

BEFORE THE WYOMING ENVIRONMENTAL QUALITY COUNCIL

Powder River Basin Resource Council and)	
Sierra Club Petition to the EQC for a Show)	
Cause Hearing Related to the Validity)	EQC Docket No. <u>14-2801</u>
of the Air Quality Construction Permit Held By)	
Two Elk Generation Partners)	

PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL
FOR A SHOW CAUSE HEARING RELATED
TO THE VALIDITY OF TWO ELK GENERATION PARTNERS' PERMIT

INTRODUCTION

1. Powder River Basin Resource Council and Sierra Club (“Organizations”) respectfully petition the Environmental Quality Council (“EQC” or “Council”) to hold a show cause hearing, in which our organizations may participate, and after such a hearing, issue an order that holds that Two Elk Generation Partners’ (“TEGP” or “Two Elk”) Air Quality Permit CT-1352B (“permit”) is invalid as a matter of law.

2. TEGP has discontinued construction activities of its proposed power plant for more than twenty-four months at its Campbell County location and therefore, as explained below, TEGP’s permit is no longer valid as a matter of law under Wyoming and federal laws and regulations.

3. However, to date, the Department of Environmental Quality (“DEQ” or “Department”) considers the TEGP permit to be valid and current. *See* electronic correspondence from Steven Dietrich, attached as Exhibit A. Numerous requests from the organizations to act on this issue over the years have been ignored by Department staff.

4. We respectfully ask the EQC to, without undue delay, order TEGP and/or the DEQ to show cause why the permit is still valid. After issuing such an order, we ask the EQC to hold a public hearing, in which the Organizations may participate. If TEGP and/or the DEQ are unable

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to show cause at such a hearing, the EQC should order the TEGP permit invalid as a matter of law.

STATEMENT OF JURISDICTION

5. The EQC has jurisdiction to review the status of the TEGP permit and declare, as a matter of law, that the permit is no longer valid.

6. The EQC has broad oversight authority over implementation of Wyoming's environmental laws and regulations. Pursuant to W.S. § 35-11-112(a), the EQC "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 . . . division[]." Under subsection (iii) of that section, the EQC shall "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." W.S. § 35-11-112(a)(iii); *Platte Development Co. v. Env't'l Quality Council*, 966 P.2d 972, 975 (Wyo. 1998) ("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 Organizations contest the Department's enforcement of TEGP permit condition number 4, which implements requirements of the Wyoming Air Quality Standards and Regulations ("WAQSR") Chapter 6, Section 2(h), as discussed below.

7. The Council has the power to "Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified." W.S. § 35-11-112(c)(ii). In this case, the Council has the power to order that the TEGP permit is invalid and should be revoked as a matter of law.

8. The Council also has continuing oversight and enforcement authority over the settlement agreement entered into between the Department and TEGP as part of EQC Docket 07-2601, explained below.

STATEMENT OF FACTS

9. In 1996 – *eighteen years ago* – TEGP submitted an application to the Department to construct a 250 megawatt (MW) coal-fired power plant called Two Elk southeast of Wright, Wyoming. On February 27, 1998, the Department issued air quality construction permit CT-1352 to TEGP. Under TEGP’s permit, the permit becomes invalid if TEGP discontinues construction for twenty-four months or more.

10. After several construction date extensions granted by the Department – some after public notice and comment and some without – TEGP allegedly “commenced construction” on August 20, 2002.

11. On August 22, 2002, DEQ personnel inspected the Two Elk site and observed three steel beams driven into the dirt, but no other ongoing construction activity. *See* DEQ Inspection Report, Aug. 23, 2002, attached as Exhibit B.

12. On September 27, 2002, lacking any evidence of ongoing construction, the Department informed TEGP in writing that the permit was no longer valid because TEGP has not actually commenced construction within the meaning of the federal and state environmental laws.

13. On October 23, 2002, TEGP filed a petition before the Council, challenging the Department’s determination. *See* EQC Docket No. 02-2601. In resolution of the petition, the Department agreed to yet another extension request, and revised the permit to contain a new May 29, 2005 construction deadline. The revised permit continued to provide a requirement that it would become legally invalid should TEGP discontinue construction for two years or more. CT-

1352B condition 4 (“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.”).

14. On July 18, 2005, the Department determined that, prior to the May 29, 2005 deadline, TEGP poured a foundation for the main stack and had “commenced construction.”

15. Predictably, two years later TEGP had not carried out ongoing construction activities. On June 7, 2007, the Department conducted an inspection of the Two Elk site and discovered that there had been no additional construction since TEGP poured the concrete for the stack foundation in 2005. *See* EQC Docket 07-2601.

16. On August 22, 2007, DEQ informed TEGP that its permit was no longer valid.

17. On October 19, 2007, TEGP once again appealed to the Council, challenging the Department’s determination. However, TEGP did not challenge any of the specific factual findings of DEQ.

18. Based on confidential business information submitted by TEGP, the Department entered into a Stipulated Settlement Agreement on November 21, 2007, approved by the Council, which governs TEGP’s permit today.

19. The Department has not carried out any further enforcement activities related to the validity of TEGP’s permit. To date, the Department considers TEGP’s permit current and valid.

20. The Department’s determination is notwithstanding the fact that TEGP needs to obtain a major modification to its permit in order to comply with the 2007 settlement agreement. *See* ¶ 3(g) of the Settlement Agreement. That permit application has been pending with the Department since it was submitted on July 20, 2010.

21. The Department’s determination is also notwithstanding a staff investigation report of October 9, 2013, attached as Exhibit C. After an October 2, 2013 site visit, DEQ staff determined

that “No construction activities could be confirmed to have taken place in the last twenty-four months.”

22. A current picture of the Two Elk site, taken on April 18, 2014 from the public road abutting the gate, is attached as Exhibit D.¹

ARGUMENT

23. The Organizations contend that TEGP has, to date, failed to commence construction of the Two Elk power plant. None of the “construction” activities completed to date are sufficient to qualify as commencing construction under the Wyoming Environmental Quality Act or the Clean Air Act.

24. Nonetheless, even if the Council agrees with past determinations and extensions granted by the Department and previous Councils – determinations and extensions that the Organizations are not directly challenging here – there is ample evidence to find that a new period of two years or more of non-construction has occurred since December 2007.

25. TEGP’s permit contains Condition Number 4, which states in pertinent part: “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.”

26. 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.

¹ An original digital copy of the photograph will be electronically mailed to Director Parfitt and Executive Secretary Ruby.


27. As explained by the Department in its letter to TEGP of August 2, 2002, attached as Exhibit E: “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.” In its letter, the Department added that “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.”

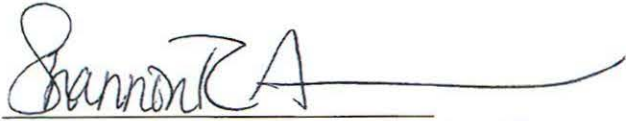
28. TEGP has not carried out any physical on-site construction activities on a site specific emissions unit since it poured the stack foundation in 2005, but certainly not since it entered into the settlement agreement with the Department in November 2007, *over six years ago*.

29. As stated in the Department’s October 9, 2013 investigation report, no construction activities have taken place in over two years. Therefore, pursuant to WAQSR Chapter 6, Section 2(h) and TEGP permit condition number 4, TEGP’s permit is invalid as a matter of law.

CONCLUSION

30. For the reasons set forth above, the Council should immediately issue an order to TEGP and the Department to show cause why the TEGP permit is still valid. If, after providing TEGP and the Department an opportunity to show cause at a hearing, in which the Organizations may participate, the Council finds that TEGP has discontinued construction for two years or more, the Council should order that the TEGP permit is invalid as a matter of law.

Respectfully submitted this  day of April, 2014.

A handwritten signature in black ink, appearing to read "Shannon Anderson", with a long horizontal flourish extending to the right.

Shannon Anderson (Wyo. Bar No. 6-4402)
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CERTIFICATE OF SERVICE

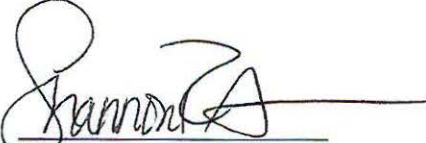
The undersigned hereby certifies that on this 24th day of April, 2014, the foregoing PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL FOR A SHOW CAUSE HEARING was served on the following parties via overnight mail, with delivery confirmation, and electronic mail:

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