

**FILED**

DEC 20 2007

Terri A. Lorenzon, Director  
Environmental Quality Council

**BEFORE THE WYOMING  
ENVIRONMENTAL QUALITY COUNCIL**

Sierra Club & PRBRC's Motion to Intervene )  
and Petition for Reconsideration and )  
Vacation of EQC Order Re: Discontinued ) Docket No. 07-2601  
Construction of Two Elk Plant )

**CITIZENS' MOTION TO INTERVENE**  
**AND PETITION FOR RECONSIDERATION AND VACATION**  
**OF EQC ORDER REGARDING DISCONTINUED CONSTRUCTION**  
**OF TWO ELK PLANT**

**I. INTRODUCTION**

1. The Sierra Club and the Power River Basin Resource Council (collectively, "Citizens") respectfully move to intervene in Docket No. 07-2601 in order to seek reconsideration and vacation of the Environmental Quality Council's ("EQC's") December 3, 2007 "Order Approving Parties' Joint Stipulated Settlement, and Dismissing TEGP's Appeal, and Approving the Withdrawal of August 20 Letter" that approved the November 21, 2007 "Joint Stipulated Settlement Agreement" between DEQ and Two Elk Generation Partners ("TEGP").

2. Citizens do not contest TEGP's right to drop its appeal of DEQ's August 20, 2007 determination that TEGP discontinued construction of its proposed coal-fired power plant south of Gillette, Wyoming, for a period of 24 months or more. Citizens, however, challenge the new issue raised by the EQC's Order that supports the opposite determination: that DEQ's August 20, 2007 letter should be withdrawn because TEGP did not discontinue construction for a period of 24 months or more. On this issue Citizens had no opportunity to argue before the EQC.

3. The EQC should reconsider and vacate its Order approving the "Joint Stipulated Settlement Agreement" because (1) there was no public notice pursuant to the Wyoming Administrative Procedure Act at Wyo. Stat. § 16-3-107 regarding the proposed decision of the

EQC to support the reversal of DEQ's discontinued construction determination, (2) the facts on which DEQ relied to reverse its determination were based on alleged "confidential business information" provided by TEGP that were not made available to either the EQC or the public, and, as a consequence, (3) lacking both notice and applicable documents, Citizens had no opportunity to challenge the Order's support of DEQ's new determination that construction of the Two Elk plant had not been discontinued.

## II. MOTION TO INTERVENE

4. Citizens respectfully move to intervene in this proceeding pursuant to DEQ Rules of Practice and Procedure, Chapter II, Section 7. According to Section 7(a):

Any person interested in obtaining the relief sought by a party or otherwise interested in the determination of a proceeding relating to other than surface coal mining operations pending before the Council may petition for leave to intervene in such proceeding prior to or at the date of hearing, but not thereafter except for good cause shown. The petition shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and if affirmative relief is sought, the same should conform to the requirements for a formal petition. Leave will not be granted unless Council shall determine that the party requesting to intervene is adversely affected by the action, has a legal right under the Environmental Quality Act or the Wyoming Administrative Procedure Act.

5. Citizens had good cause for not seeking to intervene in this proceeding prior to or at the date of hearing because (1) neither the DEQ or the EQC issued a public notice stating their intent to reverse DEQ's determination that TEGP had discontinued construction for 24 months or more, (2) there was no hearing scheduled for this proceeding, and (3) public notice of the EQC's action accepting the November 21, 2007 "Joint Stipulated Settlement Agreement" between DEQ and TEGP took place on December 3, 2007 when the EQC's "Order Approving Parties' Joint Stipulated Settlement, and Dismissing TEGP's Appeal, and Approving the Withdrawal of



August 20 Letter” was posted on the EQC’s website at <http://deq.state.wy.us/eqc/docket.htm>.

6. Citizens’ interest in this matter is to ensure TEGP’s full compliance with its legal obligations. TEGP’s compliance with the Environmental Quality Act and related regulations will further Citizens’ interest in protecting the air quality of Wyoming. The evidence made available to the public in this matter, primarily DEQ’s August 20, 2007 letter, strongly supports the conclusion that permit CT-1352B is invalid because TEGP discontinued construction for a period of 24 months or more. The evidence on which the August 20, 2007 letter was withdrawn was not available to the public or even to the EQC. The EQC should allow Citizens to intervene, and should reopen this matter, to consider all evidence on the issue of whether physical, on-site construction of the Two Elk plant was in fact discontinued for 24 months or more. Only in this manner will the EQC be able fairly to make a decision, and to back that decision up with findings of fact and conclusions of law sufficient to accommodate judicial review.

7. Members of Citizens 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’s members have been injured by the EQC’s “Order Approving Parties’ Joint Stipulated Settlement, and Dismissing TEGP’s Appeal, and Approving the Withdrawal of August 20 Letter.” The interests of Citizens members that are directly injured by the EQC’s Order 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 the EQC's Order.

### III. PETITION FOR REHEARING

8. To the extent Citizens' motion to intervene is allowed, Citizens respectfully petition the EQC to rehear the issue of whether to approve the November 21, 2007 Joint Stipulated Settlement Agreement between DEQ and TEGP, to review all the evidence regarding TEGP's claim that it did not discontinue construction of the Two Elk plant for 24 months or more, including its alleged "confidential business information," and for the EQC thereafter to vacate its December 3, 2007 Order approving the Joint Stipulated Settlement Agreement.

9. Pursuant to DEQ Rules of Practice and Procedure, Chapter IV, Section 1:

(a) Any party seeking any change in any decision of the Council may file a petition for rehearing within twenty (20) days after the written decision of the Council has been issued.

(b) Any petition for rehearing filed under this section must be confined to new questions raised by the decision and upon which the petitioner had no opportunity to argue before the Council.

(c) Any petition for rehearing must specify whether the prayer is for reconsideration, rehearing, further hearing, modification of effective date, vacation, suspension or otherwise.

(d) Except as the Council may otherwise direct, the filing of a petition under this section shall not stay the effectiveness of any decision respecting the promulgation, amendment, or repeal of any rule or rules.

10. Citizens' petition for rehearing has been filed within twenty days of the Council's December 3, 2007 Order.

11. Citizens' petition is confined to the new question of whether TEGP did not



discontinue construction for a period of 24 months or more. Citizens had no opportunity to argue before the EQC on this issue because Citizens had no notice of the EQC's proposed approval of DEQ's reversal of position.

12. Citizens respectfully request the EQC to stay the effectiveness of its December 3, 2007 Order pending the outcome of this petition.

#### **IV. ISSUE ON REHEARING**

##### The EQC Should Vacate Its Order Approving DEQ's Determination That TEGP Did Not Discontinue Construction For Two Years or More.

13. 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.

14. The EQC should reconsider its approval of the November 21, 2007 "Joint Stipulated Settlement Agreement" between DEQ and TEGP. Citizens contest DEQ's determination, based on alleged "confidential business information" that was not made available to the EQC or the public, that TEGP did not discontinue construction of its Two Elk plant for 24 months or more. As such, Citizens contest DEQ's administration of Permit CT-1352B, condition 4; and WAQSR Chapter 6, Section 2(h).

15. DEQ first 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.

16. 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.

17. 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.

18. 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.**

19. 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.

20. 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.

21. 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.

22. The facts are uncontested that TEGP did not perform any significant, on-site construction 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.

23. 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.

24. 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.

25. Because DEQ's reversal of this 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.



## V. CONCLUSION

For the reasons set forth above, the EQC should allow Citizens to intervene in this action and, thereafter, rehear the issue of whether TEGP discontinued construction of Two Elk for 24 months or more. Ultimately, the EQC should vacate its December 3, 2007 "Order Approving Parties' Joint Stipulated Settlement, and Dismissing TEGP's Appeal, and Approving the Withdrawal of August 20 Letter" because it is unsupported by law or fact.

DATED this 20<sup>th</sup> day of December, 2007.



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ATTORNEY FOR CITIZENS

CERTIFICATE OF SERVICE

I certify that on this 20<sup>th</sup> day of December, 2007, I caused the foregoing **Citizens' Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant** to be served as follows:

Two copies served upon the Chairman of the EQC, 122 W. 25<sup>th</sup> Street, Herschler Building, Room 1714, Cheyenne, WY 82002, by registered mail, return receipt requested, and one copy by hand.

Two copies were served on John Corra, Director of DEQ, Herschler Building, Cheyenne, WY 82002, by registered mail, return receipt requested, and one copy by hand.

One copy was served on Rebecca W. Watson, Hogan & Hartson LLP, 1200 Seventeenth St., Suite 1500, Denver, CO 80202, by registered mail, return receipt requested.

Copies were served electronically to:

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