

**FILED**

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING**

**NOV 21 2007**

Terri A. Lorenzon, Director  
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF THE )  
REVOCATION OF PERMIT NO. CT-1352B )  
TWO ELK POWER PLANT )

Docket No. 07-2601

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**JOINT STIPULATED SETTLEMENT AGREEMENT**

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This Stipulated Settlement Agreement (“Agreement”) is entered into between the Department of Environmental Quality, Air Quality Division (“DEQ/AQD”) and Two Elk Generation Partners, Limited Partnership, a Wyoming limited partnership (“TEGP”), for the purpose of fully resolving and disposing of all matters raised by DEQ’s August 22, 2007 letter to TEGP (“August 22 Letter”) and TEGP’s Petition for Review and Request for Immediate Stay (“Petition”) to the Environmental Quality Council (“EQC” or “Council”).

**RECITALS:**

WHEREAS TEGP submitted an air quality construction permit application to the DEQ/AQD for the Two Elk Unit 1 Power Plant to be located in Section 36, T43N, R70W, Campbell County, Wyoming (“Two Elk Plant”) and;

WHEREAS pursuant to Chapter 6, sections 2 and 4 of the Wyoming Air Quality Standards and Regulations (“WAQSR”) after notice and public hearing, the DEQ/AQD, in February 1998, issued air quality construction permit CT-1352 to TEGP for the Two Elk Plant and;

WHEREAS in August 1999, TEGP filed an application with the DEQ/AQD to modify the Two Elk Plant and;

WHEREAS in February 2000, after notice and opportunity for public hearing, the DEQ/AQD issued air quality construction permit CT-1352A to TEGP for the Two Elk Plant, requiring TEGP to commence construction by February 2002 and;

WHEREAS in February 2002, TEGP requested an extension of time to commence construction and the DEQ/AQD granted an extension of permit CT-1352A until August 2002 and;

WHEREAS in September 2002, the DEQ/AQD advised TEGP that permit CT-1352A was no longer valid because TEGP had not commenced construction of the Two Elk Plant and;

WHEREAS TEGP filed an appeal to the EQC (Docket No. 02-2601) which after notice and hearing resulted in an Order Approving Joint Stipulation for Disposition of Contested Case and the issuance of DEQ/AQD construction permit CT-1352B to TEGP on May 29, 2003 and required TEGP to commence construction of the Two Elk Plant before May 29, 2005 and;

WHEREAS on July 18, 2005, acting on TEGP's Motion to Dismiss after notice and hearing, the EQC found and concluded that DEQ/AQD had determined that TEGP had commenced construction of the Two Elk Plant before May 29, 2005 and that TEGP had complied with and fulfilled the terms of the Joint Stipulation, and entered its Order that permit CT-1352B remained valid and binding upon TEGP and granted TEGP's Motion to Dismiss and;

WHEREAS the EQC Order Granting TEGP's Motion to Dismiss required TEGP to "submit monthly status reports to the DEQ beginning August 1, 2005, and quarterly status reports to the EQC beginning October 1, 2005. These status reports will include information on engineering, procurement, financing, and construction aspects of the project. TEGP will continue to submit these reports until construction of the project is at least 50% complete, or until the EQC informs TEGP that it may stop submitting the reports" and;

WHEREAS TEGP has to date submitted all monthly and quarterly status reports required by the EQC Order to DEQ/AQD and;

WHEREAS permit CT-1352B condition No. 4 provides, "If ... construction is discontinued for a period of 24 months or more, in accordance with WAQSR Chapter 6, Section 2(h), the permit will become invalid," and;

WHEREAS on August 22, 2007, the DEQ/AQD Administrator Mr. David A. Finley issued TEGP the August 22 Letter concluding: "Because construction has been discontinued for a period of 24 months or more, DEQ/AQD Construction Permit No. CT-1352B has become invalid by operation of permit condition No. 4 and Chapter 6 Section 2(h) of the WAQSR" and;

WHEREAS since August 23, 2007, the DEQ/AQD and TEGP have engaged in discussions to determine whether there was a sufficient basis to resolve this matter without the need for a contested case proceeding by providing an opportunity for DEQ/AQD to determine whether TEGP possessed confidential business information not previously provided to the DEQ/AQD and for TEGP to provide such confidential

business information demonstrating construction of the Two Elk Plant had not been discontinued for a period of twenty-four months or more and;

WHEREAS the DEQ/AQD and TEGP were engaged in discussions but had not reached a determination at the time of TEGP's appeal deadline date of October 22, 2007 and;

WHEREAS in order to preserve its appeal rights, TEGP filed a Petition for Review and Request for Immediate Stay on October 22, 2007 and;

WHEREAS the DEQ/AQD and TEGP have continued to confer regarding the issues and confidential business information involved in this appeal and have reached agreement for withdrawal of TEGP's appeal and;

WHEREAS the DEQ/AQD reviewed TEGP's confidential business information and other documentation relating to (i) demolition, construction and relocation of an oil and gas pipeline operated by Belle Fourche Pipeline Company; (ii) construction of the required main access road; (iii) safety-related demolition, construction and reconditioning of an oil and gas well operated by Justice Oil Company; (iv) TEGP's binding and irrevocable contractual obligations relating to the Two Elk Plant and (v) other evidence of TEGP's past financial expenditures and ongoing financial and contractual commitments to the project including, without limitation, a large generator interconnection agreement with PacifiCorp to provide the transmission line capable of connecting the Two Elk Plant to the western transmission grid, and found that such confidential business information and other documentation collectively demonstrated that TEGP had not discontinued construction for a period of 24 months or more and;

WHEREAS DEQ/AQD asked TEGP to do two things: submit an application to modify Permit CT-1352B and lower the emissions of SO<sub>2</sub>, NO<sub>x</sub> and PM<sub>10</sub> filterable and to perform Class I modeling on the Two Elk Plant and;

WHEREAS TEGP submitted the application to modify permit CT-1352B to the DEQ/AQD and the modeling protocol to the DEQ/AQD and ;

WHEREAS DEQ/AQD finds TEGP has continued construction on the Two Elk Plant and rescinds the August 22, 2007 letter simultaneously with the Council's entry of the Order and;

WHEREAS the Parties have entered into this Agreement for the purpose of resolving all issues and;

WHEREAS disposition of this matter will serve and further the purposes of the Wyoming Environmental Quality Act (“WEQA”) and related air quality statutes and regulations promulgated thereunder and make it unnecessary to adjudicate the particular issues involved in this appeal;

**THEREFORE THE PARTIES STIPULATE AS FOLLOWS:**

1. Upon execution of this Agreement the Parties shall request the Council enter an order approving and binding the Parties to this Agreement and dismiss the appeal now pending before the Council.

2. Based on its review of confidential business information and other documentation provided by TEGP, the DEQ/AQD has determined that TEGP has not discontinued construction for a period of 24 months or more and is in compliance with permit CT-1352B condition No. 4.

3. TEGP agrees to and shall continue to file reports with the DEQ/AQD every 90 days (beginning 90 days from the date of the EQC’s Order approving this Agreement, and by the 15<sup>th</sup> day following the close of successive calendar quarters thereafter (“Quarterly Submittal”)) providing information that TEGP has made progress towards completing construction of the Two Elk Plant in a reasonable time.

A. TEGP’s demonstration for the first 90 day period shall include at a minimum providing to the DEQ/AQD: i) a licensed professional engineer’s report detailing the construction schedule for work to be performed by TEGP and its contractors on the Two Elk Plant, projected startup date, and construction schedule for the related transmission facilities, for the period from the date of the EQC’s Order approving this settlement agreement to the projected startup date for the Two Elk Plant; ii) copies of actual documents evidencing TEGP paid \$1,000,000 to PacifiCorp pursuant to the Large Generator Interconnection Agreement executed on October 3, 2007 (“LGIA”); iii) all Wyoming Department of Transportation final approvals for the State Highway 450 interchange.

B. Within 15 days of final execution of the Engineering, Procurement and Construction (“EPC”) Contract, and within 15 days of final execution of project financing sufficient to fund completion of construction of the Two Elk Plant, TEGP shall provide written notification to the DEQ/AQD.

C. TEGP’s demonstration for each successive Quarterly Submittal period shall include at a minimum providing to the DEQ/AQD: i) a licensed professional engineer’s report detailing physical on-site construction progress; ii) the revisions or change orders to the construction

schedule that the licensed professional engineer determines are necessary; iii) a licensed professional engineer's report detailing any off-site component progress; iv) a licensed professional engineer's report detailing construction progress pursuant to the LGIA; v) the revisions or change orders to the construction schedule that the licensed professional engineer determines are necessary for the LGIA.

D. TEGP will continue to submit quarterly reports until construction of the project is at least 50% complete, or until the DEQ/AQD informs TEGP that it may stop submitting reports.

E. If TEGP fails to meet any Quarterly Submittal deadline or submittal requirements, TEGP shall pay the DEQ/AQD liquidated damages in the amount of \$1000.00 per day for each failure to submit.

F. If any of TEGP's Quarterly Submittals reflect that the Engineer's construction schedule or estimate of plant start up has been revised and extends completion by more than 1 year but less than two years from the currently projected startup date set forth in the first 90 day submittal or startup extends beyond December 2012, then TEGP shall submit a permit modification application to the DEQ/AQD to modify permit CT-1352B or any successor permit emission limits to reflect application of then current commercially available emission control technology or TEGP may, in lieu of submitting a permit modification application, submit a showing which must be satisfactory to the DEQ/AQD Administrator that an extension is justified for the delay in start-up. TEGP shall retain any appeal rights it may have associated with either the permit modification application or showing submittal.

G. If any of TEGP's Quarterly Submittals reflect that the Engineer's construction schedule or estimate of plant start up has been revised and extends completion by 2 years or more from the currently projected startup date set forth in the first 90 day submittal, then TEGP shall either submit a showing which must be satisfactory to the DEQ/AQD Administrator that an extension is justified for the delay in start-up or shall be required to file a permit modification application to modify permit CT-1352B or any successor permit which demonstrates to the satisfaction of DEQ/AQD that TEGP's construction and subsequent operation of the Two Elk Plant satisfies Ch. 6 section 2(c) of the WAQSR and will not prevent the attainment or maintenance of any ambient air quality standard, will not cause significant deterioration of existing ambient air quality, will utilize and meet the Best Available Control Technology at such date and does not pose unacceptable air quality impacts to nearby Class I areas. The BACT

evaluation will apply BACT at the time of the application as if BACT was being conducted on a new power plant.

4. The DEQ/AQD agrees to notify TEGP within 30 days of receipt of any report filed by TEGP if DEQ/AQD has any concerns related to the information contained in the report, and to afford TEGP a reasonable opportunity to provide additional information or otherwise address such concerns.

5. TEGP agrees not to withdraw the application to modify permit CT-1352B submitted on November 13, 2007 so long as the permit application is processed at the agreed upon emission limits, the Council approves this Agreement, and the Agreement is not set aside by any court.

6. DEQ/AQD's August 22, 2007 letter is rescinded simultaneously with the Council's entry of the Order.

7. The Parties agree that each Party will be bound by this Agreement should the Council approve this Agreement and dismiss this matter. However, should the Council not dismiss this matter as requested in the Parties' Joint Motion or should the Council take action in the course of dismissing this matter which is inconsistent with or in any way alters the provisions of this Agreement, this Agreement shall be voidable at either DEQ/AQD or TEGP's option. If the Council does not approve this Agreement or if this Agreement is declared void each party reserves its rights consistent with their positions prior to signing the Agreement.

8. This Agreement represents a good faith settlement of disputed factual allegations and positions of both DEQ/AQD and TEGP and shall not constitute nor be construed as an admission by either DEQ/AQD or TEGP outside of its express terms.

9. Neither the DEQ/AQD nor the State of Wyoming nor any of its Agencies shall be held as a party to any contracts or agreements entered into by TEGP to implement any condition of this Agreement.

10. Nothing in this Agreement relieves TEGP of its duty to comply with all applicable requirements under the WEQA, and rules, regulations and standards adopted thereunder, including any permit requirements. TEGP's performance of its responsibilities pursuant to this Agreement shall not be a defense to any action commenced pursuant to such laws, regulations or permits. DEQ/AQD does not, by entering into this Agreement, warrant or aver that TEGP's completion of any aspect of this Agreement will result in compliance with the WEQA, WAQSR or permits issued thereunder. TEGP shall remain solely responsible for its completion of the terms of this Agreement, all applicable permits, and all applicable federal, state, and local laws and regulations.

11. Nothing in this Agreement shall be construed to prevent or limit DEQ/AQD's right or ability to seek relief for any future issues, or to limit TEGP's rights to defend itself against any DEQ/AQD action in the future.

12. The DEQ/AQD and TEGP reserve all legal and equitable remedies available to enforce the provisions of this Agreement.

13. The State of Wyoming and the DEQ/AQD do not waive sovereign immunity by entering into this Agreement and retain immunity and all defenses available to them as sovereigns pursuant to WYO. STAT. ANN. § 1-39-104(a) and all other state law.

14. The Parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties and obligations contained in this Agreement shall operate only among the Parties to this Agreement.

15. Should any portion of this Agreement be judicially determined to be illegal or unenforceable, the remainder of the Agreement shall continue in full force and effect, and either Party may renegotiate the terms affected by the severance.

16. The construction, interpretation and enforcement of this Agreement shall be governed by the laws of the State of Wyoming.

17. This Agreement shall be admissible by either DEQ/AQD or TEGP without objection by the other Party in any action between these Parties relating to the issues alleged herein. However if the Council does not approve this Agreement or if this Agreement is declared void this Agreement shall not be used by one party against the other in a subsequent proceeding.

18. This Agreement, consisting of eight (8) pages represents the full and complete agreement of DEQ/AQD and TEGP relating to the DEQ/AQD's August 22 Letter and TEGP's subsequent appeal thereof, and supersedes any prior discussions or negotiations of DEQ/AQD and TEGP related to the same.

19. Neither Party hereto shall have any claim against the other for attorneys' fees or other costs incurred with the issues resolved hereby, including costs associated with the preparation of this Agreement. Each Party shall bear its own attorneys' fees and costs, if any, incurred through the entry of an Order by the Council approving this Agreement. Each Party assumes the risk of any liability arising from its own conduct. Neither party agrees to insure, defend or indemnify the other.

20. This Agreement may be executed in any number of separate counterparts any one of which need not contain the signatures of more than one Party but all of such counterparts together will constitute one Agreement. The separate counterparts may contain original, photocopy, or facimile transmissions of signatures.

Signatories certify that they are authorized to bind their respective parties to this Agreement.

FOR PETITIONER TEGP:



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M. Bradley Enzi, Vice President  
Two Elk Power Company, General Partner, for  
Two Elk Generation Partners,  
Limited Partnership

FOR RESPONDENT DEQ:



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John Corra, Director



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David A. Finley, Administrator

Approval as to form:



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Nancy E. Vehr  
Attorney for Respondent DEQ

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Dennis Arfmann  
Attorney for Petitioner TEGP



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Two Elk Power Company, General Partner, for  
Two Elk Generation Partners,  
Limited Partnership

FOR RESPONDENT DEQ:



John Corra, Director



David A. Finley, Administrator

Approval as to form:



Nancy E. Vehr  
Attorney for Respondent DEQ



Dennis Arfmann  
Attorney for Petitioner TEGP