

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of the Petition)
for Hearing of:)
Two Elk Generation Partners') Docket No. 14-2801
DEQ AQD Permit CT-1352B)
Dated April 24, 2014)

**POWDER RIVER BASIN RESOURCE COUNCIL AND SIERRA CLUB'S RESPONSE
TO DEQ'S AND TWO ELK'S MOTIONS TO DISMISS**

Pursuant to the Environmental Quality Council ("Council" or "EQC") Order of June 5, 2014, and W.R.C.P. 12(b), the Powder River Basin Resource Council and Sierra Club (hereafter "Organizations") submit this response to the Department of Environmental Quality's ("Department" or "DEQ") and Two Elk Generation Partners' ("Two Elk") motions to dismiss. The organizations respectfully request that the Council deny the motions and promptly set this matter for hearing.

STATEMENT OF THE CASE

The organizations brought this matter before the Council to address the DEQ's lack of enforcement and oversight over Two Elk's Air Quality Construction Permit – Permit Number CT-1352B. The Organizations contest the validity of Two Elk's permit and petition the Council to act, or to act upon the Council's own motion, to hold a hearing forcing DEQ and Two Elk to show cause why the permit is still valid as a matter of law. As explained in the original petition, the permit is in violation of its condition 4, and underlying authority for the condition contained within the Clean Air Act and DEQ's implementing regulations, specifically WAQSR Chapter 6, Section 2(h), which hold that if construction activities at Two Elk's site are discontinued for a period of twenty-four months or more "the permit will become invalid." PRBRC, *et al.* Petition at 3-4. Also as explained in the petition, 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.” *Id.* at 4-5. Therefore, Two Elk’s permit is now invalid as a matter of law. As such, no further action is required by either the DEQ or the Council to recognize that the permit is invalid. However, because DEQ administrators disagree with the DEQ staff conclusions and because Two Elk continues to rely upon its permit and alleges that it will carry out construction activities and obtain financing under the auspices of the permit, to clarify that the permit is now invalid, and to afford Two Elk an opportunity to contest the invalidity, the Organizations are calling on the Council to exercise its oversight authority over DEQ and Two Elk and hold a hearing that requires Two Elk and/or DEQ to show cause why the permit is still valid.

STANDARD OF REVIEW

A claim must be dismissed pursuant to W.R.C.P. 12(b)(1) when a court lacks jurisdiction over the subject matter. The Wyoming Supreme Court has held that “A court has jurisdiction when it has the power to hear and determine a matter in controversy.” *Nyberg v. Wyoming Military Department*, 2003 WY 43 ¶ 8 (2003) (internal citations omitted). The same principle applies to administrative agencies acting as adjudicatory bodies.

For purposes of review of the motion, the Council should accept the facts alleged in the Organizations’ Petition as true. *Gates v. Richardson*, 719 P.2d 193, 194 (Wyo. 1986); *Wyoming v. Fremont Energy Corp.*, 651 P.2d 802, 804 (Wyo. 1982). Additionally, the Council should be mindful that “dismissal is a drastic remedy which should be granted sparingly.” *Rissler & McMurry, Co. v. Wyoming*, 917 P.2d 1158, 1160 (Wyo. 1996).

ARGUMENT

The issue before the Council is one of first impression. To date, the Council has held hearings on request of organizations challenging permits or permit conditions or on request of

organizations petitioning for amendment of DEQ rules and regulations. However, merely because the Council has never held a show cause hearing on the validity of a permit on the request of an organization contending that the permit should be revoked as a matter of law does not mean it does not have the authority to do so.

I. The Environmental Quality Act Vests the Council with Broad Jurisdiction

The Environmental Quality Act grants broad powers and duties to the Council through Wyo. Stat. § 35-11-112. Specifically, § 35-11-112(a) provides that “The 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.” In regard to the case at hand, the section requires the Council 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 department or any division thereof.” *Id.* at § 112(a)(iii). Therefore, the Council has statutory authority and jurisdiction to conduct a hearing in a case contesting the DEQ’s enforcement of its rules and regulations and permit conditions in regard to Two Elk’s permit. In fact, the Environmental Quality Act *requires* the Council to hold such a hearing “as the hearing examiner for the department.”

While DEQ and Two Elk argue that Section 112 should be read narrowly, the public interest necessitates a broad reading of the Council’s authority. The Wyoming Supreme Court has held:

We have also made it clear that the goal of the Environmental Quality Act is to protect the public. Therefore, when we deal with provisions of the Act, we recognize that they are entitled to a liberal construction to insure that the public is in fact protected from the menace the legislature has seen fit to address in the Act.

Wyoming v. Fremont Energy Corp., 651 P.2d at 807. In this case, the Council’s jurisdiction should be read liberally to ensure that the Organizations are afforded an opportunity to present their case and that the public interest in adequate enforcement and administration of the Environmental Quality Act is promoted.

While DEQ and Two Elk may be correct in that there is not a specific section of the Environmental Quality Act that grants the Organizations the right to seek a hearing before the Council over the continued validity or invalidity of an air quality permit absent the general authority in Section 112, *see* DEQ Mot. to Dismiss at 3-5, the lack of specific statutory authority does not render the more general authority of the Council provided in the Act meaningless.

In 2008, the Council was faced with a similar issue in the Dry Fork Power Plant permit appeal case. There, Basin Electric Power Cooperative argued that the Council did not have jurisdiction to hold a contested case hearing challenging an air quality construction permit.¹ In denying the motion, the Council held:

Basin Electric argued the specific statutes in the WEQA that actually provide a party with a right to a hearing before this Council become meaningless if this Council relies upon the general statutory authority to hold contested case hearings in Wyo. Stat. Ann. § 35-11-112. This Council disagrees with Basin Electric’s position in this matter. The Council’s contested case hearing authority exists so that a separate statutory right to review is not required in this case. . . [The Council] is the place for citizens who feel aggrieved by some environmental action to have their complaints heard. Basin Electric is asking this Council to ignore the underlying premise of the act.

Environmental Quality Council Order Denying Basin Electric Power Cooperative Inc.’s Motion to Dismiss Appeal, EQC Docket No. 07-2801, Aug. 21, 2008 at 6-7.

In regard to DEQ’s reliance on Section 208, the Council likewise rejected a similar argument from Basin Electric: “Basin Electric’s argument that Wyo. Stat. Ann. § 35-11-208 is the only section that authorizes an appeal in this matter, is not persuasive. By its reference to

¹ DEQ took no position on Basin Electric’s motion to dismiss.

Wyo. Stat. Ann. § 35-11-802, the section is clearly pertinent to operating permits, not construction permits.” *Id.* at 7. Therefore, it is inapplicable to a construction permit, such as Two Elk’s CT-1352B.

Moreover, the Council found unpersuasive a similar argument from Basin Electric that the organizations should have gone directly to court. *Id.* at 8. The Council found that a court can only review a record of an administrative agency and such a record gets developed through a Council hearing. *Id.* Additionally, organizations must exhaust administrative remedies, such as opportunities for administrative hearings. *Id.* These principles of administrative law necessitate a hearing before an organization could take its case to court. As “the hearing examiner for the department,” such a hearing must be held by the Council.

II. Two Elk’s Enforcement Authority Arguments Are Misplaced

Two Elk also claims that the Council does not have jurisdiction over the Organizations’ Petition because it does not have “independent enforcement authority.” Two Elk Mot. to Dismiss at 8. Two Elk claims that DEQ is the sole entity authorized with “initiating enforcement, through a Notice of Violation (NOV), NOV & Order or civil enforcement.” *Id.* However, a NOV is not necessary in this case. Instead, the Organizations are asking the Council to recognize that the permit is now invalid as a matter of law and therefore is revoked under the Environmental Quality Act. In such an instance, a NOV is not required to be given. Therefore, any reliance on Section 701 is misplaced. Similarly, the Organizations are not asking the Council to impose civil penalties and therefore reliance on Section 901 is also misplaced.

Moreover, as discussed above, Section 112 confers upon the Council authority to 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.” Wyo. Stat. §

35-11-112(a)(iii). Therefore, while the Council may not have independent enforcement authority, such as the ability to issue a NOV, it does have ability to conduct a hearing contesting the DEQ's enforcement of its rules, regulations, and permits. In this case, the Organizations are contesting DEQ's enforcement of the Two Elk Permit and the corresponding rules and regulations on which the permit is based. There is clearly a "case or controversy" surrounding whether the permit is valid and whether DEQ has adequately enforced the permit's conditions. This "case or controversy" is sufficient to give the Council jurisdiction to carry out a hearing on the matter.

III. The Council's Previous Two Elk Docket Provides Analogous Jurisdiction

In Docket Number 07-2601, the Council held hearings and received briefs related to Two Elk's request for review of DEQ's enforcement activities over the Two Elk permit. In its Petition for Review, Two Elk asked the Council "to review the Department of Environmental Quality's ("DEQ's") August 22, 2007 revocation of Permit No. CT-1352B . . ." Two Elk Petition for Review, Oct. 29, 2007, Document No. 1 in Docket No. 07-2601 at 1. Two Elk sought review of DEQ's action under Wyo. Stat. § 35-11-112(a)(iv), which gives the Council authority to hold hearings in cases contesting the suspension or revocation of a permit. *Id.* at 2. Here, the Organizations are asking the Council to hold a hearing related to the revocation of a permit (based on the DEQ staff's finding that the permit is now invalid as a matter of law). During such a hearing, Two Elk (and perhaps DEQ administration) would contest such a revocation. While Two Elk is not the initiator of this proceeding, the Council's authority to hold such a hearing is the same. In fact, in the 2007 Docket, Two Elk argued that a hearing giving the company an opportunity to contest such a revocation would be required before revocation of the permit could be effective. *Id.* at 4. If, as Two Elk asserted, the Council has authority to determine that a permit should not be revoked, it has authority to determine that a permit should be revoked.

IV. The Council Retains Jurisdiction over the Two Elk Permit As a Result of Previous Orders Approving Settlement Agreements between DEQ and Two Elk

Over the years, the Council has approved three separate Joint Stipulations related to the validity and terms and conditions of the Two Elk Permit. In 2003, as a result of a settlement agreement entered into between Two Elk and DEQ, the Council carried out multi-year enforcement oversight by receiving status reports related to the Two Elk project. Specifically, paragraph six of the 2003 settlement agreement stated that “The Council retains jurisdiction for purposes of making determinations relating to compliance with the terms of this Joint Stipulation and the Council’s Order approving it.” DEQ and Two Elk, Joint Stipulation for Disposition, May 28, 2003, at 4 ¶ 6; EQC Order Approving Joint Stipulation, May 29, 2003 at 2. A similar order was entered into on July 18, 2005 whereby the Council retained jurisdiction and oversight authority over the stipulation and the terms and conditions related to the Two Elk permit.

Most recently, in 2007, the Council approved a third stipulation between DEQ and Two Elk, and required compliance with its terms. EQC Order Approving Parties’ Joint Stipulated Settlement, Docket No. 07-2601, Nov. 30, 2007, at 1. Notably, the 2007 agreement and associated Council Order did not rescind either of the two previous orders. Thus, the Council retains jurisdiction and oversight authority in regard to compliance with all three settlement agreements.

Respectfully submitted this 3rd day of July, 2014.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of July, 2014, the foregoing RESPONSE TO DEQ AND TWO ELK'S MOTIONS TO DISMISS was served on the following parties via electronic mail and via the Council's electronic filing system:

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