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Two Elk Generation Partners

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF)
TWO ELK GENERATION PARTNERS') EQC Docket No. 14-2801
DEQ AIR PERMIT CT-1352B)

**TWO ELK GENERATION PARTNERS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Comes now, the Respondent/Permittee, Two Elk Generation Partners' (TEGP), by and through its undersigned counsel, Mary Throne, of Throne Law Office, P.C., and in accordance with Rule 12 (b)(1) of the Wyoming Rules of Civil Procedure and Chapter 2, Sections 3 and 14 of the Department of Environmental Quality Rules of Practice and Procedure (DEQ Rules of Practice), states the following in support of its Motion to Dismiss the Powder River Basin Resource Council's and the Sierra Club's (Petitioners) Petition for a Show Cause Hearing Related to the Validity of Two Elk Generation Partners' Permit (Petition).

I. INTRODUCTION

The Petition is a creative attempt to circumvent the comprehensive statutory framework of the Environmental Quality Act (Act) by interjecting the Environmental Quality Council (Council) into the day-to-day activity of the Department of Environmental Quality, Air Quality Division (DEQ/AQD). Jurisdiction, however, cannot be manufactured out of whole cloth to justify the right to a hearing before the Council. Jurisdiction either exists or does not exist.

The Permit is an air quality construction permit authorizing TEGP to construct a power plant in Campbell County, Wyoming, composed of multiple independent devices, principally including a natural gas-fired combustion turbine; a solid fuel-fired boiler-steam turbine generator, authorized to be fueled with non-commercial waste coal, coal or biomass; diesel generators; and other equipment. Petitioners are seeking a determination that TEGP has not been in compliance with Condition 4 of the Permit requiring commencement of construction within 24 months of issuance of the Permit and no discontinuance of construction for a period of more than 24 months. This condition is required under Wyoming Air Quality Standards and Regulation (WAQSR) Chapter 6, Section 2(h). Assuming Petitioners could prove their allegations, they are asking the Council to find the permit invalid as a matter of law and terminate TEGP's right to construct. In this instance, the Council lacks subject matter jurisdiction to consider the Petition. In addition, the doctrine of issue preclusion prohibits the Council from revisiting issues resolved under prior Council cases related to the Permit. For these reasons, TEGP seeks dismissal of the Petition.

II. ARGUMENT

The Council is an agency of state government created under the Act to serve as the adjudicatory and rulemaking body for the DEQ. *See Wyo. Outdoor Council v. Wyo. Dept. of Env'tl. Quality*, 2010 WY 20, ¶¶ 9-11, 225 P.3d 1054, 1056-1057 (2010) (explaining Council's rulemaking role); *Platte Development Company v. Wyoming Environmental Qual. Council*, 966 P.2d 972, 975 (Wyo. 1998) (explaining the Council's adjudicatory role). As such, the Council only has the authority conferred by the Act and its accompanying rules and regulations. All "administrative agencies have only those powers expressly conferred by statute." *State ex rel. Dept. of Revenue v. Buggy Bath Unlimited, Inc.*, 2001 WY 27, ¶ 10, 18 P.3d 1182, 1185 (Wyo. 2001); *Platte Development*, 966 P. 2d at 975. Stated another way, an "agency is limited in authority to powers legislatively delegated." *Amoco Production Co. v. Wyoming State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000). Petitioners claim the general powers of the Council set forth in Section 112 of the Act, Wyo. Stat. § 35-11-112, confer the broad authority necessary to establish jurisdiction for their Petition.

The flaw in Petitioners' reasoning is their failure to interpret the provisions of Section 112 in light of the limitations created by the entire regulatory scheme of the Act. Section 112 cannot be viewed in isolation. It is well settled that "all statutes must be construed in *pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony." *BP America Production Co. v. Department of Revenue, State of Wyo.*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005). Statutes are construed "as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the

statute *in pari materia.*” *Id.* Contrary to the reasoning in the Petition, the Act does not authorize the Council to hear matters when there has been no DEQ final action, it does not provide *carte blanche* to the Council to terminate permits and it does not allow the Council to initiate enforcement action.

A. There is no final agency action subject to Council review.

The Council is to “act as the hearing examiner for the department and shall hear and determine all cases or issues under the laws ... administered by the department.” Wyo. Stat. Ann. § 35-11-112 (a). The DEQ Rules of Practice provide that “all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action,” unless the statute or rules provide differently. DEQ Rules of Practice, Ch. 1, Sec. 16(a). Without final agency action there is nothing to appeal. The Petition fails to identify any final action of the Director or Administrator for review by the Council. Instead, the Petitioners are seeking Council review of AQD’s interpretation of Condition 4 and Chapter 6, Section 2(h) of the WAQSR. In other words, Petitioners are seeking review of agency inaction. Whether the Petition is viewed as a challenge to a DEQ regulatory interpretation or a review of agency inaction, there is no right of appeal to the Council.

Chapter 6, Section 2(h) of the WAQSR provides a permit to construct “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 Petitioners acknowledge Steve Dietrich, the AQD Administrator, has informed them the

permit remains in effect. (Pet. at ¶ 3, Exhibit A).¹ Yet, based on their review of the DEQ file, Petitioners have reached a different conclusion and ask the Council to reject AQD's interpretation of the regulation and adopt theirs. The Council is not an ombudsman or inspector general for the DEQ with authority to issue advisory opinions to the agency. In fact, the Wyoming Supreme Court has explained that the responsibility for implementing and interpreting the Act rests with the DEQ and it is DEQ's interpretation of the Act, which is entitled to deference. *Powder River Basin Res. Council v. Wyo. Dep't of Env'tl. Quality*, 2010 WY 25, ¶ 7, 226 P.3d 809, 813 (Wyo. 2010); *see also Wyo. Outdoor Council v. Wyo. Dept. of Env'tl. Quality*, 2010 WY 20 at ¶ 9, 225 P.3d 1054, 1056 (2010).

Alternatively, the Petition seeks review of DEQ's failure to act to terminate the Permit under the terms of Condition 4. In general, final agency action is defined as "an ending the proceedings, leaving nothing further to be accomplished." *MGTC, Inc. V. Public Service Com'n of Wyoming*, 735 P.2d 103, 106 (Wyo. 1987). Mr. Dietrich's email is a statement of the status quo and an affirmation of the Permit, not a decision. Agency inaction constitutes final agency action subject to review in limited circumstances under the Act, which are not applicable here. The statute creates no citizen right to review agency inaction. Only permit applicants have a right of appeal to the Council. Section 802 of the Act allows an applicant to seek review of the agency's refusal to act on a permit application. Section 208 of the Act provides a specific right for applicants for air quality operating permits to challenge agency refusal to issue a permit. Wyo. Stat. Ann.

¹ It is worth noting that if Petitioners were seeking to appeal the Administrator's action reflected in Exhibit A, their appeal would not be timely under the DEQ Rules of Practice as the email is dated January 29, 2014.

§§ 35-11-208 & 802. *See also Town of Evansville Police Dept. v. Porter*, 2011 WY 86, ¶ 11, 256 P.3d 476, 481 (Wyo. 2011) (limited judicial review of agency inaction when extended failure to respond is deemed a denial of a request).

**B. The Council has no authority under the Act to terminate
An air quality construction permit.**

Petitioners mistakenly assert Section 112(a)(iv), which requires the Council to conduct hearings in any “case” contesting the grant, denial, revocation or termination of a permit, provides jurisdiction here. (Pet. at ¶7); Wyo. Stat. Ann. § 35-11-112 (a)(iv). The Petitioners are relying on this provision in a vacuum when it must be construed in the context of the various permitting schemes implemented throughout the Act. Section 112(a)(iv) does not give the Council blanket authority to terminate or revoke a permit, absent a case arising under a specific provision of the Act.

A brief overview of the difference between air quality and land quality permitting--as just two examples--illustrates how the Act defines or limits the general grant of authority under Section 112. In the case of air quality construction permits, the director issues the permit and that is a final agency decision that may be appealed to the Council. Wyo. Stat. Ann. § 35-11-801(a). The Council plays no role in the grant of the permit, in spite of the language in Section 112. In contrast to air quality permits issued under Article 2 of the Act, mining permits under Article 4, may not be issued by the Land Quality Division until objections, if any, are resolved by the Council. Wyo. Stat. Ann. § 35-11-406 (k). Article 4, then, authorizes a hearing related to the grant of the permit, not the appeal of an already-issued permit.

When it comes to the Council's role in revocation or termination of permits, there are few specific hearing provisions in the Act. What is clear, however, in the statutory scheme is that the statute does not create a right for third parties to seek termination or revocation of an air quality construction permit before the Council. Article 2 of the Act does not provide for revocation of air quality construction permits, such as TEGP's Permit. Title V operating permits issued under Article 2 must contain a condition for termination or revocation for cause, but this provision does not provide a third party right to a hearing before the Council to enforce the condition. Wyo. Stat. Ann. § 35-11-206(f)(ii). The Permit condition, at issue here, likewise does not provide a third party right to enforce its terms before the Council.

By way of comparison, Section 409 of the Act sets forth a detailed framework for revocation of mining permits. Section 409(a) obligates the director to terminate a mining permit if he finds the "permit holder intentionally misstated or failed to provide any fact that would have resulted in denial of the mining permit." Wyo. Stat. Ann. § 35-11-409(a). The revocation becomes effective in 30 days or if there is an emergency situation, a hearing may be held in front of the council to make the revocation effective immediately. Section 409(c) is specific to surface coal mining permits. When an inspection of a surface mining operation reveals a pattern of repeat violations and general disregard of permit conditions and provisions of the Act, the director "shall issue an order to show cause," why the permit should not be suspended or revoked. Wyo. Stat. Ann. § 35-11-409(c). The statute further provides an opportunity for a hearing in front of the Council. In no case, is there a third party right to initiate termination.

Contrary to the Petitioners' claims, the general language in Section 112 of the Act does not allow the Council to conduct hearings for every grant, denial, revocation or termination of an air quality permit or any other permit issued by the DEQ. Rather it establishes the Council as the entity charged with adjudicating permit disputes created under specific permitting regimes. What is clear from a review of the entire Act and the few specific provisions related to termination, is that if the legislature had intended a third party to have the right to petition the Council for the termination of the Permit, it would have set forth the right in the Act. *See, e.g., Amoco Production*, 12 P.3d at 673. To the extent there are processes for termination of permits, those must be initiated by the DEQ. Petitioner's approach here, if found within the jurisdiction of the Council, would allow any citizen to bypass the DEQ and to seek termination from the Council. The Act does not grant this right.

C. The Act does not grant the Council independent enforcement authority

In some respect, the Petition asks the Council to initiate enforcement of the Permit condition requiring continuous construction (Pet. at 29). Again, this is not the role of the Council under the Act and accordingly, there is no jurisdiction. Within the framework of the Act, the DEQ is the government entity responsible for initiating enforcement, through a Notice of Violation (NOV), NOV & Order or civil enforcement.

Article 7 of the Act authorizes the Director of DEQ to issue an NOV or NOV and Order setting forth allegations of noncompliance with any provision under the Act. Wyo. Stat. Ann. § 35-11-701(c)(i). If the DEQ issues an NOV, alone, there is no right of appeal to the Council. If the DEQ issues an NOV & Order, there is a right of appeal to the Council within ten days. Wyo. Stat. Ann. § 35-11-701(c)(ii). This then triggers a

contested case hearing in front of the Council. If there is no appeal, the Council approves the Order without a hearing. Nowhere in Article 7 is there any right for a citizen to seek administrative enforcement of a permit condition.

Section 901 of the Act governs civil enforcement of air quality permits. It provides that “any person who violates any provision of article 2 of this chapter ... or any rule, regulation, standard or permit adopted pursuant to those provisions, or who violates any determination or order of the council pursuant to Article 2 of this chapter ... is subject to a penalty not to exceed ten thousand (\$10,000.00) dollars for each day during which the violation continues.” Wyo. Stat. Ann. § 35-11-901(a)(i). Civil penalty actions are filed in Wyoming District Court.

As part of their challenge, the Petitioners are also seeking enforcement of the Settlement Agreement between the DEQ and TEGP reached in 2007 and approved by the Council on December 3, 2007. (Order Approving Settlement, *In the Matter of the Appeal of the Revocation of Permit No. CT-1352B, Two Elk Power Plant, Dkt. No. 07-2601*) (2007 Order). The Council did not retain any continuing jurisdiction in its 2007 Order. This is in contrast to the order in a prior TEGP permitting dispute before the Council, in which it did retain jurisdiction to insure the terms of the agreement were met. (May 29, 2003 Order Approving Joint Stipulation, *In the Matter of the Appeal of Air Quality Permit No. CT-1352A (corrected), Two Elk Generating Station – Unit 1, Dkt. No. 02-2601*). In 2005, the Council terminated jurisdiction after finding TEGP had commenced construction. (*July 18, 2005 Order Granting Motion to Dismiss, Dkt. No. 02-2601*) (2005 Order).

Under the enforcement scheme of the Act, the 2007 Order is an Order of the Council, subject to enforcement under Section 901. Wyo. Stat. Ann. § 35-11-901(a)(ii). There is no basis for the Council to commence an administrative proceeding to enforce its Order. That would be akin to a judge seeking to enforce a judgment, without any request from a party. The Council serves in an adjudicatory capacity, not a regulatory capacity.² The Council cannot file its own case in district court or initiate an administrative proceeding to enforce the Settlement Agreement as embodied in the 2007 Order.

D. The doctrine of issue preclusion prohibits Petitioners from re-litigating issues resolved in the Council's 2005 and 2007 Orders.

Petitioners sought review of the Council's 2007 Order in Wyoming District Court, pursuant to the Wyoming Administrative Procedure Act and Section 1001 of the Act. Wyo. Stat. Ann. § 35-11-1001. On March 12, 2009, the court affirmed the Council Order in a detailed decision. (*See Sierra Club v. Wyo. Dept. of Env. Quality*, No. 171-041, at 2, First Jud. Dist. Court, Laramie County, Wyoming, Mar. 13, 2009) (Order affirming Council's approval of 2007 Settlement Agreement)). Petitioners appealed the district court decision to the Wyoming Supreme Court. While that action was pending, Petitioners initiated a federal citizen suit action in the United States District Court, alleging generally that the Permit was invalid. Judge Downes granted TEGP's motion to dismiss, based on issue preclusion. *Sierra Club v. Two Elk Partners, Limited Partnership*, No. 09-CV-22-D, at 27 (U.S. Dist. Court for the Dist. of Wyoming, Aug. 28, 2009)

² In fact, when the Petitioner sought judicial review of the 2007 Settlement, the Council was dismissed as a party because it was not a party to the proceeding, but an adjudicatory body. *See also Antelope Valley Imp. And Service Dist. Of Gillette v. State Bd. of Equalization for the State of Wyoming*, 4 P.3d 876 (Wyo. 2000) (Board of Equalization cannot be a party in appeal of a contested-case action).

Petitioners appealed Judge Downes' decision to the 10th Circuit. On May 31, 2011, the 10th circuit upheld dismissal of the citizen suit. *Sierra Club v. Two Elk Generation Partners, Limited Partnership*, 646 F.3d 1258 (10th Cir. 2011). Applying Wyoming law, the 10th Circuit first concluded the March 2009 state district court order precluded any relitigation of the issue of whether TEGP had engaged in continuous construction. *Id.* at 1264-1265. Second, again relying on Wyoming law, the 10th Circuit found that the Council's 2005 Order prevented litigation of the question of whether TEGP had commenced construction. *Id.* at 1266-1269. Specifically, the Court concluded Wyoming courts give preclusive effect to administrative decisions. *Id.* at 1267 (citing *Slavens v. Bd. of County Commissioners*, 854 P.2d 683, 685 (Wyo. 1993)).

In the event the Council does not dismiss the pending Petition in total, Wyoming law, as set forth by the 10th Circuit, prohibits reconsideration of issues previously resolved by this Council in 2005 and 2007. Any allegations adjudicated in prior Council dockets, contrary to the suggestion of the Petitioners, may not be reviewed. (Pet. at ¶ 24).

III. CONCLUSION

For the reasons set forth above, the Council lacks jurisdiction under the Act to consider the Petition. Thus, under W. R. Civ. P. 12(b)(1) and the DEQ Rules of Practice, the Petition should be dismissed.

Respectfully submitted this 3rd day of June, 2014.

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CERTIFICATE OF SERVICE

I, Mary A. Throne, certify that at Cheyenne, Wyoming, on the 3rd day of June, 2014, I served a copy of the foregoing *Two Elk Generation Partners' Memorandum in Support of Motion to Dismiss* by electronic mail to the following:

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