

AUG 18 2000

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

Terri A. Lorenzon, Director
Environmental Quality Council

In the Matter of the Lazy B Gas)
Processing Plant, One-Time) Docket No. 5601-00
Authorization)

OPPOSITION TO DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTION TO DISMISS

The Petitioner, Duke Energy Field Services, LLC (Duke) submits the following in opposition to the Department of Environmental Quality's (DEQ's) Motion to Dismiss with Prejudice Duke Energy Field Services, LLC's Petition for Review:

1. On June 30, 2000, Duke filed a Petition for Review, requesting that the Environmental Quality Council review the DEQ, Solid and Hazardous Waste Division's (SHWD's) May 1, 2000 letter finding that Duke had not adequately demonstrated remediation of the soils at the former Lazy B Gas Processing Plant, a site Duke voluntarily remediated. DEQ filed its Motion to Dismiss on July 14, 2000 contending that Duke is in actuality appealing the May 11, 1998 One-Time Authorization (OTA) and that the time for that appeal has expired. The Council granted Duke an extension of time to respond until August 18, 2000. Duke urges the Council to reject the DEQ's Motion to Dismiss as it misstates the nature of Duke's Petition and seeks to limit the Council's oversight of DEQ decisions.

2. The Environmental Quality Act (the Act) grants the Council broad authority to review DEQ decisions. The Council "shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department" Wyo. Stat. § 35-11-112(a). The Act obligates 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." Wyo. Stat. § 35-11-112(a)(iii). The DEQ Rules of Practice and Procedure, Ch 1, Sec. 16, provide for the appeal to the Council of final actions of the Administrators or Director within sixty (60) days of such action.

3. The DEQ contends in its Motion to Dismiss that Duke is appealing the OTA condition requiring testing of treated soils at the Lazy B site for Total Petroleum Hydrocarbons/Diesel Range Organics (TPH/DRO). This argument ignores what has transpired in the two years since the issuance of the OTA, fails to mention that the Water Quality Division(WQD)and the SHWD imposed conflicting requirements on the site, and above all, disregards the fact that on May 1, 2000 the SHWD issued a new decision about the OTA, including a modification of the TPH/DRO testing requirements. In essence, with its February 9, 2000 letter to the DEQ, Duke asked the SHWD to determine that its remediation was adequate without the TPH/DRO testing and to waive or modify the OTA accordingly. The May 1, 2000 decision rejected this request.

4. The WQD and the SHWD imposed conflicting requirements at the Lazy B site for the same treated soil. The WQD, the lead Division for the Lazy B site, approved a work plan that required testing for Total Petroleum Hydrocarbons, Gasoline Range Organics (TPH/GRO) in the treatment area and had no requirement for TPH/DRO testing. The WQD approved the work plan that governed remediation at the site. The SHWD was not primarily responsible

for the Lazy B site and the OTA was not consistent with the work plan or with WDEQ guidance that was in effect at the time. Duke conducted its remediation according to the WQD approved work plan and relied on the WQD as the lead Division. However, if this matter goes to hearing, Duke will present phone records to indicate that the company not only sought the approval of the WQD before backfilling the treated soils without TPH/DRO testing, but that SHWD also approved the backfilling of these soils. The WQD, as the lead division for the cleanup and on behalf of the entire DEQ, not just a single division, issued a closure letter to Duke for the Lazy B site on September 7, 1999.

5. Paragraphs 6 through 10 of the DEQ's Motion to Dismiss attempt to suggest that the Council need only consider the OTA and that the company's history with the WQD is irrelevant. In those paragraphs, the DEQ fails to mention that Duke complied with the requirements set down by the WQD for the same soils that are the subject of the OTA. Yet, the conflicting requirements of the WQD and the SHWD are at the heart of Duke's Petition for Review. The Council is uniquely situated to resolve disputes that arise because of confusing and conflicting requirements from two divisions within the DEQ. If the Council grants the DEQ's Motion to Dismiss, it would leave the regulated community no recourse when two divisions within the agency issue conflicting decisions.

6. The DEQ Motion treats OTA conditions as if they were comparable to permit requirements. An OTA is not a permit with conditions that can be modified only through a formal application process. Chapter 1, Section 5 of the Solid Waste Rules and

Regulations authorizes the SHWD administrator to issue a one-time waste management authorization "in lieu of permits." In this case, the OTA was issued by a letter not even signed by the SHWD administrator. Thus, DEQ has the flexibility to alter the conditions of an OTA or to determine whether its conditions remain necessary. DEQ rejected Duke's request that it modify or waive the specific TPH/DRO testing requirement and it is from this decision that Duke appeals.

7. The SHWD refers to its May 1, 2000 letter as its "final determination," but now does not want that determination to be subject to Council review. Since the rescission of the DEQ closure letter on October 18, 1999, Duke has worked with the WQD and the SHWD to resolve this dispute. Following a meeting in January with the SHWD and a representative of the WQD, the SHWD invited Duke to submit additional information so that it could consider whether there was evidence that the treatment objectives of the OTA had been met despite the absence of TPH/DRO testing. Duke submitted that information to the SHWD on February 9, 2000. On May 1, 2000, the SHWD responded that the TPH/DRO testing remained necessary. However, the SHWD authorized a different testing procedure for TPH/DRO as an alternative to the one required in the OTA. Thus, the SHWD considered the new information presented by Duke and as a result, modified the OTA. Nonetheless, the DEQ is now contending that its "final determination" is not a "final action" subject to review.

8. Section 112 of the Act gives the Council jurisdiction over Duke's dispute with the DEQ. The DEQ issued a "final determination" on May 1, 2000 to resolve its dispute with Duke

and Duke appealed that action within sixty days as required by Chapter 1, Section 16 of the DEQ Rules of Practice and Procedure. This dispute has arisen because two divisions within the DEQ issued conflicting cleanup standards for the same pile of soils and the SHWD, which has not been the lead division, has come in after the completion of the site cleanup to enforce its standard. The regulated community must be able to avail itself of the review authority of the Council to remedy a situation when it is caught between conflicting regulatory requirements and conflicting demands of divisions within the agency. Council review of the May 1, 2000 decision is consistent with the Council's broad authority under Section 112 of the Act to adjudicate the enforcement and administration of the state's rules and regulations by the DEQ.

For the foregoing reasons, Duke respectfully requests that the Council deny DEQ's Motion to Dismiss with Prejudice Duke Energy Field Services, LLC's Petition for Review.

DATED this 18th day of August, 2000.



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