related activities rather than the vegetation or cover of the land

(ii) Pastureland is land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.

(iii) Grazingland includes rangelands and forest lands where the indigenous native vegetation is actively managed for grazing, browsing, and occasional hay production, and occasional use by wildlife.

4. DEQ did not agree with TBCC's classification of the 760 acres as pastureland and therefore included Condition No. 7 in the State Decision Document accompanying approval of the Thundercloud Amendment. Condition 7 reads as follow:

Within 90 days following approval of this amendment Thunder Basin Coal Company, LLC shall submit a Chapter 13 revision to their shrub density text, tables and maps to include the premine vegetation community of Crested Wheatgrass Seedings in the eligible 20% Shrub Standard. Thunder Basin Coal Company, LLC shall achieve mutual agreement with Land Quality Division District III on the content and format of the revision prior to submittal.

5. Condition 7 requires that TBCC change its reclamation plan to meet the 20% shrub density requirement for "eligible land" for the 760 acres.

6. Chapter 4, Sec. 2(d)(x)(E)(I) requires that at least 20% of "eligible land" shall be restored to shrub patches supporting an average density of one shrub per square meter unless a lesser density is justified from premining conditions in accordance with DEQ-LQD Coal Rules, Appendix A.

7. TBCC filed a timely appeal and petition for hearing with the EQC on January 12, 2001, and an amended petition for hearing on June 29, 2001.
8. Prior to the hearing, the parties stipulated to the following material facts:
 - the 760 acres are dominated by crested wheatgrass. Crested wheatgrass is a species that is not native to Wyoming; instead, it is an adapted, domesticated forage plant that was introduced to the area to increase forage production.
 - the 760 acres are almost exclusively private land that has historically been used for grazing livestock and is currently used for grazing livestock.
 - the 760 acres are not designated as a crucial winter use area for big game or sagegrouse and have not been designated as a Critical Habitat, Crucial Habitat or Important Habitat for wildlife under Ch. 1, Sec. 2(v), (w) or (ax) of the DEQ-LQD Rules.
9. At the hearing, the testimony and data admitted into evidence established that both vegetative cover and herbaceous production on the 760 acres are dominated by crested wheatgrass.
10. Testimony established that most of the 760 acres were planted in crested wheatgrass in the early part of the 20th century to increase forage production for livestock grazing. Lands that have been seeded to adapted, domesticated forage plants and are used for grazing livestock or occasionally cut and cured for livestock feed are in long-term production of the adapted plants for livestock grazing.
11. The 760 acres of concern in this case continue to be in long-term production of crested wheatgrass for livestock grazing and the crested wheatgrass still outproduces the native vegetation on these lands.

CONCLUSIONS OF LAW

1. The Council has jurisdiction over the parties to and the subject matter of this proceeding. Wyo. Stat. § 35-11-112.
2. The definitions in Chapter 1, Section 2 under (bc) "Land use" are separate definitions, depicting a particular type of land use, with no surmised evolutionary link between one another.
3. The key definitions under (bc) "Land use" in Ch. 1, Sec. 2 are as follows:

(bc) (ii) Pastureland is land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.

(bc)(iii) Grazingland includes rangelands and forest lands where the indigenous native vegetation is actively managed for grazing, browsing, and occasional hay production, and occasional use by wildlife.

4. A comparison of the definitions of “grazingland” and “pastureland” reveals that there is no relevant distinction between the activities that fall within the two definitions; both definitions show the primary use as livestock grazing. The definitions, differ, however, with regard to the vegetation described. Despite there being a minor shrub component, “pastureland” consists of “adapted, domesticated forage plants” while “grazingland” consists of “indigenous native vegetation.” It is undisputed that the dominant vegetation on the 760 acres is an adapted, domesticated forage plant (crested wheatgrass) as compared to the vegetation on the remaining 4,487 acres on the Thundercloud Amendment, which consists almost exclusively of native grasses and shrubs.

5. The Glossary to Appendix A to the DEQ-LQD Rules directly supports the need to consider the existing plant community to determine land use and states:

“Land Use” refers to the specific uses or management-related activities which a given unit of land experiences. Land use is *directly supported by, but not directly defined by the existing plant communities.* See definitions of cropland, pastureland, grazingland, forestry, or appropriate discussion in LQD Rules and Regulations, Chapter 1, under “land use.” Appendix A at A-58 (emphasis added).

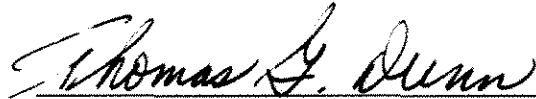
6. The definition of “Land Use” in Appendix A as well as regulatory history for the Office of Surface Mining (“OSM”) definitions of “pastureland” and “grazingland” (on which the DEQ definitions are based) support the proposition that the vegetative cover may be considered in determining whether land used for grazing is “pastureland” or “grazingland,” and that if introduced species are being grazed, the land should be classified as “pastureland” rather than “grazingland.”

7. The 760 acres are “pastureland” rather than “grazingland” and thus are not “eligible land” subject to the shrub standard under Ch. 1, Sec. 2 and Ch. 4, sec. 2(d)(x)(E)(I). TBCC should not be required to include the 760 acres in the acreage that is subject to the 20% shrub density standard for purposes of reclamation and bond release for the Thundercloud Amendment or any future permit or permit amendment.

ORDER

TBCC's appeal of Condition 7 for the Thundercloud Amendment to the Black Thunder Mine is hereby granted. DEQ shall remove or consider fulfilled all shrub density requirements arising from Condition 7 to the Form 1 for all purposes, including but not limited to shrub density calculations, reclamation requirements and bond release.

IT IS SO ORDERED THIS 2nd DAY OF ^{MAY}~~APRIL~~ 2003.



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