

FILED

FEB 25 2008

Terri A. Lorenzon, Director
Environmental Quality Council

**BEFORE THE WYOMING
ENVIRONMENTAL QUALITY COUNCIL**

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

Docket No. 07-2601

**SIERRA CLUB AND POWDER RIVER BASIN RESOURCE COUNCIL
RESPONSE TO ORDER TO SHOW CAUSE**

Sierra Club and Powder River Basin Resource Council (“Citizens”) respectfully respond to the Council’s April 20, 2008 Order that asks the parties to “show cause why the EQC should not dismiss this matter for lack of subject matter jurisdiction.” As show below, the EQC should not dismiss this matter for lack of subject matter jurisdiction because: (1) Citizens and DEQ have agreed to an order staying the Laramie County District Court proceeding pending the outcome of Citizens’ motion to intervene and petition for rehearing, and (2) the Council retains jurisdiction over Citizens’ motion to intervene and petition for reconsideration because they are not the subject of the District Court proceeding.

The Council’s Order suggests that, pursuant to Rules 6 and 12.03 of the Wyoming Rules of Appellate Procedure, the Council was deprived of jurisdiction to hear Citizens’ December 20, 2007 Motion to Intervene and Petition for Rehearing in this matter when Citizens filed their Petition of Review of Administrative Action that same day in Laramie County District Court. Docket No. 171-041. Citizens’ Petition for Review only challenges the Council’s December 3, 2007 Order Approving Parties’ Joint Stipulated Settlement, and Dismissing TEGP’s Appeal, and Approving the Withdrawal of August 22 Letter.

A. Citizens' Motion to Intervene and Petition for Reconsideration Should Not Be Dismissed Because DEQ and Citizens Have Agreed to Stay the District Court Proceeding.

The parties to the district court proceeding have agreed to a stay pending resolution of Citizens' motion to intervene and petition for reconsideration before the Council. **Exhibit A.** Therefore Citizens' motion to intervene and petition for reconsideration should not be dismissed on jurisdictional grounds.

According to Wyo. R.App.P. 12.04:

(a) In a contested case, or in an uncontested case, even where a statute allows a different time limit on appeal, the petition for review shall be filed within 30 days after service upon all parties of the final decision of the agency **or denial of the petition for a rehearing, or, if a rehearing is held, within 30 days after service upon all parties of the decision.**

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.**

(Emphasis supplied.)

Citizens filed their motion to intervene and petition for rehearing in this matter to provide the Council a vehicle to revisit its December 3, 2007 Order. If the Council were to allow Citizens' motion to intervene then no petition for review to District Court would need to be filed pursuant to Wyo.R.App.P. 12.04 until 30 days after the denial of Citizens' petition for rehearing, or, if a rehearing were held, until 30 days after a decision on rehearing. However, if the Council were to deny Citizens' motion to intervene more than 30 days after December 3, 2007, Citizens might be found to have waived their right to seek judicial review of the Council's December 3, 2007 Order unless they filed a petition for judicial review within the 30-day window.

In other words, Citizens filed a protective petition to review before the Laramie County District Court to avoid missing the appeal deadline, and filed their motion to intervene and petition for rehearing before the Council to avoid missing the rehearing deadline.

Recognizing that Citizens' petition for review might be premature if the Council entertains Citizen's motion to intervene,¹ and that the record might then not be complete before the District Court, DEQ proposed to stay the District Court proceeding and Citizens agreed. See **Exhibit A**. Because the parties have proposed a resolution to this issue by requesting a stay of proceedings in District Court, the Council should not dismiss Citizens' motion to intervene on jurisdictional grounds.

B. Citizens' Motion to Intervene and Petition for Reconsideration Should Not Be Dismissed Because the Council Retains Jurisdiction Over Citizens' Motion to Intervene and Petition for Rehearing That Are Not the Subject of the Appeal.

Because Citizens have only appealed the December 3, 2007 Order of the Council, the Council retains jurisdiction to hear Citizens' subsequent December 20, 2007 motion to intervene and petition for reconsideration that is not the subject of Citizens' petition for review in District Court. Therefore the Council should not dismiss Citizens' motion to intervene and petition for reconsideration on jurisdictional grounds.

Pursuant to Wyo.R.App.P. Rule 6.01:

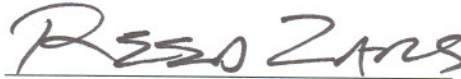
(b) The appellate court shall acquire jurisdiction over the matters appealed when the case is docketed. In all cases, the trial court retains jurisdiction over all matters and proceedings not the subject of the appeal, including all matters covered by Rules 4 and 5,

¹ Pursuant to Wyo.R.App.P. Rule 2.04, "A notice of appeal filed prematurely shall be treated as though filed on the same day as entry of the appealable order, provided it complies with Rule 2.07(a)." The appealable order in this case would be an order from the Council that addresses Citizens' motion to intervene and petition for reconsideration.

unless otherwise ordered by the appellate court.

Because the Council stands in the shoes of a District Court for the purposes of the Wyoming Rules of Appellate Procedure,² the Council retains jurisdiction over proceedings that are not the subject of an appeal. Citizens' motion to intervene and petition for reconsideration are not the subject of Citizens' petition for review in District Court and therefore Citizens' motion to intervene and petition for reconsideration should not be dismissed for want of jurisdiction.

DATED this 25TH day of February, 2008.



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ATTORNEY FOR CITIZENS

² Pursuant to Wyo.R.App.P. Rule 12.01, "All appeals from administrative agencies shall be governed by these rules."

CERTIFICATE OF SERVICE

I certify that on this 25th day of February, 2008, I caused the foregoing **Citizens' Response to Order to Show Cause** to be served by U.S. Mail and by email to the following:

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EXHIBIT A

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

SIERRA CLUB and POWDER RIVER)
BASIN RESOURCE COUNCIL,)
)
Petitioners,)
)
v.)
)
WYOMING ENVIRONMENTAL)
QUALITY COUNCIL,)
)
Respondent.)

Docket No. 171-041

FILED

FEB 14 2008

GERRIE E. BISHOP
CLERK OF THE DISTRICT COURT

DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO STAY
BRIEFING SCHEDULE AND FILING OF ADMINISTRATIVE RECORD
PENDING COMPLETION OF AGENCY PROCEEDINGS

The State of Wyoming, Department of Environmental Quality (DEQ), by and through the Office of the Attorney General and pursuant to WYO. R. APP. P. 16, moves to stay the briefing schedule and filing of administrative record in the above action pending completion of agency proceedings in *In re the Appeal of the Revocation of Permit No. CT-1352B Two Elk Power Plant* (EQC Docket No. 07-2601) for the following reasons:

1. On December 20, 2007, the Sierra Club and Powder River Basin Resource Council (PRBRC) filed a "Petition for Review of Administrative Action" (hereinafter referred to as "Petition") requesting "judicial review of a December 3, 2007 final Order issued by the Woming (sic) Environmental Quality Council ("EQC") in Docket No. 07-2601 [*In re the Appeal of the Revocation of Permit No. CT-1352B Two Elk Power Plant*]. A copy of the Petition is attached hereto as Attachment A.
2. On January 9, 2008, this Court's Order on Briefing Schedule was filed, and set the filing deadline for the administrative record as February 19, 2008. A copy of the Order is attached hereto as Attachment B.
3. Section II.2 of the Sierra Club and PRBRC's Petition filed with this Court notes that on the very day they filed their Petition they also "asked the EQC to review and

rehear the issues complained of herein.” Attachment A, ¶ 2. *See also In re the Appeal of the Revocation of Permit No. CT-1352B Two Elk Power Plant*, EQC Docket No. 07-2601, “Citizens’ Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant.”

4. The EQC has set a hearing for February 27, 2008, on the Sierra Club and PRBRC’s Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order. *See* EQC Order, *In re the Appeal of the Revocation of Permit No. CT-1352B Two Elk Power Plant*, EQC Docket No. 07-2601. A copy of the EQC’s Order is attached hereto as Attachment C.

5. In accordance with rule 12.07 of the Wyoming Rules of Appellate Procedure, the EQC is required to: “transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review” by February 19, 2008. *See* WYO. R. APP. P. 12.07; *see also* Attachment B, Order on Briefing.

6. Until the EQC issues an order on the Sierra Club and the PRBRC’s Motion to Intervene and closes EQC Docket No. 07-2601, the EQC will not be able to transmit a certified copy of the complete administrative record to this Court. *See* WYO. R. APP. P. 12.07(b), WYO. STAT. ANN. § 16-3-107(o), *Newman v. Wyoming Workers’ Safety and Compensation Div.*, 2002 WY 91, ¶¶ 24-25, 49 P.3d 163, ¶¶ 24-25 (Wyo. 2002) (judicial review of agency action is based on review of the whole record), *Knight v. EQC*, 805 P2d 268, 274 (Wyo. 1991) (administrative appeals are confined to review of the entire administrative record).

7. Upon receipt of an EQC Order on the Sierra Club and PRBRC’s Motion to Intervene and Petition for Reconsideration and Vacation of EQC [12/3/2007] Order, the DEQ will notify this Court.

8. Counsel for the State of Wyoming represents that she has contacted counsel for Two Elk Generation Partners and counsel did not object to the State filing this Motion. Counsel for the State of Wyoming also contacted counsel for the Sierra Club and PRBRC and counsel has no objection to the proposed Order submitted herewith.

WHEREFORE, the State of Wyoming Respondent prays for an Order Staying Briefing Schedule Pending Completion of Agency Proceedings and for whatever additional relief the Court deems proper.

DATED this 14th day of February, 2008.


Nancy E. Vehr
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Attorney for State of Wyoming

CERTIFICATE OF SERVICE

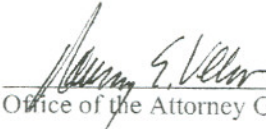
I certify that on this 14th day of February, 2008, a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, addressed as follows:

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Office of the Attorney General

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

SIERRA CLUB and POWDER RIVER))	
BASIN RESOURCE COUNCIL,))	
)	
Petitioners,))	
)	
v.))	Docket No. 171-041
)	
WYOMING ENVIRONMENTAL))	
QUALITY COUNCIL,))	
)	
Respondent.))	

**(proposed) ORDER GRANTING DEPARTMENT OF ENVIRONMENTAL
QUALITY'S MOTION TO STAY BRIEFING SCHEDULE AND FILING OF
ADMINISTRATIVE RECORD PENDING COMPLETION OF AGENCY
PROCEEDINGS**

This Court, having considered the State of Wyoming, Department of Environmental Quality's (DEQ) Motion to Stay Briefing Schedule and Filing of Administrative Record Pending Completion of Agency Proceedings and having reviewed the file and being otherwise fully advised in the premises, it is hereby:

ORDERED that the DEQ's Motion to Stay Briefing Schedule and Filing of Administrative Record Pending Completion of Agency Proceedings is GRANTED;

IT IS FURTHER ORDERED that the DEQ, upon receipt of an EQC Order on the Sierra Club and PRBRC's Motion to Intervene and Petition for Reconsideration and Vacation of EQC [12/3/2007] Order, will forthwith notify this Court. Within ten days of such notice the parties shall submit to the Court a proposed briefing schedule, unless this matter is to be dismissed.

DATED this ____ day of _____, 2008.

Peter G. Arnold
District Court Judge

cc: Reed Zars
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[M__B__H__F__]

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I hereby certify that I distributed a true and correct copy of the foregoing on the ____ day of _____, 2008, as indicated [M - mail; B-box in Clerk's Office; H-hand delivery; F-fax transmission].

Deputy Clerk or Judicial Assistant