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

FEB 25 2008

**Terri A. Lorenzon, Director
Environmental Quality Council**

IN THE MATTER OF THE APPEAL OF THE)
REVOCATION OF PERMIT NO. CT-1352B)
TWO ELK POWER PLANT)

Docket No. 07-2601

**RESPONDENT WYOMING DEPARTMENT OF ENVIRONMENTAL
QUALITY'S RESPONSE TO ORDER TO SHOW CAUSE**

Respondent Wyoming Department of Environmental Quality, Air Quality Division ("DEQ/AQD") by and through its attorney, Nancy E. Vehr, Senior Assistant Attorney General, hereby submits its Response to Order to Show Cause.

STANDARD

The Council should dismiss this matter for lack of subject matter jurisdiction. An administrative agency, like a court, must have subject matter jurisdiction before it can hear a case. *Diamond B Services, Inc. v. Rohde*, 2005 WY 130, ¶ 13, 120 P.3d 1031, 1038 (Wyo. 2005); *Bruns v. TW Services, Inc.*, 2001 WY 127, ¶ 16, 36 P.3d 608, 613-14 (Wyo. 2001). Subject matter jurisdiction refers to the power and authority to "hear and determine cases of the general class to which the proceedings in question belong." *Diamond B Services, Inc.*, 120 P.3d at 1038 (internal citations omitted). An agency, again like a court, does not have discretion to determine whether it has subject matter jurisdiction — subject matter jurisdiction either exists and the agency has jurisdiction, or it does not. *Amoco Production Co. v. Wyoming State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000).

INTRODUCTION

The Council derives its subject matter jurisdiction from statute. *See* WYO. STAT. ANN. § 35-11-112. The Council's subject matter jurisdiction includes the ability to hear and

determine cases. *Id.* After the Council's final decision, judicial review is provided for pursuant to WYO. STAT. ANN. § 35-11-1001 and the Wyoming Administrative Procedures Act (WAPA): "[judicial review] shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming supreme court." WYO. STAT. ANN. § 16-3-114(a).

The Wyoming Supreme Court's rules governing the appellate process have the force and effect of law and compliance with such rules is mandatory. *See Plymale v. Donnelly*, 2006 WY 3, ¶ 5, 125 P.3d 1022, 1024 (Wyo. 2006). Specifically, the WAPA provides that the Wyoming Supreme Court's rules governing judicial review of administrative decisions includes the authority to determine "the time and manner for filing." WYO. STAT. ANN. § 16-3-114(b).

Rule 12 of the Wyoming Rules of Appellate Procedure adopted by the Wyoming Supreme Court governs judicial review of administrative decisions: "[a]ll appeals from administrative agencies shall be governed by these rules." WYO. R. APP. P. 12.01. Judicial review is instituted by filing a petition for review in the district court having venue." *Id.* at 12.03(a). The petition for review must include a statement showing appellate jurisdiction and be filed within thirty days after service of the final decision or the denial of a petition for rehearing. *Id.* at 12.06 (statement of jurisdiction) and 12.04(a)(timeliness). Other than filing a petition for review, no other pleadings are necessary for instituting judicial review of administrative decisions. *Id.* at 12.03(a). Upon docketing the petition, the appellate court acquires jurisdiction. *Id.* at 6.01. "The timely filing of a petition for review of administrative action is mandatory and jurisdictional." *Chevron USA v. Dep't of Revenue*,

2007 WY 62, ¶ 7, 155 P.3d 1041, 1043 (Wyo. 2007). Thus, the filing of a petition for review is an event of jurisdictional significance.

BACKGROUND

In this case, the Council entered its Order of Dismissal on December 3, 2007. *See* “Order Approving Parties’ Joint Stipulated Settlement, and Dismissing TEGP’s Appeal, and Approving the Withdrawal of August 22 Letter,” attached hereto as Attachment A. Subsequently, on December 20, 2007, the Sierra Club and the Powder River Basin Resource Council (PRBRC) moved to intervene in this case by filing a combined “Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant” (Motion to Intervene). A copy of the Motion to Intervene attached hereto as Attachment B. Also on December 20, 2007, the Sierra Club and PRBRC filed a “Petition for Review of Administrative Action” (Petition for Review) in the First Judicial District Court, Laramie County, Wyoming. *See* Petition for Review of Administrative Action, *Sierra Club v. Wyoming Environmental Quality Council*, 1st Jud. Dist. Ct. Docket No. 171-041.¹ A copy of the Petition for Review is attached hereto as Attachment C.

¹ The Council’s Order to Show Cause states that prior to filing the Motion to Intervene, the Sierra Club and PRBRC filed their Petition for Review. *See Order to Show Cause* (Feb. 20, 2008). In their statement of jurisdiction in their Petition for Review, the Sierra Club and PRBRC state: “Citizens [Sierra Club and PRBRC] this day have asked the EQC to review and rehear the issues complained of herein.” *See* Attachment C, Petition for Review, ¶ 2. Although it is unclear whether the Motion or Petition was filed first, it is undisputed that they were each filed on December 20, 2008.

ARGUMENT

Filing the Petition for Review Divested the Council of Subject Matter Jurisdiction and Vested Subject Matter Jurisdiction in the Appellate Court.

In the absence of any statutory limitation to the contrary, the Council has jurisdiction over its decisions until an appeal is initiated by filing a petition for review or the time for filing an appeal has expired. WYO. R. APP. P. 12.03(a) (judicial review instituted) or 12.04(a)(timely filing). However, after a timely petition for review has been filed, or the time has expired for filing a petition for review, the Council is divested of its jurisdiction. *Id.* Once an appeal has been initiated, the appellate court has control over all matters pertaining to the matter appealed. *See Id.* at 12.09(d) (recognizing after appeal is in district court's jurisdiction, an order remanding an issue or the matter is required before the administrative agency may take additional action).

Rule 12.09(d) of the Wyoming Rules of Appellate Procedure recognizes the principle of divestiture by explicitly providing a procedure for remand to the administrative agency after an appeal has been filed: “[t]he district court may, in its discretion, remand the case to the agency for proceedings in accordance with the direction of the court.” WYO. R. APP. P. 12.09(d); *see also Harris v. Sinclair Trucking*, 900 P.2d 1163 (Wyo. 1995) (after petition for review filed, the district court remanded for the taking of additional evidence).

Despite counsel for the DEQ being unable to locate any Wyoming cases on point, other courts have recognized that the divestiture principle is essential to the efficient administration of the appellate process and important to the concept of finality of judgments. *See Griggs v. Provident Consumer Discount Co.*, 103 S.Ct. 400, 402 (1982) (“filing 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”); *Molitar v. Anderson*, 795 P.2d 266, 268 (Colo. 1990)(there is universal recognition that “once an appeal is perfected jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal”); *Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada*, 664 P.2d 351, 353 (Nev. 1983)(“generally accepted that where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved”); *Gagne v. Inhabitants of City of Lewiston*, 281 A.2d 579 (Me 1971) (agency had no authority to modify its decision after appeal filed unless reviewing court remanded matter to board for further action); *Davidson Chevrolet v. City and County of Denver*, 328 P.2d 377 (Colo. 1958)(appeal divests jurisdiction from lower court and actions taken by lower court to vacate judgment after appeal filed are null and void); *Railroad Comm’n of Texas v. North Texas Coach Co.*, 92 S.W.2d 268, 270 (Tex. Civ. App. 1936)(agency’s attempt to take action while order is under appeal “would be a clear interference by the [agency] with the jurisdiction over the subject matter in litigation”); *Hailey-Ola Coal Co. v. State Indus. Comm’n*, 251 P. 1040 (Okla. 1926)(filing petition for review divests agency of jurisdiction).

Underlying the above cases, is a recognition that without the divestiture principle, the appellate process would become a “quagmire of uncertainty” if parties could obtain administrative agency alteration of a final decision during the pendency of an appeal. See

Molitar, 795 P.2d at 268. The divestiture principle prevents the administrative agency from changing its earlier rulings at the same time the appeal is pending. To permit a modification of the final order being appealed from while at the same time pursuing an appeal of the very same final order undermines the concept of finality of judgments foundation for administrative appeals. On the other hand, dual jurisdiction wastes judicial time and resources, increases costs, and is likely to result in chaotic administrative and judicial review and wasted resources.

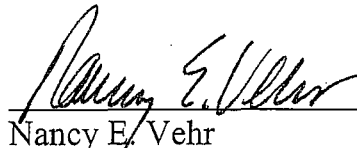
Theoretically, it is inconsistent to have an interpretation which would allow an event of jurisdictional magnitude to also permit the administrative agency to retain jurisdiction to decide the very matter being appealed while simultaneously treating the petition for review as adequate for purposes of initiating judicial review of administrative action. The divestiture principle, providing that the appellate court has jurisdiction and is responsible for the process of the appeal from the moment the Petition for Review has been filed, makes common sense and provides a bright line that is easy for administrative agencies, appellate courts, and parties alike to follow.

CONCLUSION

Subject matter jurisdiction either exists or not. The Council had subject matter jurisdiction over the issues up until the Petition for Review was filed. Upon the filing of the Petition for Review, subject matter jurisdiction was vested in the appellate court and the Council was divested of jurisdiction.

WHEREFORE, Respondent DEQ/AQD respectfully requests this Council dismiss "Citizens' Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant" for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 25th day of February, 2008.



Nancy E. Vehr
Sr. Asst. Attorney General
123 Capitol Building
Cheyenne, WY 82002
PH: 307-777-7580
FAX: 307-777-3542
Attorney for Respondent DEQ/AQD

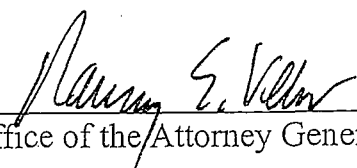
CERTIFICATE OF SERVICE

I certify that on this 25th day of February, 2008, a true and correct copy of RESPONDENT WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO ORDER TO SHOW CAUSE was served via U.S. Mail, postage prepaid, addressed as follows:

Reed Zars
Attorney at Law
910 Kearney St.
Laramie, WY 82070

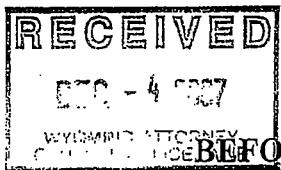
Danielle DiMauro
Michael Theis
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1200 Seventeenth Street, Suite 1500
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Mary A. Throne
John A. Coppede
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1800 Carey Avenue, Suite 700
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Office of the Attorney General

Nancy Vehr



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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF THE)
REVOCATION OF PERMIT NO. CT-1352B)
TWO ELK POWER PLANT)

Docket No. 07-2601

**ORDER APPROVING PARTIES' JOINT STIPULATED SETTLEMENT, and
DISMISSING TEGP'S APPEAL, and APPROVING THE WITHDRAWAL OF
AUGUST 22 LETTER**

THIS MATTER having come before the Environmental Quality Council ("EQC") upon Respondent Department of Environmental Quality ("DEQ"), Air Quality Division ("AQD") and Petitioner Two Elk Generation Partners', Limited Partnership ("TEGP"), "Joint Motion for Dismissal of Appeal, Approval of Settlement Stipulation, and Request for Setting of Hearing" and the Respondent DEQ/AQD appearing by and through its attorney, Ms. Nancy E. Vehr, Sr. Assistant Attorney General, and the Petitioner TEGP appearing by and through its attorney, Ms. Rebecca W. Watson, the Council having reviewed the Motion, the terms of the "Parties' Joint Stipulated Settlement Agreement" and the file herein, and having heard the statements of the parties and counsel, and otherwise being fully informed of the premises, HEREBY ORDERS:

1. The Parties' Joint Stipulated Settlement Agreement is hereby approved, and its terms are incorporated by reference into this Order. The Parties are bound by and shall comply with the terms of the Joint Stipulated Settlement Agreement.

2. DEQ/AQD's August 22 Letter to TEGP having been rescinded simultaneously with entry of this Order, hereby approves such rescission.

3. TEGP's appeal and all remaining issues pending in this action are dismissed with prejudice.

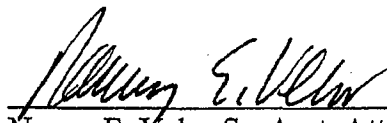
DATED this _____ day of November, 2007.

Kirby L. Hedrick, Presiding Officer
Environmental Quality Council
122 W. 25th Street, Rm 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
Fax: 307-777-6134

APPROVED AS TO FORM:

Ms. Rebecca W. Watson
Attorney for Petitioner TEGP

Date: _____



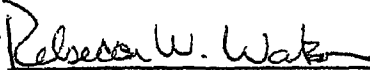
Nancy E. Vehr, Sr. Asst. Attorney General
Attorney for Respondent DEQ/AQD

Date: 11/21/07

DATED this _____ day of November, 2007.

Kirby L. Hedrick, Presiding Officer
Environmental Quality Council
122 W. 25th Street, Rm 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
Fax: 307-777-6134

APPROVED AS TO FORM:

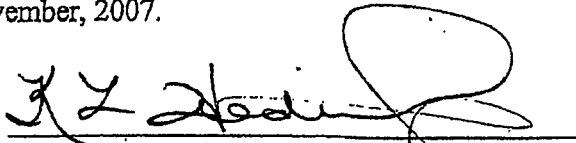


Ms. Rebecca W. Watson (5-1683)
Attorney for Petitioner TEGP

Nancy E. Vehr, Sr. Asst. Attorney General
Attorney for Respondent DEQ/AQD

3. TEGP's appeal and all remaining issues pending in this action are dismissed with prejudice.

DATED this 30 day of November, 2007.

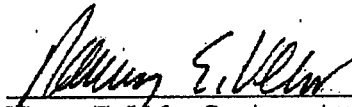


Kirby L. Hedrick, Presiding Officer
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122 W. 25th Street, Rm 1714
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Cheyenne, WY 82002
Phone: 307-777-7170
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APPROVED AS TO FORM:

Ms. Rebecca W. Watson
Attorney for Petitioner TEGP

Date: _____



Nancy E. Wehr, Sr. Asst. Attorney General
Attorney for Respondent DEQ/AQD

Date: 11/21/07

CERTIFICATE OF SERVICE

I, Alyx Reed, certify that at Cheyenne, Wyoming, on the 3rd day of December, 2007 I served a copy of the foregoing **ORDER** by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

Rebecca W. Watson
Hogan & Hartson LLP
1200 Seventeenth Street, Suite 1500
Denver, CO 80202


Dennis Arfmann
Hogan & Hartson LLP
1470 Walnut Street, Suite 200
Boulder, CO 80302

also to the following persons via interoffice mail:

Nancy Vehr
Office of Attorney General
123 State Capitol
Cheyenne, WY 82002

John Corra
Director
Department of Environmental Quality
122 W. 25th St., Herschler Bldg.
Cheyenne, WY 82002

David Finley
AQD Administrator
Department of Environmental Quality
122 W. 25th St, Herschler Bldg.
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FILED 12-28-2007

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BEFORE THE WYOMING ENVIRONMENTAL QUALITY COUNCIL

Terri A. Lorenzon, Director Environmental Quality Council

Sierra Club & PRBRC's Motion to Intervene)
and Petition for Reconsideration and)
Vacation of EQC Order Re: Discontinued)
Construction of Two Elk Plant)

Docket No. 07-2601

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

**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
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AND PETITION FOR RECONSIDERATION AND VACATION
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OF TWO ELK PLANT**

I. INTRODUCTION

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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.

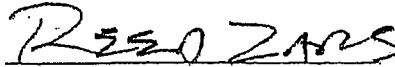
24. None of the five types of activities identified in the November 21, 2007 settlement agreement describe any physical, on-site construction of the Two Elk plant. Thus none of the facts described in the settlement agreement support a determination that TEGP was engaged in a continuous program of physical, 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 20th day of December, 2007.



Reed Zars
Attorney at Law
910 Kearney St.
Laramie, WY 82070
307-745-7979

ATTORNEY FOR CITIZENS

CERTIFICATE OF SERVICE

I certify that on this 20th 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. 25th 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:

Terri Lorenzon
TLoren@state.wy.us

John Corra
deqwyo@state.wy.us

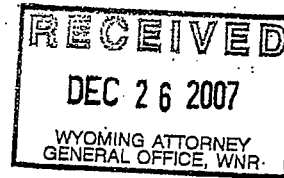
Dave Finley
DFINLE@state.wy.us

Nancy Vehr
NVEHR@state.wy.us

Rebecca W. Watson
rwwatson@hhlaw.com

Reed Zars
Reed Zars

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
307-745-7979



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,)

v.)

WYOMING ENVIRONMENTAL)
QUALITY COUNCIL,)

Respondent.)

Docket No. ~~07-2601~~ 171-041

FILED

DEC 20 2007

GERRIE E. BISHOP
CLERK OF THE DISTRICT COURT

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

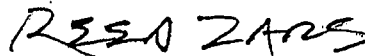
never disclosed to the EQC or the public, that TEGP did not discontinue construction for 24 months or more. None of the five types of activities identified in the November 21, 2007 settlement agreement describe any physical, on-site construction of the Two Elk plant. Thus none of the facts described 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,



Reed Zars
Attorney at Law
910 Kearney St.
Laramie, WY 82070
307-745-7979

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
Environmental Quality Council
122 W. 25th Street
Herschler Building, Room 1714
Cheyenne, WY 82002

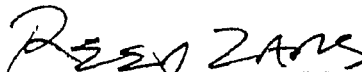
John Corra, Director
DEQ
122 West 25th Street
Herschler Building, 2nd Floor East
Cheyenne, WY 82002

David Finley, Administrator
DEQ Air Quality Division
122 West 25th Street
Herschler Building, 2nd Floor East
Cheyenne, WY 82002

Nancy Vehr
Assistant Attorney General
Attorney General's Office
123 Capitol
200 W. 24th Street
Cheyenne, WY 82002

By certified mail, return receipt requested, to:

Rebecca W. Watson
Counsel for TGEP
Hogan & Hartson LLP
1200 Seventeenth Street, Suite 1500
Denver, CO 80202


Reed Zars

Appendix A to Citizens' Petition

FILED

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL **DEQ 3 2007**
STATE OF WYOMING

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF THE)
REVOCATION OF PERMIT NO. CT-1352B)
TWO ELK POWER PLANT)

Docket No. 07-2601

**ORDER APPROVING PARTIES' JOINT STIPULATED SETTLEMENT, and
DISMISSING TEGP'S APPEAL, and APPROVING THE WITHDRAWAL OF
AUGUST 22 LETTER**

THIS MATTER having come before the Environmental Quality Council ("EQC") upon Respondent Department of Environmental Quality ("DEQ"), Air Quality Division ("AQD") and Petitioner Two Elk Generation Partners', Limited Partnership ("TEGP"), "Joint Motion for Dismissal of Appeal, Approval of Settlement Stipulation, and Request for Setting of Hearing" and the Respondent DEQ/AQD appearing by and through its attorney, Ms. Nancy E. Vehr, Sr. Assistant Attorney General, and the Petitioner TEGP appearing by and through its attorney, Ms. Rebecca W. Watson, the Council having reviewed the Motion, the terms of the "Parties' Joint Stipulated Settlement Agreement" and the file herein, and having heard the statements of the parties and counsel, and otherwise being fully informed of the premises, HEREBY ORDERS:

1. The Parties' Joint Stipulated Settlement Agreement is hereby approved, and its terms are incorporated by reference into this Order. The Parties are bound by and shall comply with the terms of the Joint Stipulated Settlement Agreement.

2. DEQ/AQD's August 22 Letter to TEGP having been rescinded simultaneously with entry of this Order, hereby approves such rescission.

3. TEGP's appeal and all remaining issues pending in this action are dismissed with prejudice.

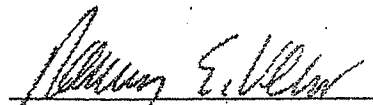
DATED this _____ day of November, 2007.

Kirby L. Hedrick, Presiding Officer
Environmental Quality Council
122 W. 25th Street, Rm 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
Fax: 307-777-6134

APPROVED AS TO FORM:

Ms. Rebecca W. Watson
Attorney for Petitioner TEGP

Date: _____



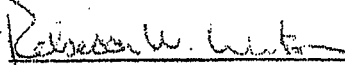
Nancy E. Yehr, Sr. Asst. Attorney General
Attorney for Respondent DEQ/AQD

Date: 11/21/07

DATED this _____ day of November, 2007.

Kirby L. Hedrick, Presiding Officer
Environmental Quality Council
122 W. 25th Street, Rm 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
Fax: 307-777-6134

APPROVED AS TO FORM:

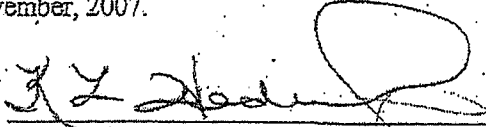


Ms. Rebecca W. Watson (5 1633)
Attorney for Petitioner TEGP

Nancy E. Vehr, Sr. Asst. Attorney General
Attorney for Respondent DEQ/AQD

3. TEGP's appeal and all remaining issues pending in this action are dismissed with prejudice.

DATED this 30 day of November, 2007.

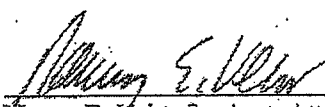


Kirby L. Hedrick, Presiding Officer
Environmental Quality Council
122 W. 25th Street, Rm 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
Fax: 307-777-6134

APPROVED AS TO FORM:

Ms. Rebecca W. Watson
Attorney for Petitioner TEGP

Date: _____



Nancy E. Vehr, Sr. Asst. Attorney General
Attorney for Respondent DEQ/AQD

Date: 11/21/07

CERTIFICATE OF SERVICE

I, Alyx Reed, certify that at Cheyenne, Wyoming, on the 3rd day of December, 2007, I served a copy of the foregoing **ORDER** by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

Rebecca W. Watson
Hogan & Hartson LLP
1200 Seventeenth Street, Suite 1500
Denver, CO 80202

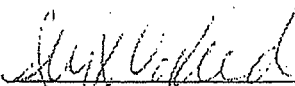
Dennis Arfmann
Hogan & Hartson LLP
1470 Walnut Street, Suite 200
Boulder, CO 80302

also to the following persons via interoffice mail:

Nancy Vehr
Office of Attorney General
123 State Capitol
Cheyenne, WY 82002

John Corra
Director
Department of Environmental Quality
122 W. 25th St., Herschler Bldg.
Cheyenne, WY 82002

David Finley
AQD Administrator
Department of Environmental Quality
122 W. 25th St, Herschler Bldg.
Cheyenne, WY 82002



Alyx Reed
Environmental Quality Council
122 W. 25th Street,
Herschler Bldg., Rm. 1714
Cheyenne, WY 82002
Tel: (307) 777-7170
Fax: (307) 777-6134

FILED

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

NOV 27 2007

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL OF THE)
REVOCATION OF PERMIT NO. CT-1352B)
TWO ELK POWER PLANT)

Docket No. 07-2601

JOINT STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement ("Agreement") is entered into between the Department of Environmental Quality, Air Quality Division ("DEQ/AQD") and Two Elk Generation Partners, Limited Partnership, a Wyoming limited partnership ("TEGP"), for the purpose of fully resolving and disposing of all matters raised by DEQ's August 22, 2007 letter to TEGP ("August 22 Letter") and TEGP's Petition for Review and Request for Immediate Stay ("Petition") to the Environmental Quality Council ("EQC" or "Council").

RECITALS:

WHEREAS TEGP submitted an air quality construction permit application to the DEQ/AQD for the Two Elk Unit 1 Power Plant to be located in Section 36, T43N, R70W, Campbell County, Wyoming ("Two Elk Plant") and;

WHEREAS pursuant to Chapter 6, sections 2 and 4 of the Wyoming Air Quality Standards and Regulations ("WAQSR") after notice and public hearing, the DEQ/AQD, in February 1998, issued air quality construction permit CT-1352 to TEGP for the Two Elk Plant and;

WHEREAS in August 1999, TEGP filed an application with the DEQ/AQD to modify the Two Elk Plant and;

WHEREAS in February 2000, after notice and opportunity for public hearing, the DEQ/AQD issued air quality construction permit CT-1352A to TEGP for the Two Elk Plant, requiring TEGP to commence construction by February 2002 and;

WHEREAS in February 2002, TEGP requested an extension of time to commence construction and the DEQ/AQD granted an extension of permit CT-1352A until August 2002 and;

WHEREAS in September 2002, the DEQ/AQD advised TEGP that permit CT-1352A was no longer valid because TEGP had not commenced construction of the Two Elk Plant and;

WHEREAS TEGP filed an appeal to the EQC (Docket No. 02-2601) which after notice and hearing resulted in an Order Approving Joint Stipulation for Disposition of Contested Case and the issuance of DEQ/AQD construction permit CT-1352B to TEGP on May 29, 2003 and required TEGP to commence construction of the Two Elk Plant before May 29, 2005 and;

WHEREAS on July 18, 2005, acting on TEGP's Motion to Dismiss after notice and hearing, the EQC found and concluded that DEQ/AQD had determined that TEGP had commenced construction of the Two Elk Plant before May 29, 2005 and that TEGP had complied with and fulfilled the terms of the Joint Stipulation, and entered its Order that permit CT-1352B remained valid and binding upon TEGP and granted TEGP's Motion to Dismiss and;

WHEREAS the EQC Order Granting TEGP's Motion to Dismiss required TEGP to "submit monthly status reports to the DEQ beginning August 1, 2005, and quarterly status reports to the EQC beginning October 1, 2005. These status reports will include information on engineering, procurement, financing, and construction aspects of the project. TEGP will continue to submit these reports until construction of the project is at least 50% complete, or until the EQC informs TEGP that it may stop submitting the reports" and;

WHEREAS TEGP has to date submitted all monthly and quarterly status reports required by the EQC Order to DEQ/AQD and;

WHEREAS permit CT-1352B condition No. 4 provides, "If ... 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," and;

WHEREAS on August 22, 2007, the DEQ/AQD Administrator Mr. David A. Finley issued TEGP the August 22 Letter concluding: "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 No. 4 and Chapter 6 Section 2(h) of the WAQSR" and;

WHEREAS since August 23, 2007, the DEQ/AQD and TEGP have engaged in discussions to determine whether there was a sufficient basis to resolve this matter without the need for a contested case proceeding by providing an opportunity for DEQ/AQD to determine whether TEGP possessed confidential business information not previously provided to the DEQ/AQD and for TEGP to provide such confidential

business information demonstrating construction of the Two Elk Plant had not been discontinued for a period of twenty-four months or more and;

WHEREAS the DEQ/AQD and TEGP were engaged in discussions but had not reached a determination at the time of TEGP's appeal deadline date of October 22, 2007 and;

WHEREAS in order to preserve its appeal rights, TEGP filed a Petition for Review and Request for Immediate Stay on October 22, 2007 and;

WHEREAS the DEQ/AQD and TEGP have continued to confer regarding the issues and confidential business information involved in this appeal and have reached agreement for withdrawal of TEGP's appeal and;

WHEREAS the 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 and;

WHEREAS DEQ/AQD asked TEGP to do two things: submit an application to modify Permit CT-1352B and lower the emissions of SO₂, NO_x and PM₁₀ filterable and to perform Class I modeling on the Two Elk Plant and;

WHEREAS TEGP submitted the application to modify permit CT-1352B to the DEQ/AQD and the modeling protocol to the DEQ/AQD and.;

WHEREAS DEQ/AQD finds TEGP has continued construction on the Two Elk Plant and rescinds the August 22, 2007 letter simultaneously with the Council's entry of the Order and;

WHEREAS the Parties have entered into this Agreement for the purpose of resolving all issues and;

WHEREAS disposition of this matter will serve and further the purposes of the Wyoming Environmental Quality Act ("WEQA") and related air quality statutes and regulations promulgated thereunder and make it unnecessary to adjudicate the particular issues involved in this appeal;

THEREFORE THE PARTIES STIPULATE AS FOLLOWS:

1. Upon execution of this Agreement the Parties shall request the Council enter an order approving and binding the Parties to this Agreement and dismiss the appeal now pending before the Council.

2. Based on its review of confidential business information and other documentation provided by TEGP, the DEQ/AQD has determined that TEGP has not discontinued construction for a period of 24 months or more and is in compliance with permit CT-1352B condition No. 4.

3. TEGP agrees to and shall continue to file reports with the DEQ/AQD every 90 days (beginning 90 days from the date of the EQC's Order approving this Agreement, and by the 15th day following the close of successive calendar quarters thereafter ("Quarterly Submittal")) providing information that TEGP has made progress towards completing construction of the Two Elk Plant in a reasonable time.

A. TEGP's demonstration for the first 90 day period shall include at a minimum providing to the DEQ/AQD: i) a licensed professional engineer's report detailing the construction schedule for work to be performed by TEGP and its contractors on the Two Elk Plant, projected startup date, and construction schedule for the related transmission facilities, for the period from the date of the EQC's Order approving this settlement agreement to the projected startup date for the Two Elk Plant; ii) copies of actual documents evidencing TEGP paid \$1,000,000 to PacifiCorp pursuant to the Large Generator Interconnection Agreement executed on October 3, 2007 ("LGIA"); iii) all Wyoming Department of Transportation final approvals for the State Highway 450 interchange.

B. Within 15 days of final execution of the Engineering, Procurement and Construction ("EPC") Contract, and within 15 days of final execution of project financing sufficient to fund completion of construction of the Two Elk Plant, TEGP shall provide written notification to the DEQ/AQD.

C. TEGP's demonstration for each successive Quarterly Submittal period shall include at a minimum providing to the DEQ/AQD: i) a licensed professional engineer's report detailing physical on-site construction progress; ii) the revisions or change orders to the construction

schedule that the licensed professional engineer determines are necessary; iii) a licensed professional engineer's report detailing any off-site component progress; iv) a licensed professional engineer's report detailing construction progress pursuant to the LGIA; v) the revisions or change orders to the construction schedule that the licensed professional engineer determines are necessary for the LGIA.

D. TEGP will continue to submit quarterly reports until construction of the project is at least 50% complete, or until the DEQ/AQD informs TEGP that it may stop submitting reports.

E. If TEGP fails to meet any Quarterly Submittal deadline or submittal requirements, TEGP shall pay the DEQ/AQD liquidated damages in the amount of \$1000.00 per day for each failure to submit.

F. If any of TEGP's Quarterly Submittals reflect that the Engineer's construction schedule or estimate of plant start up has been revised and extends completion by more than 1 year but less than two years from the currently projected startup date set forth in the first 90 day submittal or startup extends beyond December 2012, then TEGP shall submit a permit modification application to the DEQ/AQD to modify permit CT-1352B or any successor permit emission limits to reflect application of then current commercially available emission control technology or TEGP may, in lieu of submitting a permit modification application, submit a showing which must be satisfactory to the DEQ/AQD Administrator that an extension is justified for the delay in start-up. TEGP shall retain any appeal rights it may have associated with either the permit modification application or showing submittal.

G. If any of TEGP's Quarterly Submittals reflect that the Engineer's construction schedule or estimate of plant start up has been revised and extends completion by 2 years or more from the currently projected startup date set forth in the first 90 day submittal, then TEGP shall either submit a showing which must be satisfactory to the DEQ/AQD Administrator that an extension is justified for the delay in start-up or shall be required to file a permit modification application to modify permit CT-1352B or any successor permit which demonstrates to the satisfaction of DEQ/AQD that TEGP's construction and subsequent operation of the Two Elk Plant satisfies Ch. 6 section 2(c) of the WAQSR and will not prevent the attainment or maintenance of any ambient air quality standard, will not cause significant deterioration of existing ambient air quality, will utilize and meet the Best Available Control Technology at such date and does not pose unacceptable air quality impacts to nearby Class I areas. The BACT

evaluation will apply BACT at the time of the application as if BACT was being conducted on a new power plant.

4. The DEQ/AQD agrees to notify TEGP within 30 days of receipt of any report filed by TEGP if DEQ/AQD has any concerns related to the information contained in the report, and to afford TEGP a reasonable opportunity to provide additional information or otherwise address such concerns.

5. TEGP agrees not to withdraw the application to modify permit CT-1352B submitted on November 13, 2007 so long as the permit application is processed at the agreed upon emission limits, the Council approves this Agreement, and the Agreement is not set aside by any court.

6. DEQ/AQD's August 22, 2007 letter is rescinded simultaneously with the Council's entry of the Order.

7. The Parties agree that each Party will be bound by this Agreement should the Council approve this Agreement and dismiss this matter. However, should the Council not dismiss this matter as requested in the Parties' Joint Motion or should the Council take action in the course of dismissing this matter which is inconsistent with or in any way alters the provisions of this Agreement, this Agreement shall be voidable at either DEQ/AQD or TEGP's option. If the Council does not approve this Agreement or if this Agreement is declared void each party reserves its rights consistent with their positions prior to signing the Agreement.

8. This Agreement represents a good faith settlement of disputed factual allegations and positions of both DEQ/AQD and TEGP and shall not constitute nor be construed as an admission by either DEQ/AQD or TEGP outside of its express terms.

9. Neither the DEQ/AQD nor the State of Wyoming nor any of its Agencies shall be held as a party to any contracts or agreements entered into by TEGP to implement any condition of this Agreement.

10. Nothing in this Agreement relieves TEGP of its duty to comply with all applicable requirements under the WEQA, and rules, regulations and standards adopted thereunder, including any permit requirements. TEGP's performance of its responsibilities pursuant to this Agreement shall not be a defense to any action commenced pursuant to such laws, regulations or permits. DEQ/AQD does not, by entering into this Agreement, warrant or aver that TEGP's completion of any aspect of this Agreement will result in compliance with the WEQA, WAQSR or permits issued thereunder. TEGP shall remain solely responsible for its completion of the terms of this Agreement, all applicable permits, and all applicable federal, state, and local laws and regulations.

11. Nothing in this Agreement shall be construed to prevent or limit DEQ/AQD's right or ability to seek relief for any future issues, or to limit TEGP's rights to defend itself against any DEQ/AQD action in the future.

12. The DEQ/AQD and TEGP reserve all legal and equitable remedies available to enforce the provisions of this Agreement.

13. The State of Wyoming and the DEQ/AQD do not waive sovereign immunity by entering into this Agreement and retain immunity and all defenses available to them as sovereigns pursuant to WYO. STAT. ANN. § 1-39-104(a) and all other state law.

14. The Parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties and obligations contained in this Agreement shall operate only among the Parties to this Agreement.

15. Should any portion of this Agreement be judicially determined to be illegal or unenforceable, the remainder of the Agreement shall continue in full force and effect, and either Party may renegotiate the terms affected by the severance.

16. The construction, interpretation and enforcement of this Agreement shall be governed by the laws of the State of Wyoming.

17. This Agreement shall be admissible by either DEQ/AQD or TEGP without objection by the other Party in any action between these Parties relating to the issues alleged herein. However if the Council does not approve this Agreement or if this Agreement is declared void this Agreement shall not be used by one party against the other in a subsequent proceeding.

18. This Agreement, consisting of eight (8) pages represents the full and complete agreement of DEQ/AQD and TEGP relating to the DEQ/AQD's August 22 Letter and TEGP's subsequent appeal thereof, and supersedes any prior discussions or negotiations of DEQ/AQD and TEGP related to the same.

19. Neither Party hereto shall have any claim against the other for attorneys' fees or other costs incurred with the issues resolved hereby, including costs associated with the preparation of this Agreement. Each Party shall bear its own attorneys' fees and costs, if any, incurred through the entry of an Order by the Council approving this Agreement. Each Party assumes the risk of any liability arising from its own conduct. Neither party agrees to insure, defend or indemnify the other.

20. This Agreement may be executed in any number of separate counterparts any one of which need not contain the signatures of more than one Party but all of such counterparts together will constitute one Agreement. The separate counterparts may contain original, photocopy, or facimile transmissions of signatures.

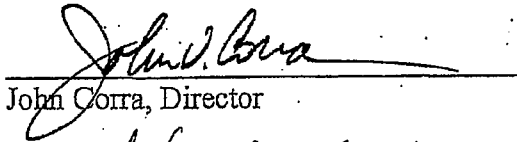
Signatories certify that they are authorized to bind their respective parties to this Agreement.

FOR PETITIONER TEGP:

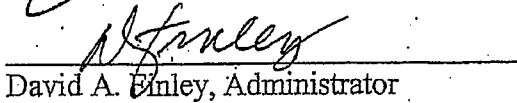


M. Bradley Enzi, Vice President
Two Elk Power Company, General Partner, for
Two Elk Generation Partners,
Limited Partnership

FOR RESPONDENT DEQ:



John Corra, Director



David A. Binley, Administrator

Approval as to form:



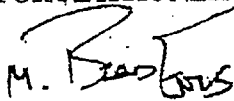
Nancy E. Wehr
Attorney for Respondent DEQ

Dennis Arfmann
Attorney for Petitioner TEGP

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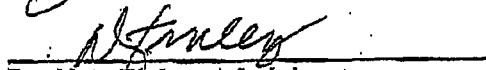


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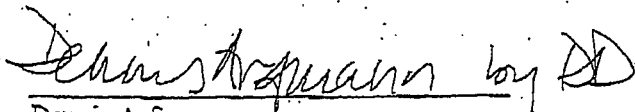


David A. Hanley, Administrator

Approval as to form:



Nancy E. Weir
Attorney for Respondent DEQ



Dennis Arfmann
Attorney for Petitioner TEGP

