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Terri A. Lorenzon, Adm. Aide
Environmental Quality Council

**BEFORE THE
WYOMING ENVIRONMENTAL QUALITY COUNCIL**

In the Matter of Issuance of Air Quality)
Permit No. MD-64 to AMAX Coal Company,) Docket No. 1905-87
Belle Ayr Mine)

**MOTION OF MOBIL COAL PRODUCING, INC.
TO SUMMARILY VACATE THE AIR QUALITY DIVISION'S FINAL DECISION
OF JANUARY 27, 1987 PURPORTING TO ISSUE PERMIT NO. MD-64
TO AMAX COAL COMPANY**

In a shocking display of non-adherence to its own agreements and to the orders of the Environmental Quality Council ("Council"), the Air Quality Division ("AQD") issued a so-called "final decision" on January 27, 1987 which purported to issue Permit No. MD-64 to AMAX Coal Company ("AMAX") for its Belle Ayr Mine. The AQD's action is clearly illegal and blatantly at odds with a stay agreement that was entered into by the AQD and the Powder River coal producers on December 17, 1986, and approved by the Council on that same date. Mobil Coal Producing, Inc. ("Mobil") respectfully moves the Council to enter an order summarily vacating the AQD's final decision and remanding this case to the AQD for further and normal processing and consideration of the AMAX permit application in a manner not inconsistent with the stay agreement.

In further support of its Motion, Mobil states as follows:

1. The tortuous history of the air quality permitting litigation, which thus far has principally involved Mobil and AMAX, is well known to all. On December 17, 1986, at the opening

of the current trial round in Casper, the parties were visited by then Governor-elect Sullivan, who made a sincere plea to the AQD and to the parties to find a way to stabilize the air quality permitting program in Wyoming and to resolve their disputes without further litigation. This put Mobil in a difficult position because, as it expressed to the Governor-elect, it had important rights at stake which needed prompt clarification.

2. Mobil's position was a matter of public record and its plight had been frankly recognized by the Council. When the June, 1986 trial round was continued without conclusion, over Mobil's objection, the Council acknowledged that its action put Mobil "in limbo" and pledged that the further proceedings to determine the existence and extent of AMAX's vested rights would be handled as quickly as possible.

3. In the fall of 1986, AMAX filed a motion seeking to stay the vested rights proceeding. Mobil vigorously opposed that motion and the Council, recognizing the threatened prejudice to Mobil's rights and its earlier commitment to minimize that prejudice, denied the motion. AMAX then renewed its motion to stay the proceedings shortly before the prehearing conference on December 12, 1986; Mobil argued its strenuous objection during the prehearing conference call, and AMAX's renewed motion was denied.

4. The case then proceeded to trial on December 17, when Governor-elect Sullivan's visit occurred. In response to his special plea, and despite its need for urgent clarification of its rights, Mobil reluctantly agreed to a stay of the proceedings. It did so, however, only upon several express conditions which were

intended to assure that the purposes of the stay were legitimate and that the positions of the parties would in no way be altered during the stay.

5. Thus, the stay agreement applied to all air quality permit proceedings and specifically spoke to the AMAX permit application that is the subject of the AQD's "final decision" of January 27, 1987. All parties, including the AQD, stipulated to their undersanding "that a new AMAX permit application is out as of yesterday or today in the public notice category" and agreed that "parties will of course protest as they have to, but proceedings beyond that would be stayed," (Transcript of December 17, 1986 proceedings, p. 10). By motion duly seconded and unanimously passed, the Council then "adopt[ed] the stipulation and agree[d] that proceedings as defined by Mr. Macleod may be stayed pursuant to that stipulation." (Tr. 15).

6. The stipulation was perfectly clear. Since the AQD's proposed decision to approve the AMAX permit application had been publicly noticed, the deadline established by § 21(m) of the Wyoming Air Quality Standards and Regulations for filing protests with the agency was running. In recognition of that mandatory deadline, the parties stipulated that they "will of course protest as they have to". (Emphasis added). In the very next clause of the same sentence, however, the parties further stipulated and agreed that "proceedings beyond that would be stayed". (Emphasis added). There can be no doubt that the phrase "beyond that" referred to the § 21(m) protests to the agency. There can be no doubt that all proceedings beyond those protests were stayed. And

there can be no doubt that the processing and consideration of those protests and the issuance of a permit constitute proceedings "beyond" the protests -- proceedings that were explicitly subject to the stay agreement.

7. Based on a plain and fair reading of the stay agreement, Mobil subsequently filed a § 21(m) protest of the AQD's proposed decision to approve the AMAX permit application. (Exhibit A). It filed that protest for protective purposes only, however, and on a skeletal basis. It specifically referenced the stay and noted its application to "this proceeding and all other air quality permit proceedings". It further requested a prompt hearing if and when the stay expired without settlement, indicating that it would "elaborate on the basis for its objections" at that time. (See Exhibit A).

8. On information and belief, parties other than Mobil also filed protests with the AQD which were similarly skeletal in nature in reliance on the stay agreement.

9. There was sound reason for Mobil and other objecting parties not to file detailed comments in support of their objections to the AQD's proposed course of action. First, they were acting in reliance on the stay. Second, there would be no point in filing detailed comments if the settlement effort that gave reason to the stay were successful. Third, the filing of detailed comments of an adverse nature might well disserve the settlement effort, an effort which all parties hoped would be successful.

10. The AQD well knew that the comments filed by Mobil and the other objecting parties were not detailed. The protests themselves said so. Moreover, following its receipt of a cryptic memorandum dated January 21, 1987 from Mr. Barrash to the parties (Exhibit B), which could be read as suggesting -- for the first time -- that the AQD might not honor the stay agreement, Mobil promptly advised the agency both orally (telephone conversation between Messrs. Macleod and Barrash on January 29, 1987) and in writing (letter of February 4, 1987 from Mr. Macleod to Mr. Collins) (Exhibit C) that any decision to proceed with issuance of the AMAX permit would violate the stay agreement. Accordingly, Mobil requested that the AQD reconsider its announced intention.

11. Notwithstanding its knowledge of the deficient state of the administrative record before it, and notwithstanding the objections made by Mobil and perhaps others, the AQD proceeded to issue a "final decision" on January 27, 1987, purporting to issue a permit to AMAX. (Lest the recounting of the dates cause confusion, Mobil was not informed -- either by the time of Mr. Macleod's telephone conversation with Mr. Barrash on January 29 or by the time Mr. Macleod wrote his letter to Mr. Collins on February 4 -- that the AQD had already issued the permit to AMAX on January 27). In issuing the permit -- a step clearly "beyond" the filing of the § 21(m) protests that were contemplated by the stay agreement -- the AQD violated the stay agreement which it had entered and which the Council had adopted by formal motion.

12. The AQD's wrongful issuance of Permit No. MD-64 prejudices Mobil because it changes the positions of the parties.

That result is contrary to Mobil's core concern about agreeing to the stay, a concern that the express conditions of the stay were crafted to address. Instead of freezing the status quo, which is the very purpose of a stay agreement, AMAX now has a permit that it did not have when the stay was entered. All that has been stayed, under the position taken by the AQD, is the ability of objecting parties to pursue their protests of that permit issuance. That gross inequity should be promptly remedied by an order from the Council vacating the issuance of the permit and remanding the case to the AQD.

13. If the Council does not act to enforce the stay by vacating the AQD's illegal actions, Mobil will have no alternative but to pursue other options which may be available to guard against further prejudice to its rights. Among them, Mobil would expect promptly to seek an order staying the effectiveness of the AMAX permit until its validity has been determined and, alternatively, to seek a protective order barring AMAX in any subsequent proceeding to determine the validity of the permit from presenting any evidence or argument about equities to which it claims entitlement by reason of having acted in reliance on the AQD's illegal decision of January 27, 1987. Should it be necessary in order to protect and preserve its rights, Mobil is also prepared, in accordance with the stay agreement, to dissolve the stay and proceed promptly to litigation.

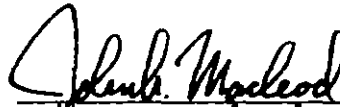
14. The AQD's purported issuance of Permit No. MD-64 to AMAX on January 27, 1987 was in clear breach of the stay agreement. That conduct should not be sanctioned.

For all of the foregoing reasons, Mobil respectfully moves the Council promptly to enter an order:

(a) vacating the AQD's "final decision" of January 27, 1987, purporting to issue Permit No. MD-64 to AMAX; and

(b) remanding this case to the AQD for further proceedings dating from the filing of the § 21(m) protests, if and when such further proceedings may be necessary upon expiration of the stay.

Respectfully submitted,



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