

**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’ RESPONSE TO TWO ELK OPPOSITION TO MOTION
TO INTERVENE AND PETITION FOR RECONSIDERATION**

The Two Elk Generation Partners’ (“TEGP”) objections to Sierra Club and Powder River Basin Resource Council’s (“Citizens”) motion to intervene and petition for reconsideration are not well taken. Citizens’ motion to intervene provides the Council the opportunity to carefully review – rather than approving without making an independent and thorough inquiry into the facts – DEQ’s reversal of position regarding TEGP’s discontinuance of construction of its Two Elk power plant. Particularly because DEQ’s reversal was based in part on “confidential” information that was not made available to the Council or the public, rendering the Council’s approval potentially unreviewable, Citizens’ motion and petition provide at least one method to correct this irregularity.

As the Council is aware, Citizens are also pursuing two other avenues of review, a petition to the Council challenging DEQ’s new determination that construction was not discontinued (Docket No. 07-2802), and Citizens’ petition for judicial review filed in Laramie County District Court (Docket No. 171-041) that challenges the Council’s approval of DEQ’s reversal and withdrawal of its finding that construction was discontinued.

A. Citizens Should Be Allowed to Intervene Because They Have Been Adversely Affected By the Council’s December 3, 2007 Order.

Turning to TEGP’s specific objections, TEGP is mistaken that Citizens must meet the intervention standard in Wyoming Rule of Civil Procedure 24. It is the Council’s intervention

rule at Chapter 2 of DEQ Rules of Practice and Procedure, § 7(a), that applies here.

Pursuant to DEQ's General Rules of Practice and Procedure, Section 14(a), "the Wyoming Rules of Civil Procedure, insofar as the same may be applicable *and not inconsistent with* the laws of the state and *these rules* shall apply to matters before the Council." Emphasis supplied.

DEQ Rules of Practice and Procedure, Chapter II, Section 7(a), allows any person "interested in the determination of a proceeding . . . before the Council" to petition to intervene. The Council will allow intervention if it determines "that the party requesting to intervene *is adversely affected by the action . . .*" Emphasis supplied. To the extent that Rule 24 of the Wyoming Rules of Civil Procedure is inconsistent with the Council's "adversely affected" standard by adding additional elements and thereby making it more stringent, the additional elements shall not apply.

Citizens' motion to intervene stated that the Powder River Basin Resource Council, Sierra Club, and their members, are adversely affected by the Council's December 3, 2007 Order.

In particular, Citizens stated at pp. 3-4:

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.

Because Citizens and Citizens' members sufficiently alleged they have been adversely affected by the Council's December 3, 2007 Order in this action, they should be allowed to

intervene.¹

B. Citizens Should Be Allowed To Intervene At This Time.

Second, TEGP's suggestion that Citizens' motion to intervene was not timely filed under the circumstances is incorrect. TEGP is correct that Citizens were notified approximately three weeks before the hearing on TEGP's petition for review of DEQ's determination that construction had discontinued for 24 months or more. But this notice provided no cause for concern. From Citizens' point of view, DEQ's finding of construction discontinuance was consistent with the standards in TEGP's permit and the facts.

Citizens however did not learn of *DEQ's reversal of position* regarding Two Elk's discontinuation of construction until the day after the Council's November 28, 2007 hearing.² The following day, November 29, 2007, Citizens sent via telefax a public records request to DEQ seeking the documents on which this new determination was made. Rather than timely provide such documents, DEQ refused to provide *any* documents other than those posted on the EQC website due to TEGP's sweeping claims of confidentiality. Rather than wait to be accused of tardiness, Citizens filed their motion to intervene on December 20, 2007 based on what

¹ TEGP is wrong to suggest that Citizens are not harmed by the finding that construction of the Two Elk plant was not discontinued because TEGP has agreed to further emissions reductions. Because the proper remedy in this matter is for TEGP to obtain a *current* PSD permit from DEQ, that requires the installation and operation of *current* Best Available Control Technology ("BACT"), and because the agreed-to limits do not purport to represent current BACT (nor could they), Citizens will be harmed by the excess pollution discharged by Two Elk because of its failure to install and operate *current* BACT.

² The earliest notice the public could have received of DEQ's reversal of position was on November 21, 2007 when it appears DEQ's proposed settlement was posted on the EQC website. However, Citizens had no reason to visit the EQC website every day for breaking developments when from all appearances DEQ had taken the correct and appropriate action.

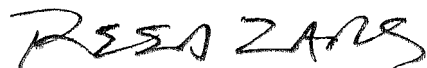
information could be culled from the limited information available.

In other words, Citizens have shown “good cause” within the meaning of DEQ Rules of Practice and Procedure, Chapter II, Section 7(a), for not seeking to intervene in this matter until after the November 28, 2007 hearing.

C. New Issues Raised By Council’s Decision

TEGP argues that Citizens’ petition for rehearing raises no new issue as required by DEQ Rules of Practice and Procedure, Chapter IV, Section 1(b). Again this is not correct. The notice of hearing in this matter pertained to TEGP’s challenge of DEQ’s determination that TEGP had discontinued construction of its power plant for 24 months or more. The new issue, which was unexpected and reasonably came as a surprise to Citizens, is DEQ’s opposite determination immediately prior to the hearing that TEGP did not discontinue construction for a period of 24 months or more. Citizens had no practical opportunity to argue before the EQC on this issue because Citizens had no actual notice of the EQC’s proposed approval of DEQ’s reversal of position until after the hearing.

DATED this 8th day of February, 2008.



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CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 2008, I caused the foregoing **Citizens' Response to TEGP's Opposition to Motion to Intervene and Petition for Reconsideration** to be served by U.S. Mail and by email to the following:

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