

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

FEB 25 2008

In the Matter of the Appeal)
Of the Revocation of)
Permit No. CT-1352B)
Two Elk Power Plant)

Docket No. 07-2601

Terri A. Lorenzon, Director
Environmental Quality Council

**PETITIONER TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S
RESPONSE TO ORDER TO SHOW CAUSE**

Petitioner Two Elk Generation Partners, Limited Partnership ("TEGP"), by and through its undersigned counsel of record, hereby submits its Response to the Environmental Quality Council's Order to Show Cause.

INTRODUCTION

On December 3, 2007, the Environmental Quality Council ("Council") issued an Order approving a joint stipulated settlement agreement between TEGP and the Wyoming Department of Environmental Quality ("DEQ") and dismissing this action. On December 20, 2007, Sierra Club and Powder River Basin Resource Council ("PRBRC") filed a "Citizens' Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant." On the same day, Sierra Club/PRBRC filed a Petition for Review of Administrative Action in the First Judicial District Court for the State of Wyoming, in and for the County of Laramie, *Sierra Club v. Wyoming Env'tl. Quality Council*, No. 171-041 (Dist. Ct. Laramie County, Wyo., Petition filed Dec. 20, 2007). The filing of a petition for review of administrative action in the district court is equivalent to the filing of a notice of appeal for a civil judicial action in a trial court, and divests the Council of jurisdiction over the issues on appeal. The Council therefore retains no jurisdiction to consider, and must accordingly dismiss, Sierra Club/PRBRC's Motion to Intervene and their Petition for Reconsideration and Vacation.

ARGUMENT

THE FILING OF THE PETITION FOR REVIEW DIVESTED THE COUNCIL OF JURISDICTION OVER “MATTERS APPEALED”

1. Dismissal of Sierra Club/PRBRC’s Motion and Petition is Required by the Wyoming Rules of Appellate Procedure.

Judicial review of administrative actions is governed by WYO. R. APP. P. 12. The proceeding for judicial review is “instituted by filing a petition for review in the district court having venue.” WYO. R. APP. P. 12.03(a). Sierra Club/PRBRC filed their Petition for Review of the Council’s Order in the First Judicial District Court for the State of Wyoming, in and for the County of Laramie. Venue over the Petition is proper in that court pursuant to WYO. STAT. ANN. § 16-3-114.

Under the Wyoming Rules of Appellate Procedure, “The timely filing of a notice of appeal . . . is jurisdictional.” WYO. R. APP. P. 1.03. “The appellate court shall acquire jurisdiction over the matters appealed when the case is docketed.” WYO. R. APP. P. 6.01(b). “In all cases, the trial court retains jurisdiction over all matters and proceedings not the subject of the appeal, . . . unless otherwise ordered by the appellate court.” WYO. R. APP. P. 6.01(b) (emphasis added). Under these rules, the district court acquired jurisdiction “over the matters appealed” when the case was docketed by the court as No. 171-041. The Council retains jurisdiction only over those “matters and proceedings not the subject of the appeal.” *Id.*

Sierra Club/PRBRC acknowledge that the matters at issue in their Petition for Reconsideration and Vacation are indeed “the subject of the appeal.” In their Petition for Reconsideration, Sierra Club/PRBRC ask the Council to “reconsider its approval of the November 21, 2007 ‘Joint Stipulated Settlement Agreement’ between DEQ and TEGP,” challenging the DEQ’s finding that TEGP had not discontinued construction of the Two Elk

plant for 24 months or more. Sierra Club/PRBRC Mot. & Pet. ¶ 14. In their Petition for Review of Administrative Action, Sierra Club/PRBRC ask the district court to reverse the Council's Order (the same Order in which the Council approved the Joint Stipulated Settlement Agreement) "approving DEQ's determination . . . that TEGP did not discontinue construction for 24 months or more." Exh. A, Pet. for Rev. ¶ 13. Sierra Club/PRBRC even state that they "this day have asked the EQC to review and rehear the issues complained of herein." *Id.* ¶ 2. Thus, by their own admission, the matters at issue in Sierra Club/PRBRC's Petition for Reconsideration and Vacation are "the subject of the appeal." Accordingly, the Council retains no jurisdiction to consider Sierra Club/PRBRC's Motion and Petition.

2. Dismissal of Sierra Club/PRBRC's Motion and Petition is Consistent with Principles of Judicial Economy and Avoidance of Confusion.

The dismissal of Sierra Club/PRBRC's Motion and Petition is consistent with principles of judicial economy and avoids "the confusion that would ensue from having the same issues before two courts simultaneously." *Natural Res. Def. Council v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The transfer of jurisdiction to the appellate court "for all essential purposes with regard to the substantive issues that are the subject of the appeal" upon perfecting of the appeal is "essential to the efficient administration of appellate processes and is an important adjunct to the concept of the finality of judgments." *Molitor v. Anderson*, 795 P.2d 266, 268 (Colo. 1990). Allowing parties to obtain altered rulings from a trial court while those rulings are on appeal would cause the appellate process to "become a quagmire of uncertainty." *Id.* As the Supreme Court has explained, it is "generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case

involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).¹ See also *Lancaster v. Indep. School Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998) (filing a notice of appeal generally divests the trial court of jurisdiction over the issues on appeal, although the trial court retains jurisdiction over collateral matters); *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987) (same); *United States v. Christy*, 3 F.3d 765, 767 (4th Cir. 1993) (in criminal context, defendant’s simultaneous filing of notice of appeal and motion for reconsideration divested the district court of jurisdiction and conferred jurisdiction upon the court of appeals).

The same principles apply in the context of judicial review of administrative decisions. “[A]n administrative agency is without authority to change, alter or vacate an order while review proceedings are pending in the district court, even as an inferior court is without authority to vacate or modify a judgment after writ of error has issued out of this court directed to such judgment.” *Colorado Anti-Discrimination Comm’n. v. Continental Air Lines, Inc.*, 355 P.2d 83, 86 (Colo. 1960). See also *O’Bryant v. Public Utilities Comm’n of Colorado*, 778 P.2d 648, 656 (Colo. 1989) (public utilities commission’s entry of settlement agreement that substantially modified prior decision after judicial review had commenced was invalid); *Westside Charter Svc., Inc. v. Gray Line Tours of Southern Nevada*, 664 P.2d 351, 353 (Nev. 1983) (where an agency’s order has been appealed to a court, the agency may not act further on the matter “until all questions raised by the appeal are finally resolved”); *Marr v. Colo. Dept. of Revenue*, 598 P.2d 155 (Colo. App. 1979) (department of revenue had no jurisdiction to enter further orders in a license revocation case until final disposition of judicial review proceedings); *R.R. Comm’n. of*

¹ Note that in *Griggs*, the Supreme Court concluded that under Fed. R. App. P. 4, a notice of appeal filed before the time for filing a motion under Fed. R. Civ. P. 59 had run was “a nullity.” 459 U.S. at 61. However, that case was decided under an old version of Rule 4. In 1993, Rule 4 was amended so that a notice of appeal filed before the disposition of any specified post-trial motions will become effective upon disposition of the motions. This provision of the revised rule still applies.

Texas v. North Texas Coach Co., 92 S.W.2d 268, 270 (Tex. Civ. App. 1936) (public utilities commission loses jurisdiction over an order that is the subject of an appeal, and may take no further action on the order while the appeal is pending); *Hailey-Ola Coal Co. v. State Indus. Comm'n.*, 251 P. 1040, 1941 (Okla. 1926) (industrial commission is “ousted” of jurisdiction over petitioner’s request for review of its decision when petitioner filed a contemporaneous appeal for judicial review and can make no further order until the appeal is resolved).

The Alaska Supreme Court has explained the logic for applying this rule in the context of administrative appeals:

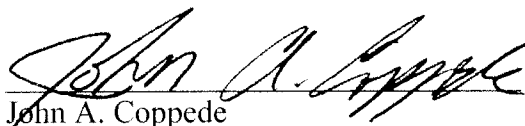
It is the general rule that when an order of an administrative agency is appealed to a court, the agency’s power and authority in relation to the matter is suspended as to questions raised by the appeal. . . . The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court’s jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174, 176 (Alaska 1965) (overruled on other grounds) (citing *Jones v. Schenectady Boys Club, Inc.*, 93 N.Y.S.2d 764 (1949); *R.R. Comm’n. of Texas*, 92 S.W.2d at 270; *Hailey-Ola Coal Co.*, 251 P. at 1941; *Colorado Anti-Discrimination Comm’n.*, 355 P.2d at 86)). For the Council to assert jurisdiction over substantive issues in this matter when the case is on appeal would be improper and an inefficient use of the Council’s resources, and likely would engender significant confusion. Accordingly, the Council should dismiss Sierra Club/PRBRC’s Motion and Petition.

CONCLUSION

For the foregoing reasons, TEGP requests that the Council dismiss Sierra Club/PRBRC's Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant.

Respectfully submitted this 25th day of February, 2008.



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ATTORNEYS FOR PETITIONER
TWO ELK GENERATION PARTNERS,
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CERTIFICATE OF SERVICE

On this 25th day of February, 2008, in accordance with the requirements of Chapter I, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure and Rule 5 of the Wyoming Rules of Civil Procedure, I caused the foregoing TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S RESPONSE TO ORDER TO SHOW CAUSE to be hand delivered and/or served by First Class, postage prepaid U.S. mail and electronic mail to:

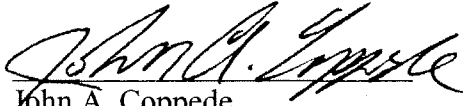
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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

In the Matter of the Appeal)
Of the Revocation of)
Permit No. CT-1352B) Docket No. 07-2601
Two Elk Power Plant)

**PETITIONER TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S
RESPONSE TO ORDER TO SHOW CAUSE**

EXHIBIT A

PETITION FOR REVIEW OF ADMINISTRATIVE ACTION

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF WYOMING,
IN AND FOR THE COUNTY OF LARAMIE

SIERRA CLUB and POWDER RIVER)
BASIN RESOURCE COUNCIL,)

Petitioners,)

) Docket No. _____

v.)

WYOMING ENVIRONMENTAL)
QUALITY COUNCIL,)

Respondent.)

PETITION FOR REVIEW OF ADMINISTRATIVE ACTION

I. Introduction

1. Sierra Club and the Powder River Basin Resource Council ("Citizens") hereby petition the Court, pursuant to W.R.A.P. 12 and Wyo. Stat. § 16-3-114, for judicial review of a December 3, 2007 final Order issued by the Wyoming Environmental Quality Council ("EQC") in Docket No. 07-2601 (Attached as Appendix A), related to the proposed Two Elk coal-fired power plant in Campbell County, Wyoming. The parties in EQC Docket No. 07-2601 are the Wyoming Department of Environmental Quality ("DEQ") and Two Elk Generation Partners ("TGEP").

II. Jurisdiction and Venue

2. This Court has jurisdiction to hear Citizens' Petition for Review of a final administrative action taken by the EQC pursuant to Wyo. Stat. § 16-3-114 (Wyo.

Administrative Procedure Act), Wyo. Stat. § 35-11-1001(a) (Wyo. Environmental Quality Act) and Wyo. Stat. § 1-37-101 et seq. (Uniform Declaratory Judgments Act). Citizens this day have asked the EQC to review and rehear the issues complained of herein. Citizens have exhausted their administrative remedies unless the EQC grants Citizens' requests. Venue in Laramie County is proper pursuant to Wyo. Stat. § 16-3-114 because the EQC issued its final agency action in Laramie County.

III. Relevant Facts

3. Condition 4 in TEGP's air pollution permit CT-1352B, issued by DEQ on May 29, 2003, provides that if TEGP fails to commence construction by May 29, 2005, or if TEGP discontinues construction for 24 months or more, the permit is invalid.

4. On July 18, 2005, DEQ determined that, prior to May 29, 2005, TEGP had commenced construction of the Two Elk plant. Thereafter it was TEGP's obligation to proceed with a continuous program of physical, on-site construction and not to discontinue construction for a period of 24 months or more.

5. On June 7, 2007, DEQ conducted an inspection of the Two Elk site and discovered that there had been no additional physical, on-site construction since DEQ inspected the site in 2005.

6. 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 of Two Elk had taken place for the last two years.

7. On October 19, 2007, TEGP filed before the Environmental Quality Council a challenge to DEQ's August 22, 2007 determination. EQC Docket No. 07-

2601. TEGP's petition did not challenge any of the specific factual findings of DEQ.

8. 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 of Two Elk had been discontinued for 24 months or more.

According to the Joint Stipulated Settlement Agreement:

[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.

9. None of the five types of activities identified in the 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.

10. On November 21, 2007, DEQ and TEGP requested the EQC approve an "Order Approving Parties' Joint Stipulated Settlement, and Dismissing TEGP's Appeal, and Approving the Withdrawal of August 20 Letter."

11. Without requesting or reviewing the alleged "confidential business

information” on which DEQ’s settlement was based, and without issuing any findings of fact or conclusions of law, the EQC on December 3, 2007 issued its Order reversing the original finding of DEQ that TEGP had discontinued construction and affirmatively finding that TEGP had not discontinued construction. Appendix A.

12. Citizens’ members 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’ members have been injured by the EQC’s failure to properly administer the Environmental Quality Act, the Wyoming Air Quality Standards and Regulations, and TEGP permits. The interests of Citizens’ members that are directly injured by the EQC’s action set forth herein 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 action complained of herein.

IV. Issues and Nature of Review Sought

13. In this petition Citizens ask the Court to reverse the EQC’s December 3, 2007 Order that approved DEQ’s determination, based on “confidential” documents

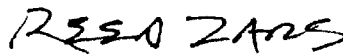
never disclosed to the EQC or the public, that TEGP did not discontinue construction for 24 months or more. None of the five types of activities identified in the November 21, 2007 settlement agreement describe any physical, on-site construction of the Two Elk plant. Thus none of the facts described in the settlement agreement support EQC's Order approving DEQ's determination that TEGP was engaged in a continuous program of physical, on-site construction of Two Elk between 2005 and 2007. As a consequence, the EQC's December 3, 2007 Order is contrary to permit CT-1352B, condition 4; Wyoming Air Quality Standards and Regulations ("WAQSR") Chapter 6, Section 2(h); Wyo. Stat. § 16-3-114; DEQ's August 20, 2007 determination; and established DEQ interpretations of such requirements, and is unsupported by substantial evidence.

V. Conclusion

For the reasons set forth above, Citizens' Petition that asks this Court to reverse and otherwise set aside the EQC's December 3, 2007 Order, and to determine permit CT-1352B is invalid consistent with DEQ's August 20, 2007 determination, should be granted.

Dated this 20th day of December, 2007.

Respectfully submitted,



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Certificate of Service

On this 20th day of December, 2007, I caused the foregoing Citizens' Petition for Review of Administrative Action, and attached Appendix A, to be served on the persons below as follows:

By hand to:

Richard C. Moore, Chairman
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122 W. 25th Street
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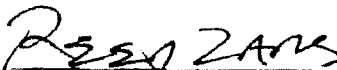
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