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Terri A. Lorenzon, Director
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF THE)
REVOCATION OF PERMIT NO. CT-1352B) Docket No. 07-2601
TWO ELK POWER PLANT)

RESPONDENT WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S OPPOSITION TO SIERRA CLUB AND PRBRC'S MOTION TO INTERVENE AND PETITION FOR RECONSIDERATION

Respondent Wyoming Department of Environmental Quality, Air Quality Division ("DEQ/AQD") by and through its attorney, Nancy E. Vehr, Senior Assistant Attorney General, hereby submits its Opposition to Sierra Club and PRBRC's[1] Motion to Intervene and Petition for Reconsideration.

DEQ/AQD AIR QUALITY PROGRAM

Air pollution is regulated pursuant to a carefully crafted, intricately woven federal and state statutory and regulatory system with many highly technical provisions. Congress adopted a cooperative federalism approach in enacting the Clean Air Act (CAA). *See* 42 U.S.C. §§ 7401 - 7671q; 40 C.F.R. parts 1 through 789 (Environmental Protection Agency ("EPA") regulations) and 40 C.F.R. part 52, subpart ZZ (Wyoming's EPA approved State Implementation Plan ("SIP")); *see also* WYO. STAT. ANN. §§ 35-11-201 through -214 and, chapters 1 through 14 of the Wyoming Air Quality Standards and Regulations ("WAQSR").

The CAA assigns primary responsibility and authority for managing and protecting air quality within state borders to the state. *See* 42 U.S.C. §§ 7407(a), 7410. The state

[1] The Movants refer to themselves as "Citizens." However, the Wyoming Secretary of State filing information reflects that both the Sierra Club and the Powder River Basin Resource Council, Inc. are "NonProfit Corporations." *See* http://soswy.state.wy.us. Rather than include a shorthand reference to these entities as "NonProfit Corporations," Respondent DEQ/AQD will simply refer to them by name.

implements its responsibility by submitting a SIP to EPA specifying the strategies which will be used to attain, maintain and enforce ambient air quality standards in the state. *See* 42 U.S.C. § 7410(a).

Wyoming's air quality program was initiated in response to CAA requirements. However, the foundation underlying Wyoming's air quality program is the Wyoming Environmental Quality Act ("WEQA") which establishes a statutory structure designed in part to enable the State of Wyoming to preserve, protect, use, develop, reclaim and enhance its air resources. The WEQA's policy and purpose states:

> Whereas pollution of the air ... of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve and enhance the air ... of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air ... resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air ...."

WYO. STAT. ANN. § 35-11-102.

To further the purpose of the WEQA, Wyoming's legislature vested the DEQ with the responsibility for administering and enforcing the WEQA, rules promulgated thereunder, and related permits. WYO. STAT. ANN. §§ 35-11-104, -109; *see also* WYO. STAT. ANN. § 35-11-110. The DEQ's administrative and enforcement authority extends to permits issued under the WEQA, including air quality permits. WYO. STAT. ANN. §§ 35-11-109, -110, -801.

Pursuant to the WEQA and DEQ's regulations, an air quality construction permit is

needed before any person commences construction of any new facility or modifies any existing facility which may cause the issuance of air pollution in excess of standards established by the DEQ/AQD. WYO. STAT. ANN. § 35-11-801(c); 6 WAQSR § 2. Under this permitting system, the DEQ Director may impose permit conditions consistent with existing rules, regulations or standards that are necessary to accomplish the purpose of the WEQA. WYO. STAT. ANN. § 35-11-801(a). Permits issued pursuant to 6 WAQSR § 2 are commonly referred to as air quality construction or modification permits and the process is referred to as new source review. DEQ/AQD permit CT-1352B, issued to Two Elk Generation Partners ("TEGP") is an air quality construction permit.

In addition to air quality construction or modification permits, major emitting facilities such as power plants, must also undergo Prevention of Significant Deterioration ("PSD") review. 42 U.S.C. § 7475; 6 WAQSR §§ 2, 4. Congress enacted the PSD program in 1977 to insure that "economic growth would occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. §§ 7470-79. Therefore, the PSD review focuses on a proposed major source's anticipated air quality impact and includes a site-specific review. *See* 42 U.S.C. § 7470; *Alabama Power v. Costle*, 636 F.2d 323, 346-51 (D.C. Cir. 1979). In addition to being an air quality construction permit, DEQ/AQD permit CT-1352B also meets the PSD requirements and is referred to as a "PSD permit."

BACKGROUND AND COURSE OF PROCEEDINGS

In November 1996, Two Elk Generation Partners, LP ("TEGP") submitted an air quality construction permit application for the Two Elk Unit 1 Power Plant ("Two Elk

Plant") to be located in Campbell County, Wyoming. In February 1998, after notice and public hearing, the DEQ/AQD issued air quality construction permit CT-1352 to TEGP for the Two Elk Plant. In August 1999, TEGP filed an application with the DEQ/AQD to modify the Two Elk Plant. In February 2000, after notice and opportunity for public hearing, the DEQ/AQD issued air quality construction permit CT-1352A which modified the original permit. Permit CT-1352A required TEGP to commence construction of the Two Elk Plant by February 2002. EQC Docket No. 07-2601, *Joint Stipulated Settlement Agreement* (11/21/07).

In February 2002, TEGP requested an extension of time to commence construction. DEQ/AQD granted an extension of permit CT-1352A until August 2002. In September 2002, DEQ/AQD advised TEGP that permit CT-1352A was no longer valid because TEGP had not commenced construction of the Two Elk Plant. TEGP filed an appeal with this Council (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 air quality construction permit CT-1352B on May 29, 2003. Permit CT-1352B required TEGP to commence construction of the Two Elk Plant by May 29, 2005. *Id.*

On July 18, 2005, acting on TEGP's Motion to Dismiss, the EQC 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 (EQC Docket No. 02-2601). *Id.*

Condition No. 4 of DEQ/AQD construction permit CT-1352B addressed both the commencement of construction and continuing construction permit requirements, stating in pertinent part, "[i]f ... 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." DEQ/AQD permit CT-1352B, condition no. 4. On August 22, 2007, the DEQ/AQD administrator issued TEGP a letter stating that, "[b]ecause 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." *Id.*; *see also* TEGP Petition for Review, Attachment C ("August 22 Letter").

On October 22, 2007, TEGP filed its Petition for Review and Request for Immediate Stay. On November 6, 2007, the EQC entered an Order setting a hearing on TEGP's Motion for Stay at the EQC's November 28, 2007 meeting.

Meanwhile, the DEQ/AQD and TEGP held discussions and the DEQ/AQD reviewed confidential business information and other documents provided by TEGP. EQC Docket No. 07-2601, *Joint Stipulated Settlement Agreement*. Ultimately, the DEQ/AQD found that TEGP had not discontinued construction of the Two Elk Plant. *Id.* On November 21, 2007, one week before the EQC's November 28, 2007 meeting, TEGP and the DEQ/AQD, the only two parties, filed a Joint Motion for Dismissal of Appeal, Approval of Settlement Stipulation, and Request for Setting of Hearing. On December 3, 2007, following the hearing, this Council entered its "Order Approving Parties' Joint Stipulated Settlement, and

Dismissing TEGP's Appeal, and Approving the Withdrawal of August 22 Letter." EAC Docket No. 07-2601, *Order*.

On December 20, 2007, the Sierra Club and Powder River Basin Resource Council ("PRBRC") filed their "Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant." Neither the Sierra Club nor PRBRC were parties, nor made an attempt to become a party until December 20, 2007.

ARGUMENT

I. STANDARD FOR INTERVENTION IN EQC PROCEEDINGS

"Intervention" describes the process by which a non-party with an appropriate interest becomes a party to an existing action. *See Halliburton Energy Servs., Inc. v. Gunter,* 2007 WY 151, ¶ 4, 167 P.3d 645, 4 (Wyo. 2007); *see also Amoco Prod. Co. v. Dep't of Revenue*, 2004 WY 89 ¶ 12, 94 P.3d 430, 12 (Wyo. 2007). Because administrative agencies have only the powers expressly conferred by statute, intervention in administrative hearings is regulated by statute and administrative rules. *See Platte Dev. Co. v. Envtl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998); *see also Amoco Prod. Co.*, 94 P.3d at 436.

The EQC's authority to hear and determine cases is found in WYO. STAT. ANN. § 35-11-112:

> (a) The [environmental quality] council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.

> * * *
>
> (f) All proceedings of the council shall be conducted in accordance with the Wyoming Administrative Procedure Act.

WYO. STAT. ANN. § 35-11-112.

The Wyoming Administrative Procedure Act ("WAPA") provides for intervention through its definition of "party." WYO. STAT. ANN. § 16-3-101(b)(vi); *see also Amoco Prod. Co.*, 2004 WY 89 ¶¶ 9-16, 94 P.3d at 436-37. "Party" is defined as "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." WYO. STAT. ANN. § 16-3-101(b)(vi). Therefore, to intervene in this matter, the Sierra Club and PRBRC must be "persons" and must be "entitled as of right to be admitted as a party." *See Amoco Prod. Co.*, 2004 WY 89, ¶¶ 9-16, 94 P.3d at 436-37.

The WAPA defines "person" as "any individual, partnership, corporation, association, municipality, governmental subdivision or public or private organization of any character other than an agency." WYO. STAT. ANN. § 16-3-101(b)(vii). Because the Sierra Club and PRBRC are non-profit corporations, they satisfy the definition of "person."

The specific legal requirements to be "entitled as of right" to intervene as a party in matters before the EQC are set forth in both the DEQ Rules of Practice and Procedure and the Wyoming Rules of Civil Procedure. Rule 24(a) of the Wyoming Rules of Civil Procedure requires:

> 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.

WYO. R. CIV. P. 24(a).

The EQC intervention rule states:

> Any person interest 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 shall 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.

2 DEQ Rules of Practice and Procedure § 7(a). ("EQC Intervention Rule")

Although the EQC Intervention Rule roughly follows rule 24(a) of the Wyoming Rules of Civil Procedure, it omits the condition that an applicant does not qualify to intervene as of right if its interests are adequately represented by existing parties. By omitting this condition, the EQC rule broadens the circumstances under which a person may intervene beyond the WAPA requirements. However, pursuant to the WAPA, the EQC may allow a person to intervene only if that person qualifies for intervention as of right pursuant to WYO. R. CIV. PRO. 24(a). *See Amoco Prod. Co.*, 94 P.3d at 437 (intervention in contested case before the Wyoming Board of Equalization).

The Wyoming Rules of Civil Procedure apply to matters before the Council. 2 DEQ Rules of Practice and Procedure § 14(a). Under the Wyoming Rules of Civil Procedure,

intervention as of right is allowed pursuant to the "unconditional statutory right" prong (Wyo. R. Civ. P. 24(a)(1)) or the "interest" prong (Wyo. R. Civ. P. 24(a)(2)).

Therefore, as persons, the Sierra Club and PRBRC may be permitted to intervene if they each satisfy the conditions for intervention as of right. However, the Sierra Club and PRBRC's Motion does not indicate whether they seek intervention as of right pursuant to the "unconditional statutory right" or "interest" prong, so an examination of each is required.

II. Movants Do Not Satisfy the Conditions for Intervention as of Right under Wyo. R. Civ. P. 24(a)(1) (Unconditional Statutory Right to Intervene)

The Sierra Club and PRBRC's Motion to Intervene is silent as to any statute providing an unconditional right to intervene in matters before the EQC. Other than citing the EQC Intervention Rule, the Motion fails to assert any statute or law providing an unconditional right to intervene. *Compare* Wyo. Stat. Ann. §§ 35-11-101 through - 214 (WEQA general statutes and air quality statutes) *with* Wyo. Stat. Ann. § 35-11-904(c) ("any person may intervene as of right" in DEQ civil enforcement actions in state district court). On this basis alone, their Motion to Intervene should be denied for failing to demonstrate they satisfy the conditions for intervention as of right pursuant to Wyo. R. Civ. P. 24(a)(1).

III. Movants Do Not Satisfy the Conditions for Intervention as of Right under Wyo. R. Civ. P. 24(a)(2) (Interest).

An applicant's right to intervene under the interest prong of Rule 24 depends on timeliness, asserted interest, impairment of that interest, and adequacy of representation. *See Am. Family Ins. Co. v. Bowen,* 959 P.2d 1199, 1201 (Wyo. 1998). We will address each

element in turn.

A. Timeliness

Under Rule 24, a motion to intervene as of right must be timely and may be denied solely on the basis of timeliness. *Masinter v. Markstein*, 2002 WY 64, 45 P.3d 237 (Wyo. 2002).[2] In this matter, the EQC's Order of Dismissal was entered on December 3, 2007. The Sierra Club and PRBRC did not seek intervention until December 20, 2007, after entry of the EQC's Order. On its face, their motion is untimely. The Wyoming Supreme Court uses a four-factor test for evaluating Rule 24 timeliness: 1) the length of time the applicant knew or reasonably should have known of its interest in the case; 2) the extent of prejudice that existing parties may suffer as a result of the applicant's failure to seek earlier intervention; 3) the extent of the prejudice the applicant may suffer if the application is denied; and, 4) the existence of unusual circumstances. *See Am. Family Ins. Co. v. Bowen,* 959 P.2d 1199, 1201 (Wyo. 1998); *State Farm Mut. Auto. Ins. Co. v. Colley,* 871 P.2d 191, 197 (Wyo. 1994). We will address each factor in turn.[3]

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[2] Both the Wyoming Rules of Civil Procedure and the EQC Intervention Rule require an intervention application to be timely. See WYO. R. CIV. P. 24(a) and 2 DEQ Rules of Practice and Procedure § 7(a). The EQC Intervention Rule considers an intervention application to be timely if it occurs prior to or at the date of hearing. 2 DEQ Rules of Practice and Procedure § 7(a). An intervention application received after entry of an EQC final order is too late, unless the applicant demonstrates good cause. 2 DEQ Rules of Practice and Procedure § 7(a).

[3] The EQC Intervention Rule requires a "good cause" demonstration, but does not not define "good cause" or what demonstration is required. The Wyoming Supreme Court has defined "good cause" as a "[s]ubstantial reason, one that affords a legal excuse." *Wilkening v. State*, 2005 WY 127 ¶ 20, 120 P.3d 680, 686 (Wyo. 2005).

1. Length of Time Intervenor Knew of Interest

The Sierra Club and PRBRC do not allege or state how long they knew about the case. However, the pleadings reveal the following timeline: 1) on August 22, 2007, the DEQ/AQD issued a letter to TEGP; 2) on October 22, 2007, TEGP filed a Petition for Review and Request for Immediate Stay; 3) on November 6, 2007, the EQC set a hearing for November 28, 2007 on TEGP's stay request; 4) on November 21, 2007, TEGP and the DEQ/AQD filed a Joint Motion for Dismissal of Appeal, Approval of Settlement Stipulation, and Request for Setting of Hearing; and 5) on November 28, 2007, the EQC hearing was held. This case was docketed with the EQC starting on October 22, 2007. Because this case was docketed with the EQC, the Sierra Club and PRBRC could reasonably have known of their interest in the case from its inception. At any point before the November 28, 2007 hearing, the Sierra Club and PRBRC could have filed to intervene. They did not. They should not be allowed to do so at this late date.

The Sierra Club and PRBRC allege that because notice was not provided to them pursuant to WYO. STAT. ANN. § 16-3-107, they did not have the opportunity to challenge the dismissal before EQC issued it on December 20, 2007. Motion ¶ 3. However, the actual notice required by that section of the WAPA applies only to parties in contested cases. *See* WYO. STAT. ANN. § 16-3-107(a). The Sierra Club and PRBRC did not receive actual notice pursuant to this WAPA provision because they were not parties entitled to such notice.

The Sierra Club and PRBRC also allege that the DEQ failed to provide notice that DEQ had determined that TEGP had not discontinued construction. Motion, ¶ 5. However,

a review of the pleadings reveals otherwise. On November 21, 2007 when the Joint Motion for Dismissal was filed, the Joint Stipulated Settlement Agreement was also filed. The Joint Stipulated Settlement Agreement states in three different places that DEQ had determined that TEGP had not discontinued construction: 1) "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" (Agreement, pg. 3); 2) "DEQ/AQD has determined that TEGP has not discontinued construction for a period of 24 months or more" (Agreement, pg. 4); and, 3) "DEQ/AQD's August 22, 2007 letter is rescinded simultaneously with the Council's entry of the Order" (Agreement, pg. 6). The pleadings plainly contradict the Sierra Club and PRBRC's unsupported allegations.

The Sierra Club and PRBRC also allege that the EQC failed to provide notice "stating their intent to reverse DEQ's determination." Motion ¶ 5. All notions of justice support the proposition that decisionmaking bodies consider matters fully and then make their determination, rather than pre-determine matters before them. The EQC should not have and did not pre-determine this matter. Hence, the EQC could not provide notice of its action until after it had taken the action. The Sierra Club and PRBRC have no basis to allege late notice.

The Sierra Club and PRBRC could have filed to intervene before the November 28, 2007 hearing, but did not. The Sierra Club and PRBRC could have attended the November 28, 2007 hearing, but did not. The Sierra Club could have sought intervention at any point before the November 28, 2007 hearing, but did not. The Sierra Club and PRBRC's failure

to seek timely intervention lies not with the EQC nor the DEQ but squarely with the Sierra Club and PRBRC. Their failure was a matter of choice, not inability. Because the Sierra Club and PRBRC had the opportunity to intervene during the case, but did not, their motion is untimely and they are not "entitled as of right" to be admitted as a party.

2. Prejudice to Existing Parties

Both the WAPA and EQC rules recognize that parties may settle contested cases. *See* WYO. STAT. ANN. § 16-3-107(n); 1 DEQ Rules of Practice and Procedure § 11. In fact, a review of the EQC docket includes numerous cases that have been dismissed following settlement. See http://deq.state.wy.us/eqc.htm. Parties expend time and other resources to reach settlement and avoid uncertain litigation outcomes. In this case, the DEQ and TEGP reached an agreement to settle this controversy. *See* Joint Stipulated Settlement Agreement. The EQC entered its Order approving such settlement. Allowing the Sierra Club and PRBRC to come in at this stage and force the parties to incur needless litigation costs and expend additional agency resources on a matter that has been resolved seriously undercuts the concept of finality. The DEQ would be prejudiced by having to incur additional costs and expend additional resources all because the Sierra Club and PRBRC failed to seek timely intervention. Should the EQC allow the Sierra Club and PRBRC to intervene after this settled matter has been dismissed, it would have a chilling effect on settlement for any future case before the EQC - parties may opt to litigate cases rather than risk an unknown third party intervention in a settled matter. It would be blatantly unfair to allow the Sierra Club and PRBRC to intervene at this late stage, eviscerate the settlement, and force the DEQ

to expend time and resources to litigate, especially where the DEQ/AQD determined that TEGP has not discontinued construction for a period of 24 months or more. *See* Agreement, pg. 4.

3. Prejudice to Applicant

The third factor in evaluating timeliness of a motion to intervene as of right is prejudice to the applicant. The Sierra Club and PRBRC do not state whether, or to what extent, they will be prejudiced if their motion is denied. As the movants, the Sierra Club and PRBRC have the burden to demonstrate prejudice. They have failed to meet this burden. The DEQ notes that the Sierra Club and PRBRC have already appealed this matter to the First Judicial District Court. *See* Petition for Review of Administrative Action, 1st Jud. Dist. Docket No. 171-041, filed December 20, 2007.

4. Unusual Circumstances/Good Cause

The sole good cause asserted by the Sierra Club and PRBRC for failing to intervene relates to notice. As discussed above, as non-parties, neither the Sierra Club nor PRBRC were entitled to notice. Because they were not entitled to notice, it is not surprising that they did not receive notice. Failure to receive a notice you are not entitled to receive should not qualify as either "good cause" or an "unusual circumstance."

The Sierra Club and PRBRC's Motion to Intervene should fail under the timeliness prong alone. The Sierra Club and PRBRC have each failed to demonstrate that their Motion to Intervene was timely given the length of time they knew or reasonably should have known of their interest, the possible prejudice to TEGP and the DEQ, the lack of prejudice they may

suffer as a result of failing to seek earlier intervention, and the lack of unusual circumstances or good cause.

However, should the Council determine that the motion is timely, it still fails under the interest and adequacy of representation requirements of Rule 24(a)(2). *See* WYO. R. CIV. P. 24(a)(2); *Am. Family Ins. Co. v. Bowen,* 959 P.2d 1199, 1201 (Wyo. 1998).

B. Interest Requirement

A person seeking intervention must have a "significantly protectable interest" in the outcome, not just a concern in the outcome or an interest that is contingent or similar to the interest of any member of the public. *See Halliburton Energy Services, Inc. v. Gunter*, 2007 WY 151, ¶6, 167 P.3d 645, 648 (Wyo. 2007). That is, the Sierra Club and PRBRC must assert a definable and protectable interest in order to intervene. The Sierra Club and PRBRC assert their interest in this matter is: "to ensure TEGP's full compliance with its legal obligations. TEGP's compliance with the Environmental Quality Act and related regulations will further Citizens' interest in protecting the air quality of Wyoming." Motion ¶6. These interests, while laudable, do not belong solely to the Sierra Club and PRBRC, they are shared by the general public and the DEQ, the agency charged with enforcing the WEQA and related regulations.

Neither the Sierra Club nor PRBRC were the object of either the DEQ/AQD's action that formed the basis for TEGP's appeal or the EQC's action dismissing this matter. Neither the Sierra Club nor PRBRC provided any information in their motion about the purpose or interests of either of their organizations. Requiring applicants to set forth their interests at

the outset provides a fair and orderly process to parties and decisionmakers alike to evaluate the merits of an application. Although the Sierra Club and PRBRC allege their members have been injured (Motion ¶ 7), neither entity alleged they were seeking to intervene in a representational capacity on behalf of identifiable injured members. Other than interests shared by the general public and the DEQ, the Sierra Club and PRBRC's motion fails to allege injury, or provide any facts to support any allegation of injury that is specific to their interests. *See Sierra Club v. EPA*, 292 F.3d 895 (D.C.Cir. 2002) (dismissed petition for review of agency rulemaking because Sierra Club failed to demonstrate standing).

C. Impairment of Interest/Adequacy of Representation

The impairment of interest and adequacy of representation requirements are intertwined. *See Masinter v. Markstein*, 2002 WY 64 ¶ 10, 45 P.3d 237 (Wyo. 2002). The Sierra Club and PRBRC states their purported interest is to assure that TEGP complies with the law and protect Wyoming's air quality. Motion ¶6. The DEQ/AQD's interest, set out in statute and regulation, includes enforcing the WEQA and "any rules, regulations, orders, limitations, standards, requirements or permits adopted, established, or issued thereunder ...." WYO. STAT. ANN. § 35-11-109(a)(i); *See also* WYO. STAT. ANN. §§ 35-11-102 (WEQA purpose), and, 35-11-201 through -213. By its very nature, a public governmental agency such as the DEQ represents the public interest. This interest extends to and includes maintaining and protecting the integrity of the very programs it administers. That the Sierra Club and PRBRC dislike the outcome does not mean that the DEQ did not vigorously represent the public interest in this matter.

PETITION FOR REHEARING

The EQC Rules provide that parties may petition for rehearing. See 4 DEQ Rules Of Practice and Procedure § 1. However, neither the Sierra Club nor PRBRC has been admitted as a party. The DEQ declines the Sierra Club and PRBRC's invitation to address the issue raised in their Petition for Rehearing at this point in the proceedings, and will defer until such time as the issue is properly before the Council.

CONCLUSION

Intervention as of right requires timeliness and an unconditional statutory right to intervene or a right based on interest. The Sierra Club and PRBRC have not met their burden to demonstrate they are entitled to intervention of right because they do not meet the requirements.

WHEREFORE, Respondent DEQ/AQD respectfully requests this Council deny "Citizens' Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant."

RESPECTFULLY SUBMITTED this 9th day of January, 2008.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of January, 2008, a true and correct copy of RESPONDENT WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE IN OPPOSITION TO SIERRA CLUB AND PRBRC'S MOTION TO INTERVENE AND PETITION FOR RECONSIDERATION was served via U.S. Mail, postage prepaid, addressed as follows:

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