

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

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

PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY

Two Elk Generation Partners, Limited Partnership (“TEGP”) petitions the Wyoming Environmental Quality Council (“Council”) to review the Department of Environmental Quality’s (“DEQ’s”) August 22, 2007 revocation of Permit No. CT-1352B for construction of the Two Elk solid waste disposal facility (“Two Elk”), located in Campbell County, Wyoming. The Two Elk facility will recycle and dispose of non-commercial or waste coal exposed during the mining process from adjacent surface coal mines, also producing electricity in the process. TEGP requests an expedited hearing in this matter in accordance with Wyo. Stat. § 35-11-112(a)(iv) and DEQ Rules of Practice and Procedure and an immediate stay of the effectiveness of the DEQ’s August 22, 2007 revocation letter pending the Council’s review of this matter. In accordance with Chapter 1, Section 3(c), DEQ Rules of Practice and Procedure, TEGP provides the following in support of its petition for hearing and request for immediate stay.

INTRODUCTION

1. The name and address of the petitioner is Two Elk Generation Partners, Ltd., 8400 E. Orchard Rd., Suite 4000, Greenwood Village, CO 80111. Legal Counsel for TEGP are Dennis Arfmann, Hogan & Hartson LLP, 1470 Walnut Street, Suite 200 Boulder, CO 80302 and Rebecca W. Watson, Hogan & Hartson LLP, 1200 Seventeenth Street, Suite 1500, Denver CO

80202. TEGP's general partner is Two Elk Power Company, which is a wholly-owned subsidiary of North American Power Group, Ltd. ("NAPG").

2. Under Wyo. Stat. § 35-11-112(a)(iv), the Council is required to conduct hearings in any case contesting the "suspension [or] revocation" of a permit or license.

3. By order of the Commission, the DEQ issued Permit No. CT-1352B, authorizing construction of the Two Elk facility, on May 29, 2003. Permit No. CT-1352B contains various conditions, including that "[i]f 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 [Wyoming Air Quality Standards and Regulations, 'WAQSR'] Chapter 6, Section 2(h), the permit will become invalid." (Attachment A, DEQ Permit No. CT-1352B, issued May 29, 2003, and filed June 2, 2003 ("Permit No. CT-1352B") ¶ 4.)

4. On July 18, 2005, the Council issued an Order finding:

DEQ has determined that, prior to May 29, 2005, TEGP completed the construction of the foundation for the main stack, and entered into a binding written contract to purchase a site-specific main boiler, which contract is not contingent upon any additional notice to proceed or exercise of an option. TEGP submitted documentation of the commencement of construction to the DEQ. TEGP has, therefore, commenced construction as required by Condition 4 of Permit No. CT-1352B.

Now that DEQ has determined that construction has commenced, and the parties have complied with and fulfilled the terms of the Joint Stipulation, the EQC does not need to

retain jurisdiction over this matter. (Attachment B, Order Granting Motion to Dismiss, Council Docket No. 02-2601, dated July 18, 2005 (“July 18, 2005 Order”) 2.)

5. In the July 18, 2005 Order, the Council also confirmed DEQ’s issuance of Permit No. CT-1352B, and ordered TEGP to submit monthly status reports to the DEQ beginning August 1, 2005, and quarterly status reports to the Council beginning October 1, 2005. The Council required the status reports to “include information on engineering, procurement, financing, and construction aspects of the project.” (*Id.*)

6. On August 22, 2007, David Finley, Administrator of the DEQ Air Quality Division (“AQD”) sent a letter to TEGP informing it of DEQ’s conclusion that “[b]ecause construction [at Two Elk] has been discontinued for a period of 24 months or more,” under permit condition No. 4 and WAQSR, Chapter 6, Section 2(h), Permit No. CT-1352B had “automatically” expired and become invalid. (Attachment C, Letter from David Finley, Administrator AQD, to Daniel D. Yueh, Vice President of NAPG (Aug. 22, 2007) (“August 22 Letter”).¹) The conclusion that Permit No. CT-1352B had expired and become invalid effected a revocation of the permit.

7. TEGP requests that the Council order an immediate stay of the effectiveness of the August 22 Letter and confirm that Permit No. CT-1352B remains in effect pending the Council’s review of this matter. Since receiving the letter revoking its permit, TEGP has no authority to continue with any construction activities at the Two Elk facility that are covered by the permit. The revocation of Permit No. CT-1352B has interrupted the construction schedule

¹ The first page of the letter bears the date “August 20, 2007,” but the header on the second page bears the date “August 22, 2007,” and the facsimile date stamp from transmission to TEGP is “August 22, 2007.” This suggests that the header automatically updated to reflect the date of printing and transmittal to TEGP; counsel for DEQ confirmed in a telephone call that the correct date of the DEQ decision was August 22 and not August 20, 2007 (October 18, 2007 telephone call D. Arfmann and N. Voight), accordingly, the letter is hereinafter referred to as the “August 22 Letter” notwithstanding the date on the first page.

for the facility at a critical moment, as essential earthwork and other foundation construction must be completed before the ground freezes for the winter. (*See* Attachment D, Affidavit of Michael Ruffatto; *see also* Attachment L, Affidavit of M. Bradley Enzi)

8. The effectiveness of the August 22 Letter should also be stayed because the DEQ concluded that Permit No. CT-1352B had expired and become invalid without providing TEGP notice and an opportunity for a hearing and thus, the revocation is invalid as a matter of law. The Wyoming Administrative Procedure Act (“APA”) states that “[n]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for retention of the license.” Wyo. Stat. § 16-3-113(c). The definition of “license” under the APA includes a “permit.” Wyo. Stat. § 16-3-101(b)(iii). The DEQ’s August 22 Letter to NAPG and TEGP does not satisfy any of the procedural requirements of the APA. *See, e.g., Slagle v. Wyoming State Bd. of Nursing*, 954 P.2d 979 (Wyo. 1998). The DEQ’s conclusion that the construction permit “automatically” became invalid thus violates the plain text of the APA.

9. DEQ’s August 22 Letter also violates TEGP’s right to due process as set forth in the 14th Amendment of the United States Constitution and Article 1, Section 6 of the Wyoming Constitution and for this reason, should be immediately stayed. Without the construction permit from the DEQ, TEGP cannot conduct business and cannot continue construction of the Two Elk facility. As such, TEGP’s permit represents a property interest and procedural due process dictates that DEQ provide notice and an opportunity for a hearing before taking any action to invalidate the permit. *Slagle*, 954 P.2d at 982; *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 961 (Wyo. 1995).

10. TEGP further requests that the Council vacate the August 22 Letter because (a) construction at the Two Elk facility has never been discontinued for a period of 24 months or more, and (b) as explained above, DEQ issued the August 22 Letter without affording TEGP due process.

GOVERNING LAW AND AGENCY POLICY

11. Under WAQSR Chapter 6, Section 2(h), a permit to construct “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.”

12. Two Elk is a “major stationary source” within the meaning of WAQSR Chapter 6, Section 4(a) and thus, is subject to the permitting requirements for Prevention of Significant Deterioration (“PSD”) found in Chapter 6, Section 4. “Construction” is defined under this section as “any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in emissions.” WAQSR Chapter 6, Section 4(a).

13. Additionally, the WAQSR define “commenced,” as applied to construction of a major stationary source or major modification, to mean “the owner or operator has obtained a Construction Permit required by Chapter 6, Section 2 and either has (i) begun, or caused to begin, a continuous program of actual on-site construction of the source or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the source to be completed within a reasonable time.” *Id.* The WAQSR also define “begin actual construction” as, “in general, initiation of physical on-site construction activities on an emissions unit which

are of a permanent nature.” *Id.* The definition of “begin actual construction” further explains that “[s]uch activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures.” *(Id.)*

14. In guidance memoranda that relate to the definition of construction in the PSD context, the U.S. Environmental Protection Agency (“EPA”) has published its conclusion that “[s]ignificant and continuous site preparation work such as major clearing or excavation or placement, assembly, or installation of unique facilities or equipment at the site” represents “construction.” (Attachment E, Memorandum from EPA Assistant Administrator for Air and Waste Management to Regional Administrators (Dec. 18, 1975); Attachment F, Memorandum from EPA Director of Division of Stationary Source Enforcement to Chief General Enforcement Branch, Region 2 (Feb. 13, 1978)). EPA has interpreted “[p]hysical on-site construction” to refer to site-specific “placement, assembly, or installation of materials, equipment or facilities which will make up part of the ultimate structure of the source.” (Attachment G, Memorandum from EPA Director, Division of Stationary Source Enforcement to Chief, Air Enforcement Branch, Region V (July 1, 1978).) EPA has further noted, “[p]lacement of footings, pilings and other materials needed to support the ultimate structures clearly constitutes on-site construction.” *(Id.)*

15. EPA has also explained that “to satisfy the commence construction requirements, a contractual obligation must be a site specific commitment” for activities such as “placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source” and “must also be one which cannot be cancelled or modified without substantial loss.” (Attachment G.)

16. Additionally, EPA policy provides that a source may be “so irrevocably committed to a particular site that it should be considered as having commenced construction.” (Attachment E.) EPA has further explained,

Such situations could include sources which are only a few days or weeks from commencing on-site construction or sources which have contracted for or constructed unique site specific facilities or equipment which are not yet being installed on-site. Such situations will be rare but may be taken into account in determining whether the source is in effectively the same position as if it had commenced on-site construction.

(*Id.*) Thus “construction” of a source may include “physical, on-site construction,” site-specific contractual obligations, or other contractual obligations that demonstrate “irrevocable commitment” to the site.

17. The Clean Air Act prohibits construction without a permit. 42 U.S.C. § 7475(a)(1). Further, EPA guidance establishes that engaging in certain activities in the absence of a PSD permit would subject the responsible party to liability for having illegally “commenced construction” on a major source or modification without appropriate authorization. For example,

[a]ll on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances [without a PSD permit]. These prohibited “construction” activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

(Attachment H, Memorandum from EPA Director, Division of Stationary Source Enforcement to Enforcement Division Directors Regions I-X (Dec. 18, 1978); Attachment I, Memorandum from EPA Director, Division of Stationary Source Enforcement to Chief, Air Branch, Region I, (Oct. 10, 1978) (noting that “[d]rains, piping, and footings . . . and any other installations necessary to accommodate” or “specific to” a source subject to PSD review may not be constructed until the PSD permit is issued).)

18. In other guidance memoranda, EPA has discussed whether excavation activity including blasting and removal of rock and soil constitute “preparatory” activities that could proceed in advance of the issuance of a PSD permit. (Attachment J, Memorandum from Director, Stationary Source Compliance, EPA Office of Air Quality Planning and Standards, to Chief, Air Enforcement Branch, Region III (May 13, 1993) 2.) EPA explained,

Although the memorandum from Edward Reich dated December 18, 1978 distinguished activities of a preparatory nature from those of a permanent nature, our policy also focuses on the relation of the activity to the PSD source. Construction of a retaining wall is considered an activity under “begin actual construction” because it is of a permanent nature. The excavation is also permanent and is an integral part of the PSD source.

(*Id.* at 2.) In contrast to site clearing and grading, EPA explained, “The excavation activities in this case . . . are costly, they significantly alter the site, are an integral part of the overall construction project, and are clearly of a permanent nature. Consequently, these activities are within the meaning of “begin actual construction.” . . . [W]e believe that the excavation is a prohibited activity” (*Id.* at 3; *see also* Attachment K, Letter from Director, EPA Office of Air Quality Planning and Standards, to Commissioner, Minnesota Pollution Control Agency

(Dec. 13, 1995) (“Prohibited (permanent and/or preparatory) preconstruction activities under 40 CFR 52.21(b)(i)(1) and (b)(11) would include any construction that is costly, significantly alters the site, and/or permanent in nature. This would include, but is not limited to: (1) excavating, blasting, removing rock and soil, and backfilling, and (2) installing footings, foundations, permanent storage structures, pipe, and retaining walls.”)

CONSTRUCTION AND IRREVOCABLE COMMITMENTS AT THE TWO ELK FACILITY

19. Since commencing construction in 2005, TEGP has engaged in physical, on-site construction activities including, without limitation, excavation, demolition, relocation, and installation of oil and gas pipelines, road construction activities, and has entered and maintained in effect numerous contractual obligations that satisfy the EPA and this Council’s interpretation of construction and that further demonstrate TEGP’s irrevocable commitment to the Two Elk project. Construction at Two Elk has never been discontinued for a period of 24 months or more, as DEQ asserted in the August 22 Letter. Consequently, the DEQ had no grounds to revoke Permit No. CT-1352B, and the Council should vacate the August 22 Letter.

20. Beginning in June 2005 and ending in September 2005, TEGP initiated and paid for the excavation, demolition, relocation, and reconstruction of an oil pipeline operated by Belle Fourche that interfered with the footprint of the Two Elk facility. This excavation, demolition, and construction was an integral part of the overall construction of the facility as the pipeline had to be moved prior to grading the site and building the Two Elk facility. (*See Attachment D*)

21. Upon information and belief, from April 2006 to June 2007, Justice Oil and Gas Company reworked an existing oil and gas well that created safety concerns with the construction of the Two Elk facility and excavated, demolished, relocated, and reconstructed a high pressure natural gas pipeline that interfered with the footprint of the Two Elk facility. The

new pipeline will, in part, provide gas to the Two Elk facility and construction of the facility could not safely proceed until this pipeline was relocated. TEGP has also requested other natural gas service and supplies for a combustion turbine, also authorized to be constructed under DEQ Permit 1352B. (See Attachment D; Attachment L)

22. Construction of the main access road for the Two Elk facility is underway. This work included surveying the access road, the Wyoming State Highway 450, and road drainage areas, field staking, and soil borings and geotechnical analysis in the summer and fall of 2006. (See Attachment D; Attachment L)

23. TEGP entered into an Interim Notice to Proceed Agreement (“INTP”) with TEGP’s primary contractor authorizing the contractor to commence work under the Turnkey Engineering, Procurement and Construction Contract (“EPC Contract”), substantially negotiated between the parties, for the design, engineering, procurement, construction and startup services necessary to complete the Two Elk facility. In accordance with the INTP, the primary contractor issued a purchase order to a subcontractor for Two Elk’s main boiler in the amount of \$48,000,000, which remains valid. In addition, TEGP, among other activities, separately paid \$500,000 to ALSTOM Power to reserve a production slot in the manufacturing cycle for Two Elk’s steam turbine – the total cost of which will be in excess of \$25,000,000; entered into contracts to pay for electrical transmission upgrades to interconnect the Two Elk facility to the electrical grid system with current estimated costs of \$60,000,000, under which TEGP has an obligation to make a \$1,000,000 payment to PacifiCorp on or before November 27, 2007; and entered into contracts for site grading and road construction with Wyoming contractors in excess of \$2,000,000. In the Council’s July 18, 2005 Order, the Council found the contract to purchase a site-specific boiler was a commencement of construction. These contracts are valid and

contain financial penalties for failure to perform. These agreements and the financial penalties associated with their nonperformance, along with other construction and financing agreements entered into and conducted by TEGP, demonstrate TEGP's significant and irrevocable commitment to the Two Elk project. (See Attachment D; Attachment L)

24. Beginning in August 2005, following the Council's July 18, 2005 Order, TEGP provided the DEQ with monthly status reports, as required by Order, describing its construction and contractual activities associated with the development of the Two Elk facility, including activities relating to licensing and permitting the Two Elk facility, financing the project, transmission and power purchase agreements, engineering, procurement, and physical construction. The monthly reports, while not required by statute, were required by the Council to improve communication between Wyoming DEQ and TEGP regarding the Two Elk facility and ensure that DEQ would raise any questions or concerns with TEGP in a timely fashion. (See Attachment L) The status reports included information that was updated monthly. Particular monthly reports: (1) advised the DEQ that TEGP's primary contractor and its boiler supplier had provided notices of *force majeure* relating to the effects of Hurricanes Katrina and Rita; (2) advised the DEQ of the status of Wyoming Department of Transportation permitting for the highway interconnection for the main access road; and (3) advised the DEQ of PacifiCorps' requests for extensions of time beyond the requirements of its Open Access Transmission Tariff and the requirement for additional facilities studies before an interconnection agreement for the Two Elk facility could be offered or executed. (See Attachment D; Attachment L)

25. At no time prior to the August 22 Letter did DEQ indicate to TEGP (either orally or in writing) that it had any questions about a particular report or concerns as to whether TEGP was "continuing" construction in accordance with Permit No. CT-1352B and WAQSR Ch. 6,

Section 2(h). In fact, Brad Enzi, Vice President of Two Elk Power Company (the sole general partner of TEGP), was in Wyoming DEQ's offices for meetings with staff on a regular basis during the summer of 2007 and repeatedly asked whether Wyoming DEQ staff had any questions or concerns regarding the Two Elk facility that TEGP could address. (*See* Attachment L). Then, without any prior notice or discussion, TEGP received the August 22 Letter from DEQ revoking the permit. In its letter DEQ states that the permit "expiration occurred automatically and did not require any action by DEQ/AQD to take effect." (Attachment C at 2.) The DEQ never provided TEGP with notice or an opportunity to demonstrate its compliance with all lawful requirements for retention of the permit before DEQ concluded that the permit had expired and become invalid.

26. State and local agencies have recognized TEGP's continuing construction activities at the Two Elk facility. The State of Wyoming and Campbell County have increased TEGP's property valuation over seventeen fold from 2006 to 2007 due to "construction work in progress" at the Two Elk facility, thereby increasing the corresponding tax assessment from \$21,011 in 2006 to \$383,080 in 2007. The 2007 assessed property value was based upon the State of Wyoming Department of Revenue's determination that construction work in progress as of December 31, 2006 totaled slightly more than \$51,500,000. (*See* Attachment D; Attachment L)

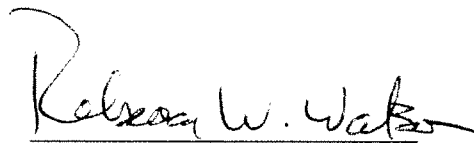
27. While construction has continued at the Two Elk facility, TEGP has made community impact payments in the amount of \$35,560 to the Campbell County School District and \$12,000 to Wyoming Game and Fish. In addition, upon information and belief, Wyoming DEQ also has made community impact assistance payments, related to continuing construction of the Two Elk facility, during 2005 and 2006. (*See* Attachment D; Attachment L)

28. TEGP will incur a substantial financial loss if it is not allowed to proceed. Additionally, Campbell County will lose a significant investment if the Two Elk project is not allowed to proceed on schedule or delayed, and the economic benefits of the project to the County and the State of Wyoming will be significantly delayed or lost. Moreover, non-commercial or waste coal that would otherwise be disposed of at the Two Elk facility will be exposed to the atmosphere and re-inserted into mine pits, either to be lost forever or later require incremental mining.

29. TEGP respectfully requests: (1) that the Council order an immediate stay of the effectiveness of the DEQ's August 22 Letter revoking Permit No. CT-1352B until a hearing can be held in this matter, consistent with the requirements of the Wyoming APA and due process; and (2) that the Council vacate the August 22 Letter and find that construction at Two Elk has not been discontinued for a period of 24 months or more.

30. **TEGP FURTHER REQUESTS AN EXPEDITED HEARING ON THIS MATTER.**

Dated this 19th day of October, 2007.

A handwritten signature in black ink that reads "Rebecca W. Watson". The signature is written in a cursive style and is underlined.

Rebecca W. Watson (Wyoming # 5-1683)
Hogan & Hartson LLP
1200 Seventeenth Street, Suite 1500
Denver, CO 80202

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 19th day of October, 2007, in accordance with the requirements of Chapter 1, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure, this Petition for Review and Request for Immediate Stay was served as follows:

Two copies were served upon the Chairman of the Environmental Quality Council, 122 West 25th Street, Herschler Building, Room 1714, Cheyenne, WY 82002, by registered mail, return receipt requested.

Two copies were served upon the Director of the Department of Environmental Quality, 122 West 25th Street, Herschler Building, 4th Floor West, Cheyenne, WY 82002, by registered mail, return receipt requested.

Copies of the Petition for Review were served by registered mail, return receipt requested and hand delivery to the following:

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

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



The State
of Wyoming

Dave Freudenthal, Governor

Department of Environmental Quality

Herschler Building • 122 West 25th Street • Cheyenne, Wyoming 82002

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ADMIN/OUTREACH (307) 777-7758 FAX 777-3610	ABANDONED MINES (307) 777-6145 FAX 777-6462	AIR QUALITY (307) 777-7391 FAX 777-5816	INDUSTRIAL SITING (307) 777-7388 FAX 777-6937	LAND QUALITY (307) 777-7756 FAX 777-5864	SOLID & HAZ WASTE (307) 777-7752 FAX 777-5973	WATER QUALITY (307) 777-7781 FAX 777-5973
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FILED

May 29, 2003

JUN 02 2003

Mr. Daniel D. Yueh
Two Elk Generation Partners, Limited Partnership
8480 East Orchard Road, Suite 4000
Greenwood Village, CO 80111

Terri A. Lorenzon, Director
Environmental Quality Council

Permit No. CT-1352B

Dear Mr. Yueh:

By Order of the Environmental Quality Council (EQC) in *In the Matter of the Appeal Involving Air Quality Permit No. CT-1352A Corrected, Docket No. 02-2601*, the Division of Air Quality of the Wyoming Department of Environmental Quality issues Air Quality Permit CT-1352B authorizing construction of a nominal 280 Mw coal fired power plant, known as the Two Elk Power Plant, located in Section 36 of T43N, R70W adjacent to the Black Thunder Mine approximately fifteen (15) miles southeast of Wright, in Campbell County, Wyoming.

Based on the EQC Order in Docket No. 02-2601 and the information contained in applications for Permits CT-1352 and CT-1352A, approval to construct the Two Elk Power Plant is hereby granted pursuant to Chapter 6, Section 2 and Section 4 of the Wyoming Air Quality Standards and Regulations with the following conditions:

1. That authorized representatives of the Division of Air Quality be given permission to enter and inspect any property, premise or place on or at which an air pollution source is located or is being constructed or installed for the purpose of investigating actual or potential sources of air pollution, and for determining compliance or non-compliance with any rules, regulations, standards, permits or orders.
2. That all substantive commitments and descriptions set forth in the application for this permit, unless superseded by a specific condition of this permit, are incorporated herein by this reference and are enforceable as conditions of this permit.
3. For a major source, as defined by WAQSR Chapter 6, Section 3(b)(xvii), an application for an operating permit, in accordance with WAQSR Chapter 6, Section 3(c)(i)(A), is required within 12 months of commencing operation.

Attachment A

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Two Elk Power Generation
 Air Quality Permit CT-1352B
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4. The date of commencement of construction shall be reported to the Administrator within 30 days of commencement. 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. To satisfy the condition that construction commence within 24 months, Two Elk Generation Partners, Limited Partnership (TEGP) shall, within 24 months:
 - a) complete on-site construction of any one (1) of the following foundations:
 - i) Main Boiler
 - ii) Main Stack
 - iii) Steam Turbine, or
 - iv) Air-Cooled Condenser, and
 - b) enter into a binding written contract to purchase a site-specific main boiler or steam turbine, which is not contingent upon any additional notice to proceed or exercise of an option, etc.
5. Written notification of the anticipated date of initial start-up of each source, in accordance with WAQSR Chapter 6, Section 2(i), is required 60 days prior to such date. Notification of the actual date of initial start-up is required 15 days after start-up.
6. Required performance tests shall be conducted, in accordance with WAQSR Chapter 6, Section 2(j), within 30 days of achieving maximum design rate but not later than 90 days after initial start-up. Two copies of the written report shall be submitted to the Division within 30 days of testing. A test protocol shall be submitted to this office for review and approval prior to testing, and the Division shall be given at least 15 days notice prior to the test. If a maximum design production rate is not achieved within 90 days of start-up, the Administrator may require testing be done at the rate achieved and again when a maximum rate is achieved.
7. That allowable pollutant emission rates shall be assigned as follows.

Two Elk Allowable Emissions			
PC Boiler Emissions - Main Stack (2960 MMBtu/hr)			
Pollutant	lb/MMBtu	lb/hr¹	TPY
PM ₁₀	0.018	53.3	233.4
SO ₂	0.15 (3-hr fixed) 0.132 (30-day rolling) 70% minimum removal efficiency (30 day rolling)	444.0 (3-hr fixed) 390.7 (30-day rolling)	1,711.4
NO _x	0.09 (30-day rolling)	266.4 (30-day rolling)	1,166.8
CO	0.135	399.6	1,750.2
VOCs	0.0135	40.1	175.6

¹ Based on lb/MMBtu emission rate and 2,960 MMBtu/hr heat input.

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Auxiliary Boiler Emissions (180 MMBtu/hr)			
Pollutant	lb/MMBtu	lb/hr	TPY¹
NO _x	0.05	9.0	2.3

¹ Based on 500 hours per year operation

Natural Gas Turbine Emissions			
Pollutant	ppm	lb/hr	TPY
NO _x	25.0 @ 15% O ₂ (1-hr)	62.6	24.1
CO	25.0 @ 15% O ₂ (1-hr)	38.1	NA

2,200 hp Diesel Emergency Generator Sets (Allowables for Each of Two Units)			
Pollutant	g/hp-hr	lb/hr	TPY¹
NO _x	6.9	33.5	8.4
CO	8.5	41.2	10.3

¹ - Based on 500 hours of operation

600 hp Diesel Fire Pump			
Pollutant	g/hp-hr	lb/hr	TPY¹
NO _x	8.8	11.7	2.9
CO	1.9	2.5	0.6

¹ - Based on 500 hours of operation

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Two Elk Allowable PM Emissions Material Handling Collectors			
Source	gr/dscf (dscfm)	lb/hr ¹	TPY ²
Dump Pocket & Crusher Baghouse	0.01 (6,000)	0.5	2.3
Coal Barn & Handling Facilities Baghouse	0.01 (13,200)	1.1	5.1
Plant Coal Boiler Silo Baghouse	0.01 (8,500)	0.7	3.2
Lime Silo Baghouse	0.01 (850)	0.1	0.3
Fly Ash Building Silo Baghouse	0.01 (1,000)	0.1	0.4
Fly Ash Product Silo Baghouse "A"	0.01 (2,200)	0.2	0.8
Fly Ash Product Silo Baghouse "B"	0.01 (2,200)	0.2	0.8
¹ Emissions based on 0.01 gr/dscf. ² Based on 8,760 operating hours per year.			

8. That initial performance tests to determine compliance with the above listed permit limits shall consist of the following:

PC Boiler

- A) Particulate - Testing shall follow 40 CFR 60.48a.
- B) SO₂ - EPA Method 6C or equivalent shall be employed to determine initial compliance with the SO₂ 3 hour emission limit. Tests shall consist of 3 runs of 3 hours each.
- C) SO₂/NO_x 30-day rolling average/Sulfur Percent Reduction Requirements - Initial testing and compliance determination shall follow methodologies established in NSPS 40 CFR Part 60, Subpart Da, 60.46a, 60.47a, and 60.48a.
- D) CO - EPA Reference Method 10 shall be employed to determine initial compliance with the CO emission limit established by this permit.
- E) VOCs - EPA Reference Method 18 and Reference Method 25 or equivalent shall be employed to determine initial compliance with the VOC emission limits established by this permit.

FILED

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Terri A. Lorenzon, Director
Environmental Quality Council

- F) Opacity -EPA Method 9 and the procedures in WAQSR, Chapter 5, Section 2(i) shall be employed to determine initial compliance with opacity limits established by this permit.
- G) NH₃ -EPA Conditional Method 27 (CTM-027) or equivalent methods. Results of the tests shall be reported in units of lb/hr and ppm, on a dry basis corrected to 3% O₂.

Auxiliary Boiler

- A). Compliance with the NO_x limits for the shall be determined by EPA Reference Methods 1-4 and 7E, Appendix A, 40 CFR Part 60 consisting of 3-1 hour tests.

Natural Gas Turbine

- A) NO_x: EPA Reference Methods 1-4 and 20 and the requirements of 40 CFR 60, Subpart GG. Compliance with the lb/hr emissions limits shall be determined with three 1 hour tests conducted while the turbine is operating near full load.
- B) CO: EPA Reference Methods 1-4 and 10. Testing on a ppm basis shall follow the testing methodology in 40 CFR 60, Subpart GG. Compliance with the lb/hr emissions limits shall be determined with three 1 hour tests conducted while the turbine is operating near full load.

Emergency Generators and Pump Engines

- A) NO_x: EPA Reference Methods 1-4 and 7E consisting 3-1 hour tests.
- B) CO: EPA Reference Methods 1-4 and 10 consisting of 3-1 hour tests.

Coal Handling Baghouses

- A) Particulate - EPA Reference Methods 1-5, front half only, shall be employed to determine initial compliance with the particulate emission limits established by this permit.
 - B) Opacity -EPA Method 9 and the procedures in WAQSR, Chapter 5, Section 2(i) shall be employed to determine initial compliance with opacity limits established by this permit.
9. That prior to any performance testing or monitor certification testing required by this permit, a test protocol be submitted to the Division for approval, at least 30 days prior to testing.
10. Opacity shall be limited as follows:
- A) Visible emissions from the PC boiler shall be limited to 20% opacity (6-minute average) except for one 6-minute period per hour of not more than 27 percent opacity in accordance with NSPS, Subpart Da, 40 CFR 60.42a(b).
 - B) Opacity shall be limited to less than 20% from all coal processing and conveying equipment (including breakers and crushers), coal storage systems, truck dump and coal transfer and loading systems in accordance with NSPS, Subpart Y, 40 CFR 60.252(c) as determined by 40 CFR Part 60, Appendix A, Method 9.

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Two Elk Power Generation
Air Quality Permit CT-1352B
Page 6

Terri A. Lorenzon, Director
Environmental Quality Council

- C) Opacity from any other source of emissions at this facility shall be limited to 20% opacity in accordance with WAQSR, Chapter 3, Section 2(a) as determined by 40 CFR Part 60, Appendix A, Method 9.
11. That the stalling shed for the truck dump shall be maintained and operated to minimize fugitive dust emissions. Repair measures must be initiated by the operator in an expeditious manner when the control device is determined to be improperly maintained or operated.
12. TEGP shall use the following in-stack continuous emission monitoring (CEM) equipment on the PC Boiler stack to demonstrate continuous compliance with the emission limits set forth in this permit:
- A) TEGP shall install, calibrate, operate, and maintain a monitoring system, and record the output of the system, for measuring NO_x emissions discharged to the atmosphere in units lb/MW-hr, lb/MMBtu and lb/hr. The NO_x monitoring system shall consist of the following:
 - i) A continuous emission NO_x monitor located in the PC boiler stack
 - ii) A continuous flow monitoring system for measuring the flow of exhaust gases discharged into the atmosphere.
 - iii) A watt meter to measure gross electrical output in megawatt-hours on a continuous basis.
 - iv) An in-stack oxygen or carbon dioxide monitor for measuring oxygen or carbon dioxide content of the flue gas at the location NO_x emissions are monitored.
 - B) TEGP shall install, calibrate, operate, and maintain a SO₂ monitoring system, and record the output of the system, for measuring emissions discharged to the atmosphere in units of lb/MMBtu, lb/hr and measuring the control efficiency of the SO₂ control device. The SO₂ monitoring system shall consist of the following:
 - i) Continuous emission SO₂ monitors located at the inlet and outlet to the SO₂ control device.
 - ii) A continuous flow monitoring system for measuring the flow of exhaust gases discharged into the atmosphere.
 - iii) An in-stack oxygen or carbon dioxide monitor for measuring oxygen or carbon dioxide content of the flue gas at the location of each SO₂ monitor.
 - C) TEGP shall install, calibrate, operate, and maintain a monitoring system, and record the output of the system, for measuring the opacity of the emissions discharged to the atmosphere.

JUN 02 2003

- D) Each continuous monitor system listed in this condition shall comply with the following:
- i) NSPS Subpart Da, Standards of Performance for Electric Utility Steam Generating Units (40 CFR 60.47a).
 - ii) Monitoring requirements of WAQSR, Chapter 5, Section 2(j) including the following:
 - a) 40 CFR 60, Appendix B, Performance Specification 1 for opacity, Performance Specification 2 for NO_x and SO₂, and Performance Specification 3 for O₃ or CO₂. The monitoring systems must demonstrate linearity in accordance with Division requirements and be certified in both concentration (ppm) and units of the standard (lb/MMBtu, lb/MW-hr and lb/hr).
 - b) Quality Assurance requirements of 40 CFR 60, Appendix F.
 - c) TEGP shall develop and submit for the Division's approval a Quality Assurance plan for the monitoring systems listed in this condition.
13. Following the initial performance tests, compliance with the limits set forth in this permit for the PC boiler shall be determined with data from the continuous monitoring systems required by Condition 12 of this permit as follows:
- A) Exceedances of the limits shall be defined as follows:
- i) Any 30-day rolling average of NO_x emissions which exceeds the lb/MW-hr output-based standard or lb/MMBtu limit calculated in accordance 40 CFR Part 60, Subpart Da, 60.46a, 60.47a, and 60.48a. Any 30-day rolling average which exceeds the lb/hr NO_x limit as calculated following the methodology in Subpart Da for the lb/MMBtu emission limit.
 - ii) Any calculated 3-hour block average of SO₂ emissions as measured by the PC Boiler stack SO₂ outlet CEM which exceeds the lb/MMBtu or lb/hr limit established in this permit. The 3-hour average emission rate shall be determined at the end of each 3-hour operating block, and calculated as the arithmetic average of the previous three operating hours SO₂ stack emission rates.
 - iii) Any 30-day rolling average which exceeds the lb/MMBtu SO₂ limit and the percent reduction requirements calculated in accordance 40 CFR Part 60, Subpart Da, 60.46a, 60.47a, and 60.48a. Any 30-day rolling average which exceeds the lb/hr SO₂ limit as calculated following the methodology in Subpart Da for the lb/MMBtu emission limit.
 - iv) Any 6-minute average opacity, except for one 6-minute period per hour of not more than 27 percent opacity, in excess of 20 percent in accordance with NSPS, Subpart Da, 40 CFR 60.42a(b).

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Terri A. Lorenzon, Director
Environmental Quality Council

- B) TEGP will comply with all reporting and record keeping requirements as specified in WAQSR, Chapter 5, Section 2(g) and 40 CFR Part 60, Subpart Da. Reporting and record keeping requirements for the 30-day rolling 1b/hr NO_x and SO₂ and 3-hour fixed SO₂ emission rates shall follow the same requirements as the NSPS lb/MMBtu standards.
14. TEGP shall install, operate, and maintain a telescoping loading spout designed to minimize fugitive dust from unloading flyash and desulfurization byproducts from the silo and while loading the trucks. The loading spout shall have an outer sleeve for dust withdrawal or equivalent and shall be connected to a bargehouse to minimize fugitive dust from the system.
15. That to minimize transport emissions, the flyash and desulfurization byproducts will be entirely enclosed in the haul trucks. Haul road routes will be treated with suitable chemical dust suppressants in addition to water to control fugitive dust emissions. All treated roads will be maintained on a continuous basis to the extent that the surface treatment remains viable as a control measure.
16. That the design documents for the ammonia feed system shall be maintained on site and available to Division personnel during facility inspections.
17. The emergency coal stockpile will only be used in the event the coal supply is temporarily interrupted. The pile will not exceed the capacity of 25,000 tons of coal. The stockpile will be covered at all times except during the emergency use. Dust control chemicals will be used to limit the fugitive dust emissions during construction and reclamation of the stockpile.
18. That the natural gas turbine shall comply with all applicable requirements of Chapter 5, Section 2, WAQSR, NSPS, Subpart GG, "Standards of Performance for Stationary Gas Turbines." TEGP shall monitor the sulfur and nitrogen contents of the fuel(s) being fired and record the values daily in accordance with 40 CFR 60.334(b)(2) using the test methods and procedures in 40 CFR 60.335 unless a custom fuel monitoring schedule or waiver from fuel monitoring requirements is obtained from EPA Region VIII.
19. That the natural gas turbine shall only be fired with pipeline quality natural gas with a sulfur content less than 0.04 grains per dry standard cubic foot.
20. The following continuous emission monitoring (CEM) equipment shall be used to demonstrate continuous compliance with the NO_x emission limits set forth in this permit for the natural gas turbine:
- A) TEGP shall install, calibrate, operate, and maintain a CEM system, and record the output, for measuring NO_x emissions discharged to the atmosphere in units of ppm, and lb/hr. The CEM system shall consist of the following:
- i) A continuous emission NO_x monitor located in the turbine stack.
 - ii) An in-stack monitor for measuring oxygen content of the flue gas at the location NO_x emissions are monitored.
 - iii) A continuous flow monitoring system for measuring the flow of exhaust gases discharged into the atmosphere.

JUN 02 2013

- B) The continuous monitor system listed in this condition shall comply with the monitoring requirements of WAQSR, Chapter 5, Section 2(j) including the following:
- i) 40 CFR 60, Appendix B, Performance Specification 2 for NO_x and Performance Specification 3 for O₂. The monitoring systems must demonstrate linearity in accordance with Division requirements and be certified in both concentration (ppm_v) and units of lb/hr and lb/MMBtu.
 - ii) Quality Assurance requirements of 40 CFR 60, Appendix F.
 - iii) TEGP shall develop and submit for the Division's approval a Quality Assurance plan for the monitoring systems listed in this condition.
21. Following the initial performance tests, compliance with the limits set forth in this permit for the natural gas turbine shall be determined with data from the CEM systems required by Condition 20 of this permit as follows:
- A) Exceedances of the limits shall be defined as follows:
- i) Any calculated 1-hour average of NO_x emissions which exceeds the ppm_v or lb/hr limits established in this permit using data meeting the requirements of WAQSR, Chapter 5, Section 2(j). Data (and associated monitoring data hours) which do not meet the requirements of WAQSR, Chapter 5, Section 2(j) shall not be included.
 - ii) Any calculated calendar year average of NO_x emissions as measured by the turbine stack NO_x CEM which exceeds the TPY limit established in this permit. All 1-hour averages meeting the requirements of WAQSR, Chapter 5, Section 2(j) shall be included in the average. The allowable hourly NO_x emission rate shall be used for all periods of monitor downtime during turbine operation.
- B) TEGP shall comply with all reporting and record keeping requirements as specified in Chapter 5, Section 2(g). Excess NO_x emissions shall be reported in units of ppm_v, lb/hr, and TPY. Quarterly excess emission reports are required per Chapter 5, Section 2(g). The quarterly report shall include an hourly summation of the NO_x emissions and a year to date summation of NO_x emissions to determine compliance with the TPY limitation on the turbine.
22. The Auxiliary Boiler shall be limited to 500 hours per year of operation, and its usage shall be limited to incidents when the PC Boiler is out of service. Hours of operation for the Auxiliary Boiler shall be submitted with the quarterly NO_x report for the gas turbine.
23. The two (2) 2,200 hp diesel fired emergency generators and one (1) 600 hp diesel fired emergency fire pump shall each be limited to 500 hours of operation per year. Hours of operation for the emergency generators and fire pump shall be submitted with the quarterly NO_x report for the gas turbine.
24. TEGP shall comply with all acid rain programs as defined by Chapter 11, Section 2 of the WAQSR.
25. TEGP shall comply with all applicable requirements of 40 CFR 60 Subparts Da and Y.

FILED

JUN 02 2003

Two Elk Power Generation
Air Quality Permit CT-1352B
Page 10

Terri A. Lorenzon, Director
Environmental Quality Council

26. Records required by any applicable regulation or permit condition shall be maintained for a minimum period of 5 years and shall be readily accessible to Division representatives.

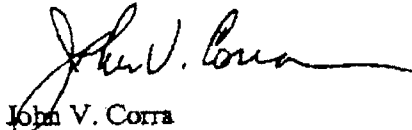
It must be noted that this approval does not relieve you of your obligation to comply with all applicable county, state, and federal standards, regulations or ordinances. Special attention must be given to Section 21 of the Wyoming Air Quality Standards and Regulations, which details the requirements for compliance with conditions 3, 4, 5 and 6.

If we may be of further assistance to you, please feel free to contact this office.

Sincerely,



Dan Olson
Administrator
Air Quality Division



John V. Corra
Director
Dept. of Environmental Quality

cc: Mike Warren

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JUL 18 2005

In the Matter of the Appeal of Air Quality)
Permit No. CT-1352A (Corrected),)
Two Elk Generating Station – Unit 1)

Tom A. Lorenson, Director
Department of Environmental Quality Council

Order Granting Motion to Dismiss

Petitioner Two Elk Generating Partners (TEGP) moved the Environmental Quality Council (EQC) to dismiss this matter. The Wyoming Department of Environmental Quality (DEQ) does not oppose the motion. The EQC has considered the motion, and conducted a hearing on June 27, 2005, at which the parties were given an opportunity to be heard concerning the motion. On this basis, the EQC finds and concludes as follows:

1. On October 23, 2002, TEGP filed a petition for EQC review of a decision by the Wyoming Department of Environmental Quality (DEQ) that Permit No. CT-1352A (Corrected) had terminated. DEQ had determined that TEGP failed to commence construction prior to August 20, 2002, as required by the permit. TEGP disagreed, and so appealed to the EQC.

2. Prior to hearing, TEGP and DEQ reached a settlement in this matter, and entered into a Joint Stipulation they filed with the EQC on May 28, 2003. At the request of the parties, the EQC entered an "Order Approving Joint Stipulation for Disposition of Contested Case." The terms of the approved stipulation included agreement that the permit should be modified to extend the deadline for commencing construction and to reduce certain emissions limitations. In its Order, EQC retained jurisdiction over the matter for purposes of determining compliance with the terms of the Joint Stipulation.

3. In accordance with the Joint Stipulation and the EQC Order, DEQ issued a modified air quality permit, Permit No. CT-1352B, on May 29, 2003. Under this permit, TEGP was required to commence construction before May 29, 2005.

4. DEQ has determined that, prior to May 29, 2005, TEGP completed the construction of the foundation for the main stack, and entered into a binding written contract to purchase a site-specific main boiler, which contract is not contingent upon any additional notice to proceed or exercise of an option. TEGP submitted documentation of the commencement of construction to the DEQ. TEGP has, therefore, commenced construction as required by Condition 4 of Permit No. CT-1352B.

5. Now that DEQ has determined that construction has commenced, and the parties have complied with and fulfilled the terms of the Joint Stipulation, the EQC does not need to retain jurisdiction over this matter.


IT IS THEREFORE ORDERED that:

1. The DEQ's issuance of Permit No. CT-1352B is hereby confirmed, and that permit remains valid and binding upon TEGP.

2. This matter is dismissed, and the EQC's continued jurisdiction over it is terminated.

3. TEGP will 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.

Dated this 28th day of June, 2005.



Mark Gordon, Chair
Wyoming Environmental Quality Council

CERTIFICATE OF SERVICE

I, Kim McGee, certify that at Cheyenne, Wyoming, on the 19th day of July, 2005, I served a copy of the foregoing **ORDER GRANTING MOTION TO DISMISS** by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

Mary A. Throne
Hickey & Evans, LLP
1800 Carey Ave., Suite 700
P.O. Box 467
Cheyenne, WY 82001

Edward W. Harris
Holland & Hart
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347

also to the following persons via interoffice mail:

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

Nancy Vehr
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002

Dan Olson, Administrator
Air Quality Division
Department of Environmental Quality 122
W. 25th Street, Herschler Bldg.
Cheyenne, WY 82002



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



Department of Environmental Quality



To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

John Corra, Director

Freudenthal, Governor

CERTIFIED RETURN RECEIPT 7005 1820 0005 1478 6534

August 20, 2007

Attachment C

Mr. Daniel D. Yuch, Vice President
North American Power Group, Ltd., for
Two Elk Generation Partners, Limited Partnership
8480 East Orchard Road, Suite 4000
Greenwood Village, CO 80111

Re: Permit No. CT-1352B

Dear Mr. Yuch:

This letter is to inform you that the Air Quality Division inspected the Two Elk site and reviewed the periodic status reports Two Elk Generation Partners (TEGP) submitted to us regarding the Two Elk Power Plant located in Section 35, T43N, R70W, Campbell County, Wyoming (Two Elk). (See Environmental Quality Council's (EQC) Order Granting Motion to Dismiss, In the Matter of the Appeal of Air Quality Permit No. CT-1352A (Corrected), Two Elk Generating Station - Unit 1 Docket No. 02-2601).

In November 1996, TEGP submitted an air quality construction permit application for Two Elk and in February 1998, pursuant to Chapter 6, sections 2 and 4 of the Wyoming Air Quality Standards and Regulations (WAQSR), the DEQ/AQD issued air quality construction permit CT-1352. In August 1999, TEGP filed an application to modify Two Elk and in February 2000, the DEQ/AQD issued air quality construction permit CT-1352A which required TEGP to commence construction by February 2002. In February 2002, the DEQ/AQD concluded that TEGP had not commenced construction. However, TEGP requested and obtained a permit extension for permit CT-1352A until August 20, 2002. In September 2002, DEQ/AQD advised TEGP that permit CT-1352A was no longer valid because TEGP had not commenced construction of Two Elk. TEGP appealed to the EQC (Docket No. 02-2601) which resulted in an Order Approving Joint Stipulation for Disposition of Contested Case and the issuance of DEQ/AQD air quality construction permit CT-1352B to TEGP on May 29, 2003. Permit CT-1352B required TEGP to commence construction of Two Elk before May 29, 2005. On July 18, 2005, acting on TEGP's Motion to Dismiss, the EQC found that TEGP commenced construction of Two Elk before May 29, 2005 and that DEQ/AQD permit CT-1352B was valid and binding upon TEGP and therefore entered its Order Granting [TEGP's] Motion to Dismiss.

Herschler Building • 122 West 25th Street • Cheyenne, WY 82002 • <http://deq.state.wy.us>

ADMIN./OUTREACH 307.777.7937 FAX 777.3810	ABANDONED MINES 307.777.6145 FAX 777.6482	AIR QUALITY 307.777.7391 FAX 777.5618	INDUSTRIAL SITING 307.777.7369 FAX 777.5973	LAND QUALITY 307.777.7758 FAX 777.5864	SOLID & HAZ. WASTE 307.777.7752 FAX 777.5973	WATER QUALITY 307.777.7781 FAX 777.5973
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Mr. Daniel Yueh
August 22, 2007
Page 2

Condition No. 4 of DEQ/AQD construction permit CT-1352B states in 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." Chapter 6, Section 2(h) of the WAQSR states in part, "... an approval to construct or modify shall become invalid . . . if construction is discontinued for a period of 24 months or more."

On May 31, 2005, DEQ/AQD Inspector Mike Warren inspected the Two Elk site and observed a concrete foundation for the main stack. On 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. 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. The expiration occurred automatically and did not require any action by DEQ/AQD to take effect.

I am certainly available to discuss this matter with you at your convenience. Please note that before commencing any future construction activity at the Two Elk site, a valid DEQ/AQD construction permit is required.. (W.S. § 35-11-801 and 6 WAQSR §§ 2 and 4).

Sincerely,


David A. Finley
Administrator
Air Quality Division

C: John Corra
Nancy Vehr
Mike Warren
Chad Schlichtemeier
Robert Gill
Brad Enzi

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

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

AFFIDAVIT OF MICHAEL J. RUFFATTO

I, Michael J. Ruffatto, being of lawful age and being first duly sworn, state as follows:

1. I am the President of Two Elk Power Company, the sole general partner of Two Elk Generation Partners, Limited Partnership (“TEGP”).

2. TEGP is the holder of Wyoming Department of Environmental Quality (“DEQ”) Permit No. CT-1352B for construction of the Two Elk solid waste disposal (“Two Elk”) in Campbell County, Wyoming. Two Elk will recycle and dispose of non-commercial or waste coal exposed during the mining process from adjacent surface coal mines, also producing electricity in the process.

3. Since the July 18, 2005 Order of the Wyoming Environmental Quality Council (“Council”), TEGP has provided the Air Quality Division (“AQD”) with monthly status reports summarizing its construction and contractual activities in connection with the development of the Two Elk facility. These status reports included TEGP’s actions and activities relating to licensing and permitting the facility, financing the project, transmission and power purchase agreements, engineering, procurement, and other ongoing construction activities for the Two Elk facility. In addition to this information, TEGP specifically advised ADQ of: (1) the fact that TEGP’s primary contractor and boiler supplier provided TEGP with notices of *force majeure* relating to the effects of Hurricanes Katrina and Rita; (2) the status of the Wyoming Department of Transportation permitting for the highway interconnection for Two Elk’s main access road;

and (3) the requirement for additional facility studies before electrical interconnection agreements for the facility could be executed; and (4) the excavation, demolition and construction of both the underground Belle Fourche oil pipeline and the Justice Oil and Gas natural gas pipeline.

4. TEGP has entered into an Interim Notice to Proceed Agreement (“INTP”) with Bechtel Power Corporation (“Bechtel”) for the design, engineering, procurement, construction and startup services necessary to complete the Two Elk facility. The INTP has been amended and restated and authorizes Bechtel to commence the work contemplated by the draft Engineering, Construction and Procurement (“EPC”) contract , including entering into major equipment purchase orders, such as for the purchase of the main boiler (\$48,000,000) for the Two Elk facility. TEGP separately paid ALSTOM Power \$500,000 to reserve a production slot in the manufacturing cycle for Two Elk’s steam turbine, contractually agreed to fund PacifiCorp’s approximately \$60,000,000 for electrical transmission network interconnection improvements, and contractually agreed to pay over \$2,000,000 to local Wyoming contractors for site grading and access road construction.

5. Upon termination or cancellation of the INTP, TEGP would be required to pay Bechtel \$2,275,000 in addition to all other Bechtel costs incurred as of the date of cancellation. Furthermore, TEGP would be required to assume subcontracts entered into by Bechtel on TEGP’s behalf separate from its own contractual obligations.

6. From June 2005 to September 2005, TEGP initiated and paid for the excavation, demolition, relocation, and reconstruction of an oil pipeline operated by Belle Fourche that interfered with the footprint of the Two Elk facility. Construction of the Two Elk facility could not safely proceed until the pipeline was relocated.

7. Upon information and belief, from April 2006 to June 2007, Justice Oil and Gas Company reworked an existing oil and gas well that created safety concerns with the construction of the Two Elk facility and excavated, demolished, relocated, and reconstructed a high pressure natural gas pipeline that interfered with the footprint of the Two Elk facility. The new pipeline will, in part, provide gas to the Two Elk facility and construction of the facility could not safely proceed until the pipeline was relocated. TEGP has also requested other natural gas service and supplies for a combustion turbine, also authorized to be constructed under DEQ Permit 1352B.

8. The State of Wyoming and Campbell County increased TEGP's property valuation from \$356,500 in 2006 to \$6,405,500 in 2007 due to "construction in progress" at the Two Elks facility, based upon the State of Wyoming Department of Revenue's determination that construction work in progress as of December 31, 2006 totaled slightly more than \$51,500,000. The corresponding property tax assessment increased from \$21,011 in 2006 to \$383,080 in 2007.

9. TEGP directly made community impact payments to Campbell County School District in the amount of \$35,560 and Wyoming Game and Fish in the amount of \$12,000. Upon information and belief, the Wyoming DEQ also made community impact assistance payments in 2005 and 2006.

10. Construction of Two Elk's main access road is underway. This work included surveying the access road, the Wyoming State Highway 450, road drainage areas, field staking, and soil borings and geotechnical analysis in the summer and fall of 2006.

11. Construction activities at the Two Elk site scheduled for fall 2007 include installation of the main access road and continuing foundation work (“Fall 2007 Activities”). These activities cannot occur while the ground is frozen or covered with snow.

12. Construction activities at the Two Elk site scheduled for spring 2008 include completion of permitted water well and supply systems; erection of batch plant; erection of emission control chemical storage; pilings and foundations for the main solid waste disposal boiler; power island and other related structures; pilings and foundations for the combustion turbine (“Spring 2008 Activities”). The Spring 2008 Activities cannot be completed until the Fall 2007 Activities have been completed.

13. If TEGP is prevented from completing the Fall 2007 Activities during October and November 2007, TEGP will not be able to complete these activities until the ground thaws and snow melts in spring 2008, at the earliest. This will result in substantial delay of the Spring 2008 Activities and the remainder of the construction schedule for Two Elk.

14. TEGP recently executed a Large Generator Interconnection Agreement (“LGIA”) with PacifiCorp, a regulated utility in Wyoming. Under the LGIA, TEGP has an obligation to make a \$1,000,000 payment to PacifiCorp on or before November 27, 2007. A delay of the Two Elk construction schedule at this stage will interfere with the schedule prescribed in the LGIA between TEGP and PacifiCorp.

15. Interruption of the Two Elk construction schedule at this stage will interfere with TEGP’s road and foundation construction contracts, and will cause TEGP to incur substantial additional expense under those contracts.

16. TEGP has arranged for a refunding and public sale of Campbell County’s Series 2000, 2001, 2005, 2005B and 2006 bonds for the Two Elk solid waste disposal facility in

November 2007. Upon information and belief, revocation of the August 22, 2007 letter is necessary for the public offering and permanent financing to be concluded.

FURTHER AFFIANT SAYETH NOT.

Date:

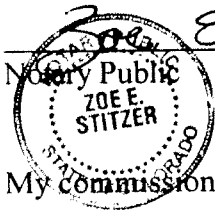
Oct 19, 2007



Michael J. Ruffatto

Subscribed and sworn before me

this 19th day of October, 2007.

 Zoe E. Stitzer

My commission expires: 1/31/11

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: December 18, 1975

MEMORANDUM

SUBJECT: PSD Regulations - Interpretation of
"Commencement of Construction"

FROM: Roger Strelow, Assistant Administrator for Air
and Waste Management (AW-433)

TO: Regional Administrators

This memorandum provides guidance on how the phrase "commence" as that term is used in EPA's regulations to prevent significant deterioration of air quality (40 CFR Section 52.21) is to be interpreted.

Section 52.21(d) (2) of the regulations requires that any of the 19 specified types of sources which commence construction or modification subsequent to June 1, 1975, are required to obtain a permit. 40 CFR Section 52.21 (b) (7) defines commenced as follows:

"Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

The purpose of the regulations to prevent significant deterioration is to ensure that a source is not located at a site which would result in emissions from that source violating the applicable increment. Thus the term "commencement of construction" as that term is used in the regulations to prevent significant deterioration, refers to on-site construction. Ordinarily therefore only significant and continuous site preparation work such as major clearing or excavation or placement, assembly, or installation of unique facilities or equipment at the site should be considered a "program of construction or modification" for purposes of Section 52.21(b) (7). However each case must be reviewed on its own facts, as noted below.

There are two additional factors that should be considered. Under 40 Part 51, Regulations for Preparation, Adoption, and Submittal of State Implementation Plans (SIP's), all SIP's are required to include a procedure for review (prior to construction and modification) of the location of

new sources (Section 51.18). Failure to obtain approval before commencing on-site construction of a source requiring such approval would, of course, violate the applicable plan. Therefore, any source of the type covered by the significant deterioration regulations that has not yet received approval to construct pursuant to the applicable plan should be subject to review. In any situation where such approval is not required for a source prior to commencement of on-site construction, the lack of such approval will not be determinative that the source has not commenced on-site construction.

There may also be situations where, although actual on-site work has not commenced or been contracted for, the source is so irrevocably committed to a particular site that it should be considered as having commenced construction. Such situations could include sources which are only a few days or weeks from commencing on-site construction or sources which have contracted for or constructed unique site specific facilities or equipment which are not yet being installed on-site. Such situations will be rare but may be taken into account in determining whether the source is in effectively the same position as if it had commenced on-site construction.

Because some sources may in good faith, have construed Section 52.21(b) (7) differently before this guidance and have since entered into binding commitments on the assumption that they were exempt from review, it is necessary to provide for such cases. Therefore, where a source has, in good faith, begun on-site construction or entered into a contractual obligation to begin on-site construction after June 1, 1975, on the good faith assumption that the source was exempt from the significant deterioration regulation, the source will not be subject to review. Reliance upon formal written statements by EPA personnel that the source in question would not be subject to new source review under these regulations would ordinarily be considered reasonable reliance in good faith on the assumption that the regulations do not apply to such sources. Conversely any source that is aware of this guidance at the time on-site construction commenced or a contractual obligation was undertaken could not be considered to have done so in good faith reliance that it did not need to be reviewed. Therefore you should review all major sources

intending to construct in your Region and notify those sources which are subject to review in accordance with this guidance.

Finally, 40 CFR Section 52.21(b) (7) states that an owner or operator has commenced construction not only when he has undertaken a continuous program of construction or modification himself but also when he has entered into a "contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification". The question of whether a contract represents a "contractual obligation" will depend on the unavoidable loss that would be suffered by a source if it is required to cancel such contract. It is clearly beyond the intent of these regulations, for example, to permit a source which has only a contract revocable at will to escape review under these regulations. Correspondingly, where the contract may be cancelled or modified at an insubstantial loss to the plant operator, the proposed source should not be allowed to escape review under these regulations. The determination of whether a source will suffer a substantial loss if the contract were terminated and therefore whether there is in fact a "contractual obligation", must be made on a case-by-case basis as there are no general guidelines that would cover all situations. Factors that would be considered would include the question of whether or not the contract could be executed at another site or modified for the site in question and the amount of any additional costs of constructing at another site or of cancelling the contract.

Additional questions may arise concerning the applicability of the PSD regulations to phased construction projects. If a new stationary source will contain a number of facilities to be built in a program of phased construction, the entire project should not automatically be exempt from review just because one of the facilities is grandfathered. Only those additional facilities which are necessary for the operation of the grandfathered facility should be exempt from review.

For example, if a power company has commenced construction only on the first unit of a planned three unit power plant prior to June 1, 1975, the other two units would normally not be exempt from significant deterioration review, since the first unit can operate completely independently of

the other two units. On the other hand, commencement of construction of the basic oxygen furnaces at a new grass roots steel mill would exempt other facilities, such as a blast furnace, continuous casting operation, rolling mill, and sintering plant, which are necessary to operate the basic oxygen furnaces.

As this guidance indicates, there is no clear line dividing those sources which are grandfathered and those which are not. Judgments must be made on a case-by case basis. For this reason it is not possible to predict without knowing the facts of each case which sources are subject to PSD review.

The policy contained in this guidance package has been discussed at length with Regions VII and X and was also discussed and agreed to at the December 12 meeting in Dallas with the Regional Division Directors for Air and Hazardous Materials.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
February 13, 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: PSD Applicability Determination

FROM: Director Division of Stationary Source Enforcement

TO: Stephen A. Dvorkin, Chief General Enforcement Branch - Region II

This is in response to your request dated January 12, 1978, concerning the applicability of the regulations for prevention of significant deterioration (PSD) to the Virgin Islands Refinery Corporation's (VIRCO) petroleum refinery to be located on St. Croix, U.S. Virgin Islands. The question at issue is whether VIRCO had commenced construction of the refinery prior to June 1, 1975.

Commenced, as it was defined on June 1, 1975, means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification. This definition has been refined to apply to on-site construction (See memos from Roger Strelow to Regional Administrators dated December 18, 1975 and April 21, 1976, copies attached). Therefore, only significant and continuous site preparation work such as major clearing or excavation or placement, assembly, or installation of unique facilities or equipment at the site should be considered a program of construction or modification for purposes of Section 52.21(b) (7).

While the question at issue is whether VIRCO commenced construction prior to June 1, 1975, it breaks down into two areas: 1) Has VIRCO undertaken a program of continuous construction, or 2) has it entered into a contract to undertake a continuous program. It is not enough that a major source has purchased a site to qualify for exemption from the PSD permit. If this were true many major companies with large land holdings could avoid the PSD requirements by virtue of owning these potential sites. Even if the site clearing,

which VIRCO has accomplished to date, satisfies the contentions in Strelow's memo, it is my opinion that VIRCO could not have undertaken a continuous program of on-site construction in light of the fact that they have not resumed their construction for a period in excess of two and one-half years.

It appears from item #2 in your memo that VIRCO's liability under their site preparation contract is limited to \$250,000. However, liability pursuant to a liquidated damages provision, should VIRCO cancel the contract entirely, is a different issue from how much liability VIRCO could incur for site preparation work done without its written approval. It is our position that the \$250,000 does not constitute a significant expenditure. However, should there be a large difference in liability incurred by VIRCO resulting from cancellation of the contract this issue may be re-opened.

In summary, based on the information submitted in your memo, it is the determination of this office that VIRCO will not suffer a significant loss should they be unable to construct this source at this site. This is provided, as discussed previously that the figures in item #2 of your memo do not significantly change. Therefore, I believe that the proposed VIRCO petroleum refinery has not commenced construction and is subject to the PSD regulations. Further, VIRCO, should they not obtain a PSD permit prior to March 1, 1978, will be subject to the new PSD requirements as proposed on November 3, 1977.

If you have any additional questions or comments, please contact Rich Biondi (755-2564) of my staff.

Edward E. Reich

Attachment
cc: Mike Trutna - CPDD

Note: Although this determination was made based on the definition of "commenced" contained in 52.21 (b)(7), the results of this decision would not have been altered had the definition contained in the Clean Air Act Amendments (Section 169(2)) been used instead.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DATE: July 1, 1978

MEMORANDUM

SUBJECT: "Commence Construction" under PSD

FROM: Director,
Division of Stationary Source Enforcement

TO: David Kee, Chief Air Enforcement Branch
Region V

This is in response to your memo of April 7, 1978, requesting guidance on how to apply the definition of "commence construction" under the new PSD regulations.

One of the requirements a major new source or major modification must satisfy in order to have commenced construction is that the owner or operator must have obtained and must continue to hold all necessary preconstruction approvals required under the applicable SIP. If all necessary preconstruction approvals have not been obtained and maintained, construction has not commenced. Your memo requests guidance on the application of this requirement in cases where a State grants limited permits, grants permits in stages, or allows site work without a permit. Rather than providing you with general examples to follow, we would prefer to address individual situations involving these State permitting procedures on a case by case basis. In this manner, consistency can be maintained in applying the regulations to unique and complex situations which might not fit a general example. If you are aware of specific cases where unusual State permitting procedures affect applicability of PSD, please feel free to refer them to us.

In addition to obtaining all required permits, a source must also satisfy one of two additional requirements in order to commence construction. A source must either 1) begin a continuous program of physical on-site construction or 2) enter into a contractual obligation to undertake a program of on-site construction to be completed within a reasonable time. Three specific questions regarding these requirements were raised in your memo and are addressed below.

1) What constitutes physical on-site construction?

We have interpreted physical on-site construction to refer to placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source. In order to qualify, these activities must take place on-site or must be site specific. Placement of footings, pilings and other materials needed to support the ultimate structures clearly constitutes on-site construction. As stated in the preamble to the draft regulations, "it will not suffice merely to have begun erection of auxiliary buildings or construction sheds unless there is clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner". Activities such as site clearing and excavation work will generally not satisfy the commence construction requirements.

2) What constitutes a contractual obligation to undertake a program of construction?

In order to satisfy the commence construction requirements, a contractual obligation must be a site specific commitment. The types of activities which will be considered site specific for purposes of a contract are identified in question #1 above. Contracts for work on footings, pilings, and other site specific materials and equipment will clearly satisfy the requirement while contracts for site clearing and excavation will not. The legislative history clearly indicates that contracts for non site specific equipment, such as boilers, will typically not suffice, regardless of any penalty clauses contained in the contracts.

A Contractual obligation for purposes of commencing construction must also be one which cannot be cancelled or modified without substantial loss. The PSD regulations provide guidance on determining whether a loss should be deemed "substantial". A loss which would exceed 10% of the total project cost will clearly be considered substantial. Whether a loss of less than or equal to 10% of the total project cost will be considered substantial will be determined on a case by case basis.

3) What constitutes a reasonable time?

In order to assure that construction proceeds in a continuous manner and is completed within a reasonable time, the

regulations require that a break in construction of greater than 18 months or failure to commence construction within 18 months of PSD permit issuance will generally invalidate a source's PSD permit. This 18 month period may be extended by the Administrator upon a satisfactory showing that an extension is justified.

Your memo raises a question as to what test should be used to decide, for enforcement purposes, if construction has commenced when a source has proceeded on a project without a permit. The PSD regulations state that no major stationary source or major modification shall be constructed until the preconstruction approval requirements are met. If a source subject to PSD review has begun on-site construction without a PSD permit, the source is in violation of Section 52.21.

Additionally, your memo requests guidance on Sections 113(a) (5), 113(b) (5), and 167. My staff is currently preparing a guidance document which addresses implementation of these sections and which will be forwarded to you upon completion.

If you require any further assistance, please contact Libby Scopino (755-2564) of my staff.

Edward E. Reich

cc: Mike Trutna	Peter Wyckoff
Eric Cohen	Linda Murphy
Ken Eng	Glenn Hansen
Winston Smith	Steve Rothblatt
Don Harvey	Bob Chanslor
Dave Joseph	Lloyd Kostow
Mike Johnston	John Johnson
Bennett Stokes	

December 18, 1978 Interpretation of "Constructed" as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit 14.4

THE TEXT YOU ARE VIEWING IS A COMPUTER-GENERATED OR RETYPED VERSION OF A PAPER PHOTOCOPY OF THE ORIGINAL. ALTHOUGH CONSIDERABLE EFFORT HAS BEEN EXPENDED TO QUALITY ASSURE THE CONVERSION, IT MAY CONTAIN TYPOGRAPHICAL ERRORS. TO OBTAIN A LEGAL COPY OF THE ORIGINAL DOCUMENT, AS IT CURRENTLY EXISTS, THE READER SHOULD CONTACT THE OFFICE THAT ORIGINATED THE CORRESPONDENCE OR PROVIDED THE RESPONSE.

14.4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
OFFICE OF ENFORCEMENT

MEMORANDUM:

DATE: December 18, 1978

SUBJECT: Interpretation of "Constructed" as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit

FROM: Director Division of Stationary Source Enforcement

TO: Enforcement Division Directors Regions I-X

Air and Hazardous Materials Division Directors Regions I-X

The issue addressed in this memorandum is where on the continuum from planning to operation of a major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit. (It is assumed here that such a permit is required by the PSD regulations.) This question has arisen several times in particular cases and general guidance now appears necessary.

The statute and regulations do not answer this question. The Clean Air Act states simply that, "[n]o major emitting facility ... may be constructed ... unless - (1) a permit has been issued ... [and various other conditions have been satisfied]." Section 165(a). Similarly, the PSD regulations state that, "[n]o major stationary source or major modification shall be constructed unless the [various PSD requirements are met]." 40 CFR 52.21(i)(1), 43 FR 26406. "Construction" is defined in the regulations as "fabrication, erection, installation, or modification of a source." 40 CFR 52.21(b)(7), 43 FR 26404. This accords with Section 169(2)(C) of the Act, but it does not explicitly answer the question posed above. To our knowledge, the legislative history of the Act does not treat this issue. Thus the term "constructed" seems to be open to

Attachment H

further interpretation by EPA.

- 2 -

Commencement of construction is quite specifically defined in both Section 169(2)(A) of the Clean Air Act and 40 CFR 52.21(b)(8), 43 FR 26404. However, that definition is for the purpose of deciding the threshold question of the applicability of the PSD regulations. Therefore, we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit.

DSSE's response to date has been that the permitting authority should make the determination on a case-by-case basis, after considering all the facts of the individual situation. For example, we said that site clearing might be inappropriate for a source proposed to be constructed in a heavily forested Class I area, but permissible for a source proposed to be constructed on a junk-strewn lot in a heavily industrialized Class III area.

After consulting with the Office of General Counsel, we are now amending this policy in order to minimize the administrative burden on the permitting authority and to adopt what we believe now to be the better legal interpretation. The new policy is that certain limited activities will be allowed in all cases. These allowable activities are planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. Any activities undertaken prior to issuance of a PSD permit would, of course, be solely at the owner's or operator's risk. That is, even if considerable expense were incurred in site-clearing and purchasing equipment, for example, there would no guarantee that a PSD permit would be forthcoming.

All on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

The new policy has several advantages. First, it will be easy to administer, since case-by-case determinations will not be required. Moreover, it assures national consistency and permits no abuse of discretion. Finally, it appears to be the most legally correct position. The policy has the undeniable disadvantage of allowing a good deal of

- 3 -

activity at sites which may be highly susceptible to environmental impact. We feel that on balance, however, the advantages of the policy outweigh the disadvantage.

If you any questions, please feel free to contact David Rochlin of my staff, at 755-2542.

Edward E. Reich

cc: Peter Wyckoff, OGC

Richard Rhoades, OAQPS
Linda Murphy, Region I
Ken Eng, Region II
Jim Sydnor, Region III
Winston Smith, Region IV
Steve Rothblatt, Region V
Don Harvey, Region VI
Bob Chanslor, Region VII
Dave Joseph, Region VIII
Bill Wick, Region IX
Mike Johnston, Region X

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Attachment I

MEMORANDUM:

DATE: October 10, 1978
SUBJECT: Source Construction Prior to Issuance of PSD Permit
FROM: Director
Division of Stationary Source Enforcement
TO: Thomas W. Devine, Chief
Air Branch, Region I

This is in response to your memo of September 8, 1978, requesting guidance on the extent to which a company can legally construct, prior to PSD permit issuance, a building which will house both PSD-affected and non PSD-affected facilities. General rules for determining the extent to which construction may proceed and specific points regarding the two cases outlined in your memo, MATEP and Hampshire Chemical, will be discussed below.

In general, a structure which is to house independent facilities, some of which are subject to PSD and some which are not, may be constructed before a PSD permit is issued only if the building is a necessary part of the PSD-exempt project and if it is in no way modified to specifically accommodate the PSD-affected facilities. For example:

We understand that the MATEP project mentioned in your memo involves the construction of steam boilers and diesel engines which are to be housed in the same building. The steam generators have been determined by the Region I Office to be exempt from PSD requirements. The diesel engines on the other hand are subject to PSD review. MATEP may begin construction on the building which will hold the boilers and the diesels, before the PSD permit is issued, as long as the drains, piping, footings for the diesels, and any other installations necessary to accommodate the diesels are not installed until the permit is issued. Although drains, diesel footings, and various other installations may be considered part of the structure of the building, they may not be constructed until the permit is issued if they are specific to the diesel engines and are not considered part of the boiler construction project.

The other case mentioned in your memo is the construction of the Hampshire Chemical wastewater treatment plant. As we understand it, the wastewater treatment facility is subject to PSD review because it will be equipped with a sludge incinerator. In this case, as in cases involving municipal wastewater treatment plants, the question of whether construction of all parts of the treatment facility must await permit issuance depends on the reliance of the treatment facility on the incinerator. That is, if the sludge incinerator is an integral part of the wastewater treatment facility (the facility would not be built without an incinerator), the PSD permit must be obtained before any work can begin on any portion of the treatment plant. If the installation of a sludge incinerator is "optional", the rules for determining what portions of any buildings or other structures common to the incinerator and other parts of the treatment facility will be those discussed earlier in this memo. By "optional" we mean that the treatment facility could be operated without the incinerator. In this way, if the PSD permit for the incinerator is denied, the portion of the treatment plant which has already been constructed will not be lost. It is extremely difficult to deny issuance of a permit when it results in a completed

portion of a project having to remain idle. Therefore, in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than to have a "white elephant" on our hands later on.

If you have any further questions on this issue, please contact Libby Scopino at FTS 755-2564.

Edward E. Reich

cc: Dick Rhoads
Peter Wyckoff

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MEMORANDUM

May 13, 1993

SUBJECT: Construction Activities at Georgia Pacific

FROM: John B. Rasnic, Director
Stationary Source Compliance
Office of Air Quality Planning and Standards

TO: Bernard E. Turlinski, Chief
Air Enforcement Branch
Region III

This is in response to your memorandum dated April 27, 1993, requesting a written opinion about the applicability of the Prevention of Significant Deterioration (PSD) regulations to certain Georgia-Pacific activities at a site in West Virginia. We also have a copy of the inquiry dated March 29, 1993 to you from Georgia-Pacific. As discussed below, this office concludes that the activities as described by Georgia-Pacific in its letter are construction activities prohibited prior to the issuance of a PSD permit.

Section 165(a) of the Clean Air Act states that "[n]o major emitting facility ... may be constructed ... unless - (1) a permit has been issued... [and various other requirements satisfied]." Section 52.21(i)(1) specifies that a source may not begin actual construction until the source obtains a PSD permit. The regulations and several memoranda specifically state that "begin actual construction means initiation of physical on-site construction activities ... which are of a permanent nature." A memorandum dated December 18, 1978 from Edward Reich, Director of the Stationary Source Compliance Division, "Interpretation of "Constructed" as it applies to Activities Undertaken Prior to Issuance of a PSD Permit," specifically states that all on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. A memorandum dated March 28, 1986 from Edward Reich, to Robert DeSpain of Region VIII, "Construction Activities Prior to Issuance of a PSD Permit with Respect to "Begin Actual Construction," clarifies such prohibited activities to include any emissions unit or installation necessary to accommodate the PSD source. If the construction activity is an integral part of the PSD source or modification, the source must obtain

Attachment J

a PSD permit. In other words, if the construction prior to such construction would not serve in accordance with its original intent except for inclusion of the emissions unit, such construction is prohibited prior to obtaining a PSD permit.

In a memorandum dated October 10, 1978 from Edward Reich to Thomas Devine of Region I, "Source Construction Prior to Issuance of a PSD Permit," EPA referred to equity arguments in addition to the statutory and regulatory basis for prohibiting construction on a source prior to issuance of a PSD permit. Any activities undertaken prior to the issuance of a PSD permit, although solely at the owner's or operator's risk, should minimize or avoid any equity arguments at a later time that the permit should be issued. The memorandum stated that the permitting authority would be placed in a very difficult position when denying issuance of a permit when it results in a completed portion of a project having to remain idle. Therefore, activities of a permanent nature that also contribute to such equity arguments (such as they are an integral part of the PSD source, activities that are very costly or would result in significant irrevocable loss to the owner,) are prohibited construction activities prior to the issuance of a PSD permit.

In the letter to Region III, Georgia-Pacific stated that it blasted rock and removed rock and soil to create a pit 40 feet wide by 230 feet long by 35 feet deep in connection with the construction of an oriented strand board (OSB) plant. Georgia-Pacific requested to be allowed to complete what it describes as "preparatory" activities by constructing a retaining wall and backfill some of the press pit.

Your office agrees that construction of a retaining wall involves more than preparatory activities under 40 C.F.R. SS52.21(b)(11). Although the memorandum from Edward Reich dated December 18, 1978 distinguished activities of a preparatory nature from those of a permanent nature, our policy also focuses on the relation of the activity to the PSD source. Construction of a retaining wall is considered an activity under "begin actual construction" because it is of a permanent nature. The excavation is also permanent and is an integral part of the PSD source.

The PSD regulations prohibit any construction activities that are of a permanent nature related to the specific project for which a PSD permit is needed, as opposed to general construction activities not related to the emissions unit(s) in question, prior to the receipt of a construction permit. This standard prohibits activities affecting the property in a permanent way that the source would reasonably undertake only with the intended purpose of constructing the regulated project. Site clearing and grading are in general relatively inexpensive and could be used for a variety of possible construction-related activities. Moreover,

even if site clearing and grading were not followed by any construction, it normally would not represent a significant economic loss to the owner or change in use of the property. Accordingly, such activities generally are not considered permanent activities related to the specific project. The excavation activities in this case, on the other hand, are costly, they significantly alter the site, are an integral part of the overall construction project, and are clearly of a permanent nature. Consequently, these activities are within the meaning of "begin actual construction."

Therefore, we agree with your opinion that construction of the retaining wall is a prohibited activity. In addition, we believe that the excavation is a prohibited activity, as well.

If you have any questions regarding this matter, please contact Clara Poffenberger at 703 308-8709.

Attachments

cc: Julie Domike, OE
Greg Foote, OGC
David Solomon, AQMD
Laxmi Kesari, SSCD
Charles McPhedran, ORC, Region III



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

DEC 13 1995

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Charles W. Williams
Commissioner, Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, Minnesota 55155-4194

Dear Mr. Williams:

This is in response to your September 27, 1995 letter to Carol Browner requesting clarification from the United States Environmental Protection Agency (EPA) concerning the scope of construction-related activities that may occur prior to issuance of a Prevention of Significant Deterioration (PSD) permit under the Federal regulations at 40 CFR 52.21, which are also incorporated into Minnesota's rules. Your letter requests the EPA's interpretation on four related issues that are addressed below. The EPA's policy on most of the issue; is explained in the attached memorandum of March 28, 1986 entitled "Construction Activities Prior to Issuance of a PSD Permit with Respect to Begin Actual Construction" from Edward E. Reich, Director, EPA's Stationary Source Compliance Division (March 1986 Memo).

First, Minnesota interprets the Federal PSD regulation to allow an applicant to enter into binding agreements or contractual obligations prior to receiving a PSD permit. The PSD regulations at 40 CFR 52.21(i)(1) require an applicable source to obtain a PSD permit before it may "begin actual construction." The PSD rules at 40 CFR 52.21(b)(11) define "begin actual construction" as the "-initiation of physical on-site construction activities on an emissions unit which are of a permanent nature.... With respect to a change in the method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change." Since entering into binding agreements or contractual obligations is not prohibited under this definition, the EPA agrees with the Minnesota view that these activities are allowed under the Federal PSD rules prior to obtaining a PSD permit. We also agree that the owner or operator who chooses to undertake

Attachment K

these activities prior to obtaining the required PSD permit does so at its-own risk that a permit may not be issued or may not contain the terms the applicant desires.

Second, Minnesota interprets the Federal PSD rules to not prohibit site clearing activities prior to receiving a PSD permit, but that there is a prohibition on beginning construction activities that are of a permanent nature. The EPA agrees with Minnesota that site clearing and grading are not prohibited by this definition. Allowed preconstruction activities would also include ordering materials and temporary storage on site (see March 1986 memorandum).

Prohibited (permanent and/or preparatory) preconstruction activities under 40 CFR 52.21(b)(i)(1) and (b)(11) would include any construction that is costly, significantly alters the site, and/or permanent in nature. This would include, but is not limited to: (1) excavating, blasting, removing rock and soil, and backfilling, and (2) installing footings, foundations, permanent storage structures, pipe, and retaining walls. See May 13, 1993 memorandum from John Rasnic to Region III, "Construction Activities at Georgia Pacific" (GP memo); see also November 4, 1993 memorandum from Dave Howekamp to Region IX, "Preconstruction Review and Construction Activities Prior to Permit Issuance."

As explained in the GP memo (and those preceding), absent a prohibition on any costly, significant or permanent preconstruction, affected sources could defeat the preconstruction requirement or its enforcement by making a costly, substantial, and/or permanent investment and later argue that retrofitting of PSD requirements or a denial of the permit would unreasonably interfere with their investment.

Further, it is EPA's longstanding policy that section 52.21(i) reasonably prohibits any preconstruction "intended to accommodate" an "emissions unit" or which is an "integral part of the source or modification." This is supported by the definition of "emissions unit" at 52.21(b)(7), which "means any part of a stationary source which emits or would have the potential to emit any pollutant . . ." (see March 1986 memo). The meaning of "intended to accommodate" was also discussed in the GP memo which states: "[i]f the construction activity is an integral part of the PSD source or modification, the source must obtain a PSD permit prior to construction. In other words, if the construction would not serve in accordance with its original intent except for inclusion of the emissions unit, such construction is prohibited prior to obtaining a PSD permit."

Finally, you have asked whether there is flexibility under the Clean Air Act (Act) or rules to allow construction of footings for emissions units without a PSD permit in cold weather States such as Minnesota. EPA's general view is that such an exemption is not authorized under the Act or the Federal PSD rules. Historically, foreseeable circumstances such as a short construction season have been factored into the design, planning, and permitting of any affected construction project. However, the EPA believes that Minnesota has raised legitimate concerns. As a part of the NSR Reform, such concerns were raised and considered, but no agreement was reached on specific changes to the NSR rules. EPA intends to ask the NSR Reform Subcommittee to consider again rule reforms that would address possible extenuating circumstances under which certain limited construction-related activities could take place prior to receipt of a final permit. In the interim, I encourage the State to continue its discussions with the Regional Office to develop a solution, within the current rules, that considers EPA's concerns about allowing certain construction-related activities prior*to receipt of a PSD permit. Specifically, should a source request to establish footings prior to cold weather without receiving the required PSD permit, the EPA may be willing to discuss compliance options, consistent with the rules.

I hope this letter clarifies EPA's interpretation of the Federal PSD rules regarding permissible activities prior to obtaining a PSD permit. If you have any questions concerning the application or enforcement of the PSD rules, you may contact Ron Van Mersbergen of EPA Region 5 at (312) 886-6056.

Sincerely,

John S. Seitz
Director
Office of Air Quality Planning
and Standards

Enclosures

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

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

AFFIDAVIT OF M. BRADLEY ENZI

I, M. Bradley Enzi, being of lawful age and being first duly sworn, state as follows:

1. I am the Vice President of Two Elk Generation Partners, LP (“TEGP”).
2. I have been Vice President of Two Elk Power Company, the sole general partner of TEGP, since June 1, 2006.
3. TEGP is the holder of Wyoming Department of Environmental Quality (“DEQ”) Permit No. CT-1352B for construction of the Two Elk solid waste disposal (“Two Elk”) in Campbell County, Wyoming. The Two Elk facility will recycle and dispose of non-commercial waste coal exposed during the mining process from adjacent mines, also producing electricity in the process.
4. Since the July 18, 2005 Order of the Wyoming Environmental Quality Council (“Council”), TEGP has provided the Wyoming DEQ, Air Quality Division (“AQD”) with monthly status reports detailing its construction and contractual activities in connection with the development of the Two Elk facility. These status reports included details of TEGP’s actions and activities relating to licensing and permitting the facility, financing the project, transmission and power purchase agreements, engineering, procurement, and other ongoing construction activities for the Two Elk facility. In addition to this information, TEGP specifically advised ADQ of: (1) the fact that TEGP’s primary contractor and boiler supplier provided TEGP with notices of *force majeure* relating to the effects of Hurricanes Katrina and Rita; (2) the status of

the Wyoming Department of Transportation permitting for the highway interconnection for Two Elk's main access road; (3) the requirement for additional facility studies before electrical interconnection agreements for the Two Elk facility could be executed; and (4) the excavation, demolition, and construction of both the underground Belle Fourche oil pipeline and the Justice Oil and Gas natural gas pipeline.

5. Since June 1, 2007, I have made the monthly reports for TEGP. I have also conducted several meetings with the staff of the Wyoming DEQ. At no time prior to the August 22, 2007 letter from Wyoming DEQ ("August 22 Letter") was I informed that there was a problem or question with regard to construction activities at the Two Elk facility.

6. On Friday May 25, 2007, Mr. Finley of the Wyoming DEQ asked me to contact him and set a meeting to discuss the progress on the TEGP project. I attempted to contact and left messages for Mr. Finley on Tuesday, May 29, 2007; Thursday, May 31, 2007; on Monday, June 4, 2007 when I delivered the monthly report to his assistant; and Thursday, June 7, 2007. I never received any communication from Mr. Finley in response to my attempts to contact him regarding the meeting, nor did I receive any additional comments from Mr. Finley during my subsequent face to face encounters with him in the Wyoming DEQ offices during the course of June, July, or August, 2007.

7. On Wednesday June 6, 2007, I conducted a site visit with Tom Schroeder of the WDEQ's Industrial Siting Division and updated him on the construction activities that had been conducted at the Two Elk facility including the relocation and construction of pipelines in the first part of 2007. I also showed him the oil and gas well work that was done by Justice Oil to allow for the safe operation and construction of a large generation facility in the vicinity. I provided Mr. Schroeder with an updated status on the bid process for site grading and road

construction which was also noted in the monthly status reports. The status of the PacifiCorp Large Generator Interconnection Agreement (“LGIA”) was also discussed relaying the integral importance of the final agreement to the timing of the Two Elk project.

8. On July 10, 2007, I conducted a meeting on the separate permit application for the Two Elk Expansion Project (Unit 2) with members of Wyoming DEQ staff. I updated the staff in attendance (Chad Schlictemeir, Darla Potter, and Stewart Greiner) as to the ongoing construction activities on Two Elk Unit #1 with regard to road construction, site construction, progress pertaining to the LGIA with PacifiCorp, and the overall construction schedule. No one raised a question regarding the validity of the permit, the construction schedule, or ongoing construction activities. After the meeting, I was not contacted or informed of any additional questions or concerns with regard to the Two Elk facility or TEGP’s permit.

9. TEGP has entered into an Interim Notice to Proceed Agreement (“INTP”) with Bechtel Power Corporation (“Bechtel”) for the design and fabrication of a boiler, steam turbine, and related equipment for the Two Elk facility. The INTP, as amended and restated, authorizes Bechtel to commence the work contemplated by the draft Engineering Procurement Contract (“EPC”) including entering into major equipment purchase orders, such as the purchase of the main boiler (\$48,000,000) for the Two Elk solid waste disposal facility. TEGP separately paid ALSTOM Power \$500,000 to reserve a production slot in the manufacturing cycle for Two Elk’s steam turbine (with a currently estimated cost in excess of \$25,000,000), contractually agreed to fund PacifiCorp approximately \$60,000,000 for electrical transmission network interconnection improvements (under which a payment of \$1,000,000 is due to PacifiCorp on or before November 27, 2007), and contractually agreed to pay over \$2,000,000 to local Wyoming contractors for site grading and road construction.

10. Upon termination or cancellation of the INTP, TEGP would be required to pay Bechtel \$2,275,000 in addition to all other costs incurred by Bechtel as of the date of cancellation. Furthermore, TEGP would be required to assume subcontracts entered by Bechtel on TEGP's behalf separate from its own contractual obligations.

11. From June 2005 to September 2005, TEGP initiated and paid for the excavation, demolition, relocation, and reconstruction of an oil pipeline operated by Belle Fourche that interfered with the footprint of the Two Elk facility. Construction of the Two Elk facility could not safely proceed until the pipeline was relocated.

12. Upon information and belief, from April 2006 to June 2007, Justice Oil and Gas Company reworked an existing oil and gas well that created safety concerns with the construction of the Two Elk facility and excavated, demolished, relocated, and reconstructed a high pressure natural gas pipeline that interfered with the footprint of the Two Elk facility. The new pipeline will, in part, provide gas to the Two Elk facility and construction of the facility could not safely proceed until the pipeline was relocated. TEGP has also requested other natural gas service and supplies for a combustion turbine, also authorized to be constructed under DEQ Permit 1352B.

13. The State of Wyoming and Campbell County increased TEGP's property valuation from \$356,500 in 2006 to \$6,405,500 in 2007 due to "construction in progress" at the Two Elks facility based upon the State of Wyoming Department of Revenue's determination that the valuation of construction work in progress as of December 31, 2006 for the Two Elk facility totaled slightly more than \$51,500,00. The corresponding property tax assessment for the Two Elk facility increased from \$21,011 in 2006 to \$383,080 in 2007.

14. TEGP directly made community impact payments to Campbell County School District in the amount of \$35,560 and Wyoming Game and Fish in the amount of \$12,000. Upon information and belief, the Wyoming Department of Environmental Quality also made community impact payments in 2005 and 2006.

15. Construction of Two Elk's main access road is underway. This work included surveying the access road, Wyoming State Highway 450, and road drainage areas, field staking, and soil borings and geotechnical analysis in the summer and fall of 2006.

16. Completion of widening a portion of the Wyoming State Highway 450 interconnection road will be completed by November 1, 2007.

17. Construction activities at Two Elk scheduled for fall 2007 include installation of the main access road and continuing foundation work ("Fall 2007 Activities"). The Fall 2007 Activities cannot occur while the ground is frozen or covered with snow.

18. Construction activities at the Two Elk site scheduled for spring 2008 include completion of permitted water well and supply systems; erection of batch plant; erection of emission control chemical storage; pilings and foundations for the main solid waste disposal boiler; power island and other related structures; pilings and foundations for the combustion turbine ("Spring 2008 Activities"). The Spring 2008 Activities cannot be completed until the Fall 2007 Activities have been completed.

19. If TEGP is prevented from completing the Fall 2007 Activities during October and November 2007, TEGP will not be able to complete these activities until the ground thaws and snow melts in spring 2008, at the earliest. This will result in substantial delay in the remainder of the construction schedule for the Two Elk facility.

20. TEGP recently executed a LGIA with PacifiCorp, a regulated utility in Wyoming. A delay of the Two Elk construction schedule at this stage will interfere with the schedule prescribed by the LGIA between TEGP and PacifiCorp. This agreement and its status have been communicated in each of the monthly reports submitted to the DEQ. The importance of this agreement with relation to the overall construction of Two Elk facility was never questioned by Wyoming DEQ staff.

21. TEGP has arranged for a refunding and public sale of Campbell County's Series 2000, 2001, 2005, 2005B and 2006 bonds for the TEGP solid waste disposal project in November 2007. Upon information and belief, revocation of the August 22, 2007 letter is necessary for the public offering and permanent financing to be concluded.

22. It is essential to continue construction at this point as the mobilization of site grading and road construction equipment is extremely costly. Remobilization of this equipment off and onto the Two Elk site would cost TEGP \$120,000. Any delay in construction at the Two Elk facility will generate additional interest costs during construction to the project. It will also further delay the completion of the Two Elk project which is tied to the final LGIA interconnection in 2011.

FURTHER AFFIANT SAYETH NOT.

Date: _____

M. Bradley Enzi

Subscribed and sworn before me

this _____ day of _____, 2007.

Notary Public

My commission expires: _____