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APR 09 2008

Terri A. Lorenzon, Director
Environmental Quality Council

**BEFORE THE WYOMING
ENVIRONMENTAL QUALITY COUNCIL**

Sierra Club and PRBRC Appeal of DEQ)
Construction Continuance Determination) Docket No. 07-2802
Re: Two Elk Power Plant)

CITIZENS' RESPONSE TO TWO ELK MOTION TO DISMISS

I. Introduction

Petitioners Sierra Club and Powder River Basin Resource Council (collectively, "Citizens") respectfully respond to Two Elk Generation Partners' ("TEGP") motion to dismiss. TEGP asks the Council to dismiss, for varying reasons, all four claims set forth in Citizens' December 20, 2007 appeal. As described below, Citizens' first and second claims should not be dismissed. Because Citizens agree to dismiss voluntarily their third and fourth claims, TEGP's motion regarding these claims should be denied as moot.

II. Argument

A. Citizen's First Claim Should Not Be Dismissed.

TEGP's motion to dismiss Citizens' first claim should be denied. Citizens' first claim appeals DEQ's November 21, 2007 final action that determined TEGP did not discontinue construction of the Two Elk power plant for more than 24 months.

TEGP argues in its motion that Citizens may not appeal DEQ's November 21, 2007 final action set forth in a settlement agreement because it was effectively subsumed by the Council's approval of that action a week later. And because the Council's approval of the settlement agreement is the subject of an action for judicial review in Laramie County District Court, the Council should dismiss this matter.¹ According to TEGP:

¹ To the extent the Council is concerned about the application of Wyo.R.App.P. Rule (continued...)

First, the pre-hearing notices provided to the public by the Council did not include any notification of DEQ's reversed position that Two Elk did not discontinue construction for 24 months, or that the Council was considering taking action on such position. According to the attached declaration of Shannon Anderson, all the notices for the November 28, 2007 hearing received by PRBRC on November 7 and 10, 2007, merely stated that "the EQC was going to consider the 'Motion for Stay' of Two Elk Generating Partners (TEGP)." Exhibit A, ¶3. According to Ms. Anderson, "I understood this agenda item to refer to the October 19, 2007 'Petition for Review and Request for Immediate Stay' filed in Docket No. 07-2601 by TEGP and posted on the EQC's website." *Id.*

Ms. Anderson further testifies that the EQC's notices never informed PRBRC of DEQ's reversed position and thus were not a cause for concern:

PRBRC supported DEQ's carefully considered determination that TEGP had discontinued construction of the Two Elk power plant for 24 months, as explained in DEQ's August 20, 2007 letter that was included as Attachment C to TEGP's Motion for Stay, and reasonably believed DEQ would sufficiently defend its position before the EQC at the November 28, 2007 meeting. Nothing in the EQC's agendas notified me that DEQ had reversed its August 20, 2007 determination that TEGP had discontinued construction for 24 months. In other words, nothing in the EQC's agendas gave me reason to believe PRBRC should intervene in the action or even be present at the November 28 meeting to protect its interests.

Id., ¶5.

Ms. Anderson also testifies that:

Even if the EQC's agendas had given me reason to be concerned, had I checked the EQC's website on the days or even weeks those agendas were received by PRBRC [November 7 and 10] I would not have seen DEQ's proposed Joint Stipulated Settlement Agreement of November 21, 2007.

In the EQC agendas for the November 28 meeting the EQC provided notice of a

Motion for Joint Stipulation of Dismissal of Appeal in Devon Energy, Docket No. 07-3800. See Attachments 1 and 2. Had the EQC provided similar notice of the Joint Stipulation in the Two Elk matter after November 21, 2007 but before the November 28, 2007 meeting, which it did not, I would certainly have gone to the EQC's website, read the proposed Joint Stipulation, and found cause to be present at the November 28 meeting.

Id., ¶¶6, 7.

Sufficient notice is a prerequisite before the Council may lawfully proceed to act under its rulemaking or contested case authority. As set forth in Chapter III of the Council's Rules of Practice and Procedure at Section 4:

Prior to the adoption, amendment or repeal of any rules, other than interpretive rules or statements of general policy, *the Department shall publish notice of its intended action*, including the date, time and place of any hearing, in a newspaper of general circulation in the state, and afford a thirty (30) day public comment period after the last publication.

See also, Wyo. Stat. § 16-3-103(a)(i).

Because the Council's action on December 3, 2007 effectively amended or repealed WAQSR Chapter 6, Section 2(h), by relying on the legally irrelevant removal of a pipeline and oil wellhead to find a continuation of construction at Two Elk between 2005 and 2007, notice of this drastic departure from the regulations was required before the Council acted. That the DEQ has consistently interpreted the definition of "construction" in WAQSR Chapter 6, Section 2(h), as requiring construction of a "site specific emission unit" is beyond question. Plainly, the pipeline and wellhead were not emissions units, and their removal would not require the prior issuance of an air emissions permit. As DEQ stated in its letter to TEGP of August 2, 2002:

Actual on-site construction refers to physical on-site construction activities on a site specific emissions unit which are of a permanent nature such as placement of footings, pilings and other materials and equipment needed to support ultimate structures.

Exhibit B, emphasis added. Because DEQ and/or the Council failed to notify the public that, imbedded in the settlement agreement between DEQ and TEGP was a DEQ determination that significantly amended or effectively repealed WAQSR Chapter 6, Section 2(h), this action should not be dismissed. The Council did not probe into the facts or law of DEQ's determination, and the only way that can be done now is for the Council to deny TEGP's motion to dismiss and to take jurisdiction over this matter.

Similarly, pursuant to Chapter I of the Council's Rules of Practice and Procedure, Section 4, notice of any Council contested case proceeding must comply with the Wyoming APA, including the requirement at Wyo. Stat. § 16-3-107(b)(iv) that the notice include "[a] short and plain statement of the matters asserted." Although Citizens did not seek party status in the contested case proceeding due to the notice deficiencies described above, that fact does not absolve the Council of following its own rules. Here again, it did not do so.

Because the Council's pre-hearing notices provided to PRBRC failed sufficiently and fairly to apprise the group of the real issues at stake in the Council's November 28, 2007 hearing, namely DEQ's determination that Two Elk did not discontinue construction between 2005 and 2007, PRBRC should not be deemed to have waived its right to challenge this determination before the Council. Further, the Council may not preclude the public's right to appeal a final DEQ determination to the EQC by simply incorporating that determination a week later into a settlement agreement as shown below.

2. The EQC May Not Eliminate the Public's Right to Bring a Section 16 Appeal of a DEQ Final Action Through the Expedient of a Settlement Agreement.

Second, the Council may not unilaterally eliminate a procedural right provided to the

public by statute and regulation, in this case Citizens' right to appeal a final determination of DEQ.² Because Citizens clearly have the right to take such an appeal, this matter should not be dismissed.

Pursuant to the Environmental Quality Act at Wyo. Stat. § 35-11-112(a), "the Council **shall** (i) promulgate rules and regulations necessary for the administration of this act . . ."

(Emphasis supplied.) In compliance with this mandatory duty, the Council promulgated Rules of Practice & Procedure. Chapter 1, Section 16 of those rules states:

(a) Unless otherwise provided by these Rules or the Environmental Quality Act, **all appeals to Council** from final actions of the Administrators or Director **shall be made** within sixty (60) days of such action.

(Emphasis added.)

It is a long-standing rule in Wyoming that "[a]dministrative rules and regulations have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action." *RME Petroleum Co. v. Wyoming Dept. of Revenue*, 150 P.3d 673, 688 (Wyo. 2007); *Painter v. Abels*, 998 P.2d 931, 938 (Wyo.2000). Particularly germane to this case, the Wyoming Supreme Court has held that,

While administrative agencies are afforded considerable latitude in the procedures to be followed in such [contested case] hearings, that flexibility does not go so far as to permit procedures which are contrary to statutory mandate or **procedures which allow the agency to act without collecting the necessary facts**. *Cook v. Zoning Bd. of Adjustment*, 776 P.2d 181, 185 (Wyo. 1989); *Holdings's Little America v. Board of County Comm'rs*, 712 P.2d 331, 333 (Wyo. 1985); *First National Bank of Thermopolis v. Bonham*, 559 P.2d 42, 48-49 (Wyo. 1977).

² TEGP admits that, "[v]iewed in isolation, the DEQ's November 21,2007 decision might have been the final agency action for purposes of an appeal to the Council." TEGP mistakenly argues, however, that "once the Council issued its December 3,2007 Order approving that decision, the Council's Order (rather than the Director's November 21, 2007 decision) became the final administrative action in the matter. See *Bennett*, 520 U.S. at 178.

Emphasis added.

Because the Council has a mandatory duty to hear all appeals of final DEQ actions, and because Citizens filed their appeal of DEQ's November 21, 2007 final action well within 60 days, this matter should not be dismissed.

3. Deprived of the "Confidential" Information on Which DEQ Based Its Reversal of Position, the EQC Could Not Have Independently Determined Whether DEQ's Position Was Proper.

Before approving DEQ's final action that found Two Elk did not discontinue construction for 24 months or more, the EQC was required to review thoroughly the facts and law relied upon by DEQ to take that action. This the EQC did not do, and could not have done because many of the documents were shielded from the EQC's eyes due to TEGP's claim of confidentiality. Because the EQC never reviewed the record on which DEQ relied, the EQC should allow this appeal to survive to allow a full and fair airing of the issues.

It is well established that an agency determination must be made "upon consideration of the whole record or such portion thereof as may be cited by any party." *Pan American Pet. Corp v. Wyo. Oil & Gas Con. Com'n*, 446 P.2d 550, 550 (Wyo. 1968); Wyo. Stat. § 16-3-114(c). The EQC is not simply a rubber stamp for DEQ, and under its independent agency status it is required to determine the facts for itself. Wyo. Stat. § 35-11-112. DEQ's settlement agreement contains numerous references to confidential information on which DEQ relied, but which was never provided to the Council or the public. For example, the settlement agreement states:

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.

Settlement Agreement, p. 4.

Because the EQC was not provided access to the confidential information on which DEQ based its decision, the EQC should allow this appeal to go forward so that such facts can be brought to light.

B. Citizens' Second Claim Should Not Be Dismissed.

TEGP's effort to dismiss Citizens' second claim in their appeal as untimely is misplaced. Citizens' position is not that DEQ determined incorrectly in 2005 that TEGP had commenced construction within the limited meaning of its permit. Citizens's claim is that, on the basis of the facts we know today, the 2005 determination was, in hindsight, wrong. Obviously this claim could not have been brought in 2005 because it relies on two years of subsequent experience. As Citizens' explained in their opening appeal:

Because the facts **now show** that since TEGP pored a token stack foundation in 2005 it has not proceeded with physical, on-site construction of Two Elk in a continuous manner. **Because TEGP failed to continue with construction after poring the stack foundation in 2005 its initial showing of commencement has no legitimacy.**

A runner who puts on a bib and crosses the start line could be said, at that moment, to have "commenced" a race. However, if immediately after crossing the start line the runner leaves the course and spends the rest of the morning at Starbucks, the runner's behavior after crossing the start line destroys the "race commencement" determination. The runner may have commenced to run, but he never commenced to run the race because he never intended to run beyond anything but the start line. Similarly, history shows that while TEGP may have commenced to construct a stack foundation in 2005, it never commenced construction of the Two Elk plant (and it must not have been contractually obligated to do so) because it never followed the stack foundation work with a continuous program of physical, on-site work related to the stack foundation or any other permanent Two Elk structure.

Citizens' December 20, 2007 appeal, pp. 15-16.

In sum, Citizens appeal on this issue is not untimely because it could not have been brought sooner. Only the passage of time showed the emptiness of TEGP's claim that it had commenced construction of the Two Elk plant in 2005.

C. Citizens Appeal Should Not Be Dismissed for Want of Standing.

TEGP also incorrectly asserts that Citizens insufficiently allege standing to bring this appeal. First, TEGP misstates the law.

According to Wyo. Stat. § 35-11-112(a), the Environmental Quality Council shall:

(iii) Conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof; [and]

(iv) Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.

The Rules of Practice and Procedure that govern this proceeding allow any "protestant" to bring an appeal before the Council. "Protestant" is defined as "any person . . . requesting a hearing before the Environmental Quality Council and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief." Chapter I, Sections 2 and 3. Clearly Citizens are "persons" and therefore may bring this appeal. Although an intervener must allege that he is "adversely affected" by the action, no similar requirement for an initial protestant is found in the Rules of Practice and Procedure.

Nevertheless, Citizens' plainly alleged that they were adversely affected by DEQ's actions and inactions, and thus they should not be dismissed on standing grounds. As Citizens stated in their opening appeal:

Citizens' members reside in, work in, or regularly visit and use the resources of

Campbell County and the Thunder Basin Grasslands, the airsheds that would be most immediately impacted by emissions from TEGP's Two Elk plant. The aesthetic, recreational, environmental, spiritual, economic and health-related interests of Citizens' members have been injured by DEQ's failure to properly administer the Environmental Quality Act, the Wyoming Air Quality Standards and Regulations, and TEGP permits. The interests of Citizens' members that are directly injured by DEQ's actions and inactions set forth herein include, but are not limited to: (1) breathing clean air, (2) having new sources of air pollution follow all applicable laws, including all permitting requirements and the installation of current Best Available Control Technology, (3) viewing the sky, natural scenery and wildlife unimpaired by unnecessary pollution, and (4) protecting the natural ecology of the region from air pollution related impacts. The interests of Citizens's members have been, and unless the relief requested herein is granted, will continue to be, adversely affected by DEQ's actions and inactions complained of herein.

Citizens' appeal at pp. 10-11. Because Citizens sufficiently allege that they will be directly affected by the emissions from the Two Elk plant they have standing here.

C. Citizens Voluntarily Dismiss Their Third and Fourth Claims.

Citizens hereby agree to dismiss voluntarily their third and fourth claims.

III. Conclusion

For the reasons set forth above, the EQC should deny TEGP's motion to dismiss Citizens' first and second claims. Because Citizens agree to dismiss voluntarily their third and fourth claims, TEP's motion should be denied as moot with respect to these claims.

DATED this 9th day of April, 2008.

/s/ Reed Zars
Reed Zars
Attorney at Law
910 Kearney St.
Laramie, WY 82070
307-745-7979

ATTORNEY FOR CITIZENS

CERTIFICATE OF SERVICE

I certify that on this 9th day of April, 2008, I caused the foregoing **Citizens' Response to Two Elk Motion to Dismiss** to be served by U.S. Mail and by email to the following:

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/s/ Reed Zars
Reed Zars

Declaration of Shannon Anderson

I, Shannon R. Anderson, declare as follows:

1. I am an Organizer at the Powder River Basin Resource Council (PRBRC). I work in PRBRC's Sheridan office, located at 934 N. Main Street, Sheridan, Wyoming 82801.
2. PRBRC is on the mailing list of the Wyoming Environmental Quality Council (EQC) to be notified of matters that will be considered at EQC meetings.
3. On or about November 7, 2007, PRBRC received in the mail an agenda from the EQC regarding the EQC's upcoming November 28, 2007 meeting in Rock Springs. A copy of that agenda is attached hereto as Attachment 1. Under item 3, the agenda stated that the EQC was going to consider the "Motion for Stay" of Two Elk Generation Partners (TEGP). I understood this agenda item to refer to the October 19, 2007 "Petition for Review and Request for Immediate Stay" filed in Docket No. 07-2601 by TEGP and posted on the EQC's website.
4. On or about November 10, 2007, PRBRC received in the mail an amended agenda from the EQC regarding the November 28, 2007 meeting in Rock Springs. A copy of that agenda is attached hereto as Attachment 2. The amended agenda only changed the location of the meeting.
5. PRBRC supported DEQ's carefully considered determination that TEGP had discontinued construction of the Two Elk power plant for 24 months, as explained in DEQ's August 20, 2007 letter that was included as Attachment C to TEGP's Motion for Stay, and reasonably believed DEQ would sufficiently defend its position before the EQC at the November 28, 2007 meeting. Nothing in the EQC's agendas notified me that DEQ had reversed its August 20, 2007 determination that TEGP had discontinued construction for 24 months. In other words, nothing in the EQC's agendas gave me reason to believe PRBRC should intervene in the action or even be present at the November 28 meeting to protect its interests.
6. Even if the EQC's agendas had given me reason to be concerned, had I checked the EQC's website on the days or even weeks those agendas were received by PRBRC I would not have seen DEQ's proposed Joint Stipulated Settlement Agreement of November 21, 2007.
7. In the EQC agendas for the November 28 meeting, the EQC provided notice of a Motion for Joint Stipulation of Dismissal of Appeal in Devon Energy, Docket No. 07-3800. See Attachments 1 and 2. Had the EQC provided similar notice of the Joint Stipulation in the Two Elk matter after November 21, 2007 but before the November 28,

2007 meeting, which I did not, I would certainly have gone to EQC's website, read the proposed Joint Regulation, and found cause to be present at the November 28 meeting.

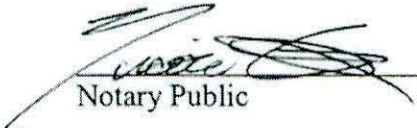
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

STATE OF Wyoming)
)
COUNTY OF Sheridan)


Signature

Subscribed and sworn before me this 9th day of April 2008.




Notary Public



THE STATE OF WYOMING
ENVIRONMENTAL QUALITY COUNCIL

AGENDA

Dave Freudenthal,
Governor
Richard C. Moore, P.E.,
Chair
Sara Flitner,
Vice-Chair
Dennis Boal,
Secretary
Kirby Hedrick
Mark Gifford
John N. Morris
F. David Searle
Terri Lorenzon, Esq.
Director
Joe Girardin,
Paralegal
Kim McGee,
Executive Assistant

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FAX: (307) 777-6134
<http://deq.state.wy.us/eqc>

The Environmental Quality Council is scheduled to hold a meeting at the Western Wyoming Community College, 2500 College Drive, Rm. #1302, Rock Springs, WY, on November 28, 2007 at 9:00 A.M.. The following is the Council's tentative agenda:

For updated meeting information, please contact the Council office at (307) 777-7170 or check the Council's website at: <http://deq.state.wy.us/eqc/>

MEETING

1. **Call to Order**
2. **Approval of Minutes**
 - A. May 10, 2007 Conference Call
 - B. August 29, 2007
3. **Decisions**
 - A. Designation of Area Known as Adobe Town as Rare or Uncommon Docket No. 07-1101
 - B. Two Elk Generating Partners—Docket No. 07-2601, Motion for Stay
4. **Old Business**
 - A. Transition of the EQC Executive Director/Attorney
 - B. Review of the Docket
 - a. Scheduling of Cases
5. **New Business**
 - A. 2009-2010 Budget
 - B. Use of Office of Administrative Hearings
6. **Dismissal**
 - A. Devon Energy—Docket No. 07-3800
Motion for Joint Stipulation of Dismissal of Appeal
7. **Review of Program**
 - A. Solid and Hazardous Waste, Chapters 1-14
Pending Rulemaking—Council Work Session

6. Schedule next EQC Meeting

Adjournment

In accordance with the Americans with Disabilities Act, special assistance or alternate formats will be made available upon request for individuals with disabilities



THE STATE OF WYOMING
ENVIRONMENTAL QUALITY COUNCIL

AMENDED AGENDA

Dave Freudenthal,
Governor
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Chair
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Vice-Chair
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Kirby Hedrick
Mark Gifford
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F. David Searle
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eqc](http://deq.state.wy.us/eqc)

The Environmental Quality Council is scheduled to hold a meeting at the Sweetwater County School Administration Building Board Room, 3550 Foothill Blvd., Rock Springs, WY, on November 28, 2007 at 9:00 A.M.. The following is the Council's tentative agenda:

For updated meeting information, please contact the Council office at (307) 777-7170 or check the Council's website at: <http://deq.state.wy.us/eqc/>

MEETING

1. Call to Order

2. Approval of Minutes

- A. May 10, 2007 Conference Call
- B. August 29, 2007

3. Decisions

- A. Designation of Area Known as Adobe Town as Rare or Uncommon
Docket No. 07-1101
- B. Two Elk Generating Partners—Docket No. 07-2601, Motion for Stay

4. Old Business

- A. Transition of the EQC Executive Director/Attorney
- B. Review of the Docket
 - a. Scheduling of Cases

5. New Business

- A. 2009-2010 Budget
- B. Use of Office of Administrative Hearings

6. Dismissal

- A. Devon Energy—Docket No. 07-3800
Motion for Joint Stipulation of Dismissal of Appeal

7. Review of Program

- A. Solid and Hazardous Waste, Chapters 1-14
Pending Rulemaking—Council Work Session

B. Proposed Changes to Pollution Prevention Program

8. Schedule next EQC Meeting

Adjournment

In accordance with the Americans with Disabilities Act, special assistance or alternate formats will be made available upon request for individuals with disabilities



EXHIBIT B



The State of Wyoming

Department of Environmental Quality

Jim Geringer, Governor

Herschler Building • 122 West 25th Street • Cheyenne, Wyoming 82002

ADMIN/OUTREACH (307) 777-7758 FAX 777-3610	ABANDONED MINES (307) 777-6145 FAX 777-6462	AIR QUALITY (307) 777-7391 FAX 777-5616	INDUSTRIAL SITING (307) 777-7368 FAX 777-6937	LAND QUALITY (307) 777-7756 FAX 777-5864	SOLID & HAZ. WASTE (307) 777-7752 FAX 777-5973	WATER QUALITY (307) 777-7781 FAX 777-5973
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August 2, 2002

Mr. Daniel D. Yueh, Vice President
North American Power Group, Ltd
8480 E. Orchard Rd, Suite 4000
Greenwood Village, CO 80111-5027

Re: Two Elk Generating Station - Unit 1
Permit No. CT-1352A(Corrected)

Dear Mr. Yueh:

I am in receipt of your letter of July 30, 2002, wherein you state that Two Elk Generation Partners, Limited Partnership (TEGP) is providing "Notice of Commencement of Construction" pursuant to the requirements of the referenced permit issued by the Wyoming Department of Environmental Quality on February 17, 2000.

As you are aware, Wyoming Air Quality Standards and Regulations(WAQSR) at Chapter 6, Section 2(a)(i) allows no actual work on any new source prior to issuance of a construction permit for the facility. Chapter 6, Section 2(e)(h) also provides that an approval to construct becomes invalid if construction has not commenced within 24 months unless such time period has been extended by the Administrator. My letter of March 15, 2002, granted an extension of the referenced permit for a period of six months to August 20, 2002, on a one time basis only. On that basis TEGP is allowed to begin actual work on the facility, however, I cautioned in my March 15, 2002, letter that any construction on a "major emitting facility" initiated by August 20, 2002, must also meet the regulatory definition of "commenced construction" for the permit to remain valid. That definition is contained at Chapter 6, Section 4(a)(ii) of the WAQSR and at 40 CFR Part 51.166(b)(9) of the Federal Regulations. At our meeting on May 1, 2002, in my offices I provided you with clarification and guidance relative to the long standing regulatory interpretation of that definition.

To reiterate, the pertinent section of that definition is that the owner or operator has... "(i) begun, or caused to begin, a continuous program of **actual on-site construction** of the facility or (ii) entered into binding agreements or **contractual obligations**, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a **reasonable time.**"