

DEC 20 2007

BEFORE THE WYOMING ENVIRONMENTAL QUALITY COUNCIL Terri A. Lorenzon, Director
Environmental Quality Council

Sierra Club and PRBRC Appeal of DEQ)
Construction Continuance and Commencement)
Determinations, and Permit Deadline Extensions)
Re: Two Elk Power Plant)

Docket No. 07-2802

CITIZENS' APPEAL OF DEQ CONSTRUCTION CONTINUANCE AND COMMENCEMENT DETERMINATIONS, AND PERMIT DEADLINE EXTENSIONS, REGARDING TWO ELK POWER PLANT

I. INTRODUCTION

1. The Sierra Club and the Powder River Basin Resource Council (collectively, "Citizens") respectfully request the Wyoming Environmental Quality Council ("EQC") set aside the November 21, 2007 final determination of Department of Environmental Quality ("DEQ") Director John Corra that Two Elk Generation Partners ("TEGP") has not discontinued construction of its proposed "Two Elk" coal-fired power plant south of Gillette, Wyoming, for a period of 24 months or more. Director Corra's November 21, 2007 determination represents a reversal of DEQ's earlier, factually supported position that TEGP had discontinued physical, on-site construction of Two Elk for 24 months or more as set forth in the August 20, 2007 letter from Dave Finley, Air Quality Division Administrator, to TEGP. Director Corra's subsequent determination relied on alleged "confidential business information," unrelated to the physical, on-site construction of Two Elk, to make his determination. Moreover, the information that Mr. Corra relied upon was never disclosed to the EQC or the public.

2. Citizens also respectfully request the EQC to find that TEGP never legitimately commenced construction of Two Elk in 2005. Although TEGP commenced construction of a stack foundation in 2005, because TEGP never performed any additional on-site work related to the stack foundation or any other permanent Two Elk structure, TEGP never commenced

construction of Two Elk in 2005.

3. Citizens further respectfully request the EQC to find that DEQ's modification of permit CT-1352A, that extended TEGP's commence construction deadline by over three years, from 2002 to 2005, invalid because such permit modification was not preceded by public notice or the opportunity to comment, and failed to show that TEGP had made a satisfactory showing that an extension was justified.

4. Citizens additionally ask the EQC to order DEQ to release immediately to Citizens all records related to Two Elk. DEQ has refused to disclose such records for at least a month after they were requested by Citizens in writing on November 29 and 30, 2007.

5. Citizens finally respectfully request that the EQC stay the effectiveness of DEQ's determination that TEGP did not discontinue construction, as set forth in the November 21, 2007 "Joint Stipulated Settlement Agreement" filed in EQC Docket No. 07-2601, pending the outcome of this appeal.

II. EQC JURISDICTION

6. The EQC has jurisdiction to review DEQ Director John Corra's final determination that TEGP had not discontinued construction for 24 months pursuant to the Environmental Quality Act and DEQ Rules of Practice and Procedure. The EQC also has jurisdiction to determine TEGP did not commence construction of Two Elk in 2005, that DEQ's three-year extension of TEGP's 2002 commence construction deadline is invalid, and to order DEQ to release Two Elk documents to Citizens.

7. Pursuant 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.

8. “The EQC is the body established by the Wyoming legislature to hear and decide disputes arising from the implementation of the Wyoming Environmental Quality Act. The EQC is to ‘[c]onduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the [DEQ] or any division thereof [.]’ Wyo. Stat. § 35-11-112(a)(iii) (1997).” *Platte Development Co. v. Environmental Quality Council*, 966 P.2d 972, 975 (Wyo. 1998).

9. Pursuant to DEQ Rules of Practice & Procedure, Ch. 1, Sec. 16:

(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.

10. Because Citizens seek to contest DEQ’s administration and enforcement of WAQSR Chapter 6, Section 2(h), WAQSR Chapter 6, Section 4(a), 40 C.F.R. § 51.166(b)(9), the Environmental Quality Act at Wyo. Stat. § 35-11-1101(a), and TEGP permit CT-1352B condition 4, and to contest DEQ’s effective renewal of permit CT-1352B, the EQC has jurisdiction over this matter.

III. FACTS

11. In 1996, more than ten years ago, TEGP submitted an application to DEQ to construct a 250 megawatt (MW) coal-fired power plant called Two Elk south of Gillette, Wyoming. After providing public notice and opportunity to comment pursuant to WAQSR

deadline, this time for six months to August 20, 2002. According to then-DEQ Administrator

Dan Olson:

I am going to extend Permit CT1352A for a six-month period on a one time basis only. **I will not consider a further extension of the permit.** Construction must be initiated and meet the regulatory definition of “commenced” construction by August 20, 2002 or the permit will expire.

DEQ expressed no determination that TEGP had made a satisfactory showing that an extension was justified consistent with WAQSR Chapter 6, Section 2(h). DEQ provided no public notice or opportunity to comment on this permit modification.

18. On July 30, 2002, TEGP filed a “Notice of Commencement of Construction” with DEQ. According to its notice, TEGP stated that it “anticipates commencing construction on or about August 5, 2002 and continuing thereafter. TEGP expects that construction activities will achieve the milestone of driving piles for major apparatus (boiler) foundation placement by August 20, 2002.” In its notice TEGP provided no evidence of physical, on-site construction, nor did it provide contracts showing it was committed to a continuous program of construction.

19. On August 2, 2002, DEQ Administrator Dan Olson promptly responded to TEGP’s “notice of commencement,” reminding TEGP that he had not only granted the six month extension “on a one time basis only,” but that he had “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.” After setting forth the legal definition of “commenced construction” found at Chapter 6, Section 4(a)(ii) of the WAQSR and at 40 C.F.R. Part 51.166(b)(9), and long-standing agency interpretation of that term, Mr. Olson summarized:

of its obligation to commence construction of the Two Elk plant, from August 20, 2002 to May 29, 2005.

25. Rather than live by its statement that TEGP would not be granted another extension, or by its legal determination that permit CT-1352A had become invalid on August 20, 2002, DEQ capitulated to TEGP's extension demand. On May 29, 2003, therefore, DEQ issued to TEGP air quality permit CT-1352B that contained a new May 29, 2005 commence construction deadline.

26. DEQ provided no public notice or opportunity to comment on its significant modification of permit CT-1352A. DEQ expressed no determination that TEGP had made a satisfactory showing that an extension of permit CT-1352A was justified consistent with WAQSR Chapter 6, Section 2(h). DEQ's new permit CT-1352B continued to provide that it would become invalid if TEGP discontinued construction for two years or more.

27. To demonstrate that it had commenced construction by May 29, 2005, permit CT-1352B at paragraph 4 required TEGP at a minimum to complete on-site construction of a foundation for either the main boiler, main stack, steam turbine or air-cooled condenser, and to enter into a binding written contract to purchase a site-specific main boiler or steam turbine that was not contingent on any future action.

28. On July 18, 2005, DEQ determined that, prior to May 29, 2005, TEGP had pored a foundation for the main stack and, apparently, had entered into a binding written contract to purchase a main boiler or steam turbine. DEQ thus determined at that time that TEGP had commenced construction of the Two Elk plant. Thereafter it was TEGP's obligation to proceed with a continuous program of construction and not to discontinue construction for a period of 24

months or more.

29. On June 7, 2007, DEQ conducted an inspection of the Two Elk site and discovered that there had been no additional construction since TEGP pored the stack foundation in 2005.

30. On August 22, 2007, in a letter from DEQ Administrator Dave Finley, DEQ informed TEGP that its construction permit was no longer valid because no construction had taken place for the last two years. According to Mr. Finley, DEQ's determination that no construction had taken place at the Two Elk site was based on the following observations:

On May 31, 2005, DEQ/AQD Inspector Mike Warren inspected the Two Elk site and observed a concrete foundation for the main stack. In June 7, 2007, DEQ/AQD Inspector Mike Warren conducted an inspection of the Two Elk site and observed that there had been no additional dirt work or construction since his 2005 inspection. My review of your periodic status reports supports Mr. Warren's observations and leads me to conclude that the last date for any construction was before May 29, 2005, and that no construction has occurred since that date up to and including the DEQ/AQD's last on-site inspection on June 7, 2007. Additionally, no construction activities have been documented in TEGP's status reports during that time period.

31. On October 19, 2007, TEGP filed before the Environmental Quality Council a challenge to DEQ's August 22, 2007 determination. Styled as a "Petition for Review and Request for Stay," TEGP argued that DEQ's determination amounted to a "revocation" of its permit for which the Environmental Quality Act allows a contested case hearing. Wyo. Stat. § 35-11-112(a)(iv). TEGP's petition did not challenge any of the specific factual findings of DEQ.

32. On November 21, 2007, based on a review of purported confidential business information provided by TEGP, DEQ Director John Corra reversed DEQ's prior determination that construction had been discontinued for 24 months or more. According to the Joint

Stipulated Settlement Agreement:

[T]he 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.

33. None of the five types of activities identified in the settlement agreement describe any physical, on-site construction of the Two Elk plant. Thus none of the facts described in the settlement agreement support a determination that TEGP was engaged in a continuous program of physical, on-site construction of Two Elk between 2005 and 2007.

34. TEGP did not commence construction of Two Elk by February 27, 2000 as required by Permit CT-1352, or by February 17, 2002 as required by Permit CT-1352A, or by August 20, 2002 as required by Permit CT-1352A as extended, or by May 29, 2005 as required by Permit CT-1352B.

35. Even if TEGP commenced construction at some time between 1998 and 2005, TEGP failed to engage in a continuous program of actual on-site construction during that period. Between 1998 and 2007, TEGP discontinued construction for a period or periods of 24 months or more.

36. TEGP will not complete the construction of Two Elk within a reasonable time.

37. DEQ significantly modified permit CT-1352A on March 15, 2002, by extending

TEGP's deadline to commence construction by six months. DEQ did not provide public notice or opportunity to comment on its March 15, 2002 permit modification pursuant to WAQSR Chapter 6, Section 2(m).

38. DEQ again significantly modified permit CT-1352A on May 29, 2003, by extending TEGP's deadline to commence construction by two years and nine months. DEQ did not provide public notice or opportunity to comment on its May 29, 2003 permit modification pursuant to WAQSR Chapter 6, Section 2(m).

39. DEQ did not make a determination for each of the deadline extensions it granted to TEGP that TEGP had made a satisfactory showing that an extension was justified consistent with WAQSR Chapter 6, Section 2(h).

40. For each deadline extension granted by DEQ, the agency did not review and re-evaluate the emission limits and other requirements in Permit CT-1352B to determine whether they reflect current Best Available Control Technology (BACT). WAQSR Chapter 6, Section 4(b)(ii)(A). The emission limits and other requirements in Permit CT-1352B do not reflect current BACT.

41. 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.

42. On November 29 and 30, 2007, pursuant to the Wyoming Public Records Act, Wyo. Stat. § 16-4-201, *et seq.*, Citizens submitted two written requests to DEQ for all relevant Two Elk documents. To date, DEQ has refused to provide Citizens access to any Two Elk documents for at least a month. DEQ has not, pursuant to the Environmental Quality Act at Wyo. Stat. § 35-11-1101(a), demonstrated that any of the documents it is withholding contain trade secrets.

43. As of the date of this filing, Citizens have been significantly hindered by DEQ's refusal to allow them access to all Two Elk documents not otherwise available on DEQ's website. Citizens therefore reserve their right to revise and augment the allegations herein once access to the Two Elk documents is allowed.

IV. ISSUES ON APPEAL

A. The EQC Should Overturn DEQ's Determination That TEGP Did Not Discontinue Construction For Two Years or More.

44. Pursuant 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.

45. Citizens contest DEQ's administration of Permit CT-1352B, condition 4; and WAQSR Chapter 6, Section 2(h), by determining TEGP did not discontinue construction for 24 months or more.

46. DEQ determined on August 20, 2007 that Permit CT-1352B was invalid because TEGP discontinued construction of the Two Elk plant for 24 months or more. DEQ thereafter effectively renewed permit CT-1352B by reversing its previous determination to find TEGP did not discontinue construction for 24 months or more. Citizens contest DEQ's effective renewal of TEGP's invalid permit.

47. Permit CT-1352B, condition 4 states in pertinent part:

If construction or modification does not commence within 24 months of the date of the Council's Order approving the stipulated modification of this permit or 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.

48. WAQSR Chapter 6, Section 2(h) states:

A permit to construct or modify shall remain in effect until the permit to operate the facility for which the application was filed is granted or denied or the application is canceled. However, an approval to construct or modify shall become invalid if construction is not commenced within 24 months after receipt of such approval or if construction is discontinued for a period of 24 months or more. The Administrator may extend such time period(s) upon a satisfactory showing that an extension is justified.

49. As explained by DEQ 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.

50. The facts are uncontested that TEGP did not perform any significant physical, on-site construction of Two Elk for 24 months or more after it pored the stack foundation in 2005.

As DEQ Administrator Dave Finley stated in his letter to TEGP of August 20, 2007:

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 4 and Chapter 6 Section 2(h) of the WAQSR. The expiration occurred automatically and did not require any action by DEQ/AQD to take effect.

51. Nevertheless, on November 21, 2007, based on a review of purported confidential business information provided by TEGP, DEQ Director John Corra reversed DEQ's prior determination that construction had been discontinued for 24 months or more. According to the November 21, 2007 Joint Stipulated Settlement Agreement filed in EQC Docket 07-2601:

[T]he 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.

52. None of the five types of activities identified in the November 21, 2007 settlement agreement describe any physical, on-site construction of the Two Elk plant. Thus none of the facts described in the settlement agreement support a determination that TEGP was engaged in a continuous program of physical, on-site construction of Two Elk between 2005 and 2007.

53. Because DEQ's November 21, 2007 reversal of its August 20, 2007 determination was wrong as a matter of law and fact, and was based on alleged "confidential business information" that was not made available to either the public or the EQC, it should be overturned by the EQC.

B. The EQC Should Find That TEGP Did Not Commence Construction In 2005.

54. In 2005 TEGP persuaded DEQ that by May 29, 2005, it had commenced construction of the Two Elk facility within the meaning of Permit CT-1352B, condition 4, WAQSR Chapter 6, Section 4(a), and 40 C.F.R. Part 51.166(b)(9). The pertinent provisions of Permit CT-1352B, condition 4, state:

To satisfy the condition that construction commence within 24 months, Two Elk Generation Partners, Limited Partnership (TEGP) shall, within 24 months:

a) complete on-site construction of any one (1) of the following foundations: i) Main Boiler, ii) Main Stack, iii) Steam Turbine, or iv) Air Cooled Condenser, and

b) enter into a binding written contract to purchase a site-specific main boiler or steam turbine, which is not contingent upon any additional notice to proceed or exercise of an option, etc.

55. WAQSR Chapter 6, Section 4(a) states:

"Commenced", as applied to construction of a major stationary source or major modification, means that the owner or operator has obtained a Construction Permit required by Chapter 6, Section 2 and either has (i) begun, or caused to begin, **a continuous program of actual on-site construction of the source** 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 source to be completed within a reasonable time.**

56. 40 C.F.R. Part 51.166(b)(9) states:

Commence as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction

approvals or permits and either has: (i) Begun, or caused to begin, a **continuous program of actual on-site construction of the source**, to be completed within a reasonable time; or (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

57. As explained by DEQ in its letter to TEGP of August 2, 2002:

1. **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. **There must be clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner.** Activities such as site clearing, excavation work and road building will generally not satisfy the commence construction requirements.

2. **Contractual obligations** to undertake a program of construction refers to a contractual obligation which is site specific as referenced above and which cannot be cancelled or modified without substantial loss. Contracts for non site specific equipment, such as boilers, will typically not suffice. The criteria for substantial loss is generally considered to be one which would exceed 10% of the total project cost.

3. **Reasonable time** in the regulatory definition is **intended to assure the permitting authority that the approval to go forward with construction, having been “commenced” as defined above, in a continuous manner is implemented.** If construction is not commenced (in this case by August 20, 2002) or if there is a break in construction of 24 months or more after construction has “commenced”, the permit to construct is invalid.

58. 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.

59. 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.

60. As shown above, the EQC should find that TEGP did not commence construction of Two Elk in 2005 and that, as a consequence, permit CT-1352B is invalid.

C. The EQC Should Find DEQ's Permit Modifications that Extended TEGP's Commence Construction Deadline By Over Three Years Invalid.

61. Pursuant to WAQSR Chapter 6, Section 2(m),

After the Administrator has reached a proposed decision based upon the information presented in the permit application to construct or modify, the Division of Air Quality will advertise such proposed decision in a newspaper of general circulation in the county in which the source is proposed.

* * *

The public notice will include notification of the opportunity for a public hearing and will indicate the anticipated degree of increment consumption if the source is subject to Chapter 6, Section 4 of these Regulations. The public will be afforded a 30-day period in which to make comments and recommendations to the Division of Air Quality. A public hearing may be called if sufficient interest is generated or if any aggrieved party so requests in writing within the 30-day comment period. After considering all comments, including those presented at any hearings held, the Administrator will reach a decision and notify the appropriate parties.

62. When DEQ first extended TEGP's commence construction deadline in permit

CT-1352A for two years from February 17, 2000, to February 17, 2002, the agency acknowledged its obligation to provide public notice and opportunity to comment regarding the modified permit pursuant to WAQSR Chapter 6, Section 2(m).

63. When DEQ extended TEGP's February 17, 2002 commence construction deadline in permit CT-1352A for over three years to May 29, 2005, however, DEQ did not provide public notice and opportunity to comment regarding the modified permit pursuant to WAQSR Chapter 6, Section 2(m).

64. When DEQ extended TEGP's February 17, 2002 commence construction deadline in permit CT-1352A for over three years to May 29, 2005, DEQ did not express any determination that TEGP had made a satisfactory showing that an extension was justified consistent with WAQSR Chapter 6, Section 2(h).

65. Pursuant to the Wyoming Administrative Procedure Act, Wyo. Stat. § 16-3-114(c)(i)(D), agency action will be set aside if such action was taken "without observance of procedure required by law."

66. According to the Wyoming Supreme Court in *Tri-State Generation and Transmission Assoc. v. Environmental Quality Council*, 590 P. 2d 1324, 1329 (1978), "[w]hen an agency has established general procedures it is bound to follow such procedures."

67. The extension of a compliance deadline in a permit amounts to a permit modification that, unless established notice and comment requirements are followed, is not a "valid" modification. *Cuthbertson v. Coats American, Inc.*, 913 F. Supp.1572, 1580 (D.N.D. Ga. 1995).

68. Because DEQ's extension of the commence construction deadline in permit CT-

1352A for over three years should have been preceded by public notice and opportunity to comment as a permit modification pursuant to WAQSR Chapter 6, Section 2(m), and because DEQ did not express any determination that TEGP had made a satisfactory showing that the extension was justified consistent with WAQSR Chapter 6, Section 2(h), the EQC should find such extension invalid as a matter of law.

D. The EQC Should Require DEQ to Release All Records Related To Two Elk.

69. Pursuant to the Environmental Quality Act at Wyo. Stat. § 35-11-1101(a), “[a]ny records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public.” The only records that DEQ can lawfully refuse to disclose to the public consistent with Wyo. Stat. § 35-11-1101(a) are legitimate “trade secrets.”

70. Citizens made written requests to DEQ to review Two Elk documents on November 29 and 30, 2007. DEQ has refused to allow citizens access to any Two Elk documents in DEQ files as of the date of this filing.

71. DEQ has made no showing that any of the records related to Two Elk would disclose trade secrets if released. The EQC should order DEQ to release to Citizens all Two Elk documents immediately.

V. CONCLUSION

For the reasons set forth above, the EQC should set aside DEQ’s November 21, 2007 determination that TEGP did not discontinue construction of the Two Elk plant for 24 months or more. The EQC should also find that TEGP never legitimately commenced construction of the Two Elk plant in 2005. Although TEGP commenced construction of a stack foundation in 2005,

TEGP never commenced construction of the Two Elk plant in 2005 because it has failed to perform any additional on-site work related to the stack foundation or any other permanent Two Elk structure ever since. The EQC should also find DEQ's extension of TEGP's 2002 commence construction deadline by over three years amounted to an invalid permit modification that failed to follow public notice and comment requirements. Finally, the EQC should require DEQ to release all Two Elk documents to Citizens forthwith.

DATED this 20th day of December, 2007.

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