BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of the Appeal	)	
Of the Revocation of	)	
Permit No. CT-1352B	)	Docket No. 07-2802
Two Elk Power Plant	)	

REPLY IN SUPPORT OF TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S MOTION TO DISMISS APPEAL

Pursuant to WYO. R. CIV. P. 6(c) and 12(b)(1), Intervenor Two Elk Generation Partners, Limited Partnership ("TEGP") respectfully submits to the Environmental Quality Council ("Council" or "EQC") this Reply in Support of its Motion to Dismiss ("Motion") Sierra Club and Powder River Basin Resource Council's (collectively, "Petitioners") Appeal of DEQ Construction Continuance and Commencement Determinations, and Permit Deadline Extensions, Regarding Two Elk Power Plant ("Appeal").

INTRODUCTION

In their Response to TEGP's Motion to Dismiss ("Response"), Petitioners repeatedly criticize the Council's conduct and resolution of the proceedings in EQC No. 07-2601, specifically: the adequacy of the public notice preceding the November 28, 2007 hearing (Response at 2-5); the sufficiency of the Council's inquiry into the facts supporting the parties' Joint Stipulated Settlement Agreement (Response at 7-8); and the effect of the Council's December 3, 2007 Order approving the settlement (Response at 5-7). Because each of these is a challenge to an action of the Council, the proper forum for review of these issues is the district court, not a new proceeding before the Council. Petitioners offer no support for their request that the Council review an agency decision upon which it has already acted, when neither the Environmental Quality Act nor the Council's Rules of Practice and Procedure ("R.P.P.") authorize such an action by the Council.

In their Response, Petitioners also assert that their objection to the DEQ's 2005 commencement determination is timely. However, their argument relies on an incorrect reading of the Wyoming Air Quality Standards and Regulations ("WAQSR") that confuses two separate elements of Chapter 6, Section 2(h).

Finally, Petitioners' argue that they have standing to bring their Appeal. But their argument relies upon a narrow reading of the Council's definition of "protestant," ignoring the constitutional mandate that judicial and quasi-judicial bodies decide only justiciable controversies. *State ex. rel. Bayou Liquors, Inc. v. City of Casper*, 906 P.2d 1046, 1048 (Wyo. 1995). Petitioners have not addressed that deficiency and they have not explained how any of their members will potentially suffer a perceptible harm as a result of the DEQ's decision regarding the continuation of construction at the Two Elk Plant.

In short, none of the arguments advanced by Petitioners overcomes the patent jurisdictional defects in their filing. Accordingly, the Petition should be dismissed.

I. PETITIONERS' OBJECTIONS REGARDING THE CONDUCT OF EQC NO. 07-2601 MUST BE RAISED IN A JUDICIAL REVIEW PROCEEDING

The Council is not the appropriate forum to review Petitioners' objections to the adequacy of the Council's notice of the hearing in EQC No. 07-2601, the sufficiency of its review of the facts supporting DEQ's decision to enter the Joint Stipulated Settlement Agreement, or the effect of the Council's Order approving the settlement and dismissing the proceeding. Those complaints concern actions of the Council, and can be addressed, if at all, only by a district court in a judicial review proceeding. Petitioners' arguments regarding these issues do not support their contention that the Council should revisit the DEQ's November 21, 2007 decision to withdraw the August 2, 2007 letter to TEGP and enter the Joint Stipulated Settlement Agreement.

A. The Notice of the November 28, 2007 Hearing was Adequate, and Any Objection Thereto Should be Raised, if at All, in a Judicial Review Proceeding

Petitioners were not parties to EQC No. 07-2601, and made no timely attempt to intervene in accordance with the Council's rules. Since Petitioners were not parties, they had no right to personal notice under WYO. STAT. ANN. § 16-3-107(b)(iv), and therefore do not have standing to object to the adequacy of the hearing notice under that provision. Petitioners did, however, receive public notice that EQC No. 07-2601 was on the November 28, 2007 agenda.

Petitioners insist that they should have been provided notice of the DEQ's "reversed position" regarding the continuation of construction at the Two Elk Plant. This argument fails to recognize that until the point at which the parties reached a settlement, EQC No. 07-2601 was a contested case proceeding. That being the case, Petitioners should have expected that TEGP would present evidence in support of its position that it had complied with the requirement for continuous construction at the Two Elk Plant, and that the DEQ or the Council might conclude that the August 22, 2007 letter had been issued in error. Furthermore, Petitioners should have been aware that administrative enforcement matters are routinely settled by agencies and the regulated community. *See* I R.P.P. § 11 (authorizing "informal dispositions . . . of any hearing by stipulation, agreed settlement, [or] consent . . . upon approval by the Council"). Petitioners' argument implies that they believed that they were guaranteed of a particular outcome of the proceeding. However, Petitioners took the risk that the matter would be resolved without their input by failing to move to intervene. They had no right to expect the DEQ and the Council to close their eyes to TEGP's evidence; nor were they entitled to assume that the DEQ and TEGP would not compromise the case. Nor could the Council give advance notice of a particular outcome in the case. It would be improper—if not impossible—for the Council to presage its decisions on matters that come before it when it acts in its quasi-judicial capacity.

Petitioners further contend that the notice of the November 28, 2007 hearing was deficient because the Council's December 3, 2007 Order was a *de facto* amendment or repeal of WAQSR Chapter 6, Section 2(h). This mischaracterizes the Council's action. The Order was issued by the Council in its quasi-judicial capacity, and represents the outcome of a quintessentially judicial act: the Council's application of the continuous construction rule to the facts detailed in the Joint Stipulated Settlement Agreement, the DEQ's November 21, 2007 letter, and the argument presented at the November 28, 2007 hearing. Contrary to Petitioners' assertions, the Council's action was not tantamount to an amendment or repeal of WAQSR Chapter 6, Section 2(h), and the rules that dictate the notice required for a rulemaking proceeding are not applicable here.

Perhaps most important at this juncture, all of Petitioners' objections as to the adequacy of the notice concern actions taken by the Council, and can be addressed, if at all, only by a district court.

B. The Council's Inquiry was Sufficient, and Any Objection to the Scope of the Review Should be Raised, if at All, in a Judicial Review Proceeding

At the November 28, 2007 hearing before the Council in EQC No. 07-2601, the DEQ and TEGP presented their Joint Stipulated Settlement Agreement for approval by the Council, in accordance with the Council's rules. See I R.P.P. § 11 (authorizing informal dispositions of hearings by settlement "upon approval of the Council"). At the hearing, TEGP presented a summary of the facts that had been explained to the DEQ, and were contained in the confidential business information reviewed by the DEQ, regarding construction of the Two Elk Plant. Further, the DEQ explained the basis for its agreement that the August 22, 2007 letter to TEGP should be withdrawn because TEGP had not discontinued construction at the Two Elk Plant for 24 months or more, as well as the benefits to the State that were secured by the terms of the

DEQ's settlement with TEGP. DEQ and TEGP also responded to inquiries by the Council into the facts supporting the settlement, including questions concerning the agreement to lower emissions limits and other benefits to the State of Wyoming. As TEGP noted in its Motion, the Council could not have approved the withdrawal of DEQ's August 22, 2007 letter to TEGP if it had not agreed with the DEQ that, in the time since it commenced, construction of the Two Elk Plant had never been discontinued for a period of 24 months or more. Although the Council was not required to do so, it scrutinized the factual findings of the DEQ in concluding that the agency had properly determined that a settlement was in the best interests of the State. *See, e.g., Dist. of Columbia v. Public Svc. Comm.*, 802 A.2d 373, 378 (D.C. App. 2002) (public service commission has a "wide range of latitude" in assessing a settlement as long as it still evaluates whether the settlement is in the public interest); *Ocean County Chapter Inc. of the Izaak Walton League of America v. Dep't of Envtl. Protection*, 696 A.2d 25, 29 (N.J. Super. 1997) (under state administrative rules reflecting the public policy favoring settlement of disputes, when a settlement is approved by an agency head, an administrative law judge overseeing a contested case "is not required to conduct any proceeding regarding the settlement or to review its reasonableness").

As with their objections to the hearing notice discussed above, Petitioners' complaint that the Council did not sufficiently review the factual basis for DEQ's decision to issue the August 21, 2007 letter and enter the Joint Stipulated Settlement Agreement is a challenge to the action of the Council, and can be addressed, if at all, only by a district court.

C. The Joint Stipulated Settlement Agreement is Consistent with Law and Public Policy, and Any Objection Thereto Should be Raised, If at All, in a Judicial Review Proceeding

Petitioners assert that the Council's December 3, 2007 Order deprived them of their alleged "right to appeal" the DEQ's November 21, 2007 decision to withdraw the August 22, 2007 letter to TEGP. The right to challenge DEQ action does not amount to a license to upset the expectations of settling parties and force them to perpetuate a contested case after they have reached a mutually acceptable resolution. Petitioners had the right to move for intervention before or during the hearing in EQC No. 07-2601—a right they failed to exercise.

There is a strong public policy in Wyoming that favors compromises and the finality of settlements. *See, e.g., Haderlie v. Sondgeroth,* 866 P.2d 703 (Wyo.1993) (citing *Hursh Agency, Inc. v. Wigwam Homes, Inc.,* 664 P.2d 27 (Wyo.1983); *Coulter, Inc. v. Allen,* 624 P.2d 1199 (Wyo.1981)). As noted above, the Council's own rules embody this policy by allowing disposition of "any hearing" by stipulation or agreed settlement, "upon approval by the Council." I R.P.P. § 11. This policy recognizes that in litigation all parties face risks, and negotiated resolutions allow parties to reduce the uncertainty associated with those risks while conserving resources of the parties and Council. "Settlements permit parties to resolve disputes on mutually acceptable terms rather than exposing themselves to the uncertainty of litigation." *Isaak Walton League*, 696 A.2d at 29 (citations omitted). "Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources." *Id.* (approving settlement of dispute regarding delineation of wetlands). In this case, the DEQ achieved benefits through settlement by avoiding litigation risk and securing an agreement from TEGP that will result in lower emission limits for the Two Elk Plant. Perpetuating the proceeding solely to hear

Petitioners' tardy complaints would upset the parties' expectations and interests in the settled outcome of the proceeding, and discourage negotiated resolutions in the future.

Additionally, Petitioners' complaint that the DEQ's August 21, 2007 decision was not subject to a 60-day appeal period, and instead was approved by the Council in its December 3, 2007 Order, is another challenge to the action of the Council, and can be addressed, if at all, only in a judicial review proceeding.

None of Petitioners' objections to the actions of the Council in EQC No. 07-2601 support their contention that the Council should revisit the DEQ's November 21, 2007 decision, when it has already reviewed that decision and confirmed it in the December 3, 2007 Order. Outside of the limited authority to grant rehearing, neither the Environmental Quality Act nor the Council's own rules authorize the Council to conduct another review of an agency decision that it has already reviewed and approved.

II. PETITIONERS' CHALLENGE TO THE DEQ'S DETERMINATION THAT TEGP COMMENCED CONSTRUCTION OF THE TWO ELK PLANT IN MAY 2005 IS UNTIMELY

Petitioners' argument in support of the asserted timeliness of their appeal of the Council's 2005 decision conflates the meaning of two separate concepts under the WAQSR: "commencement" and "continuation." The applicable section of the WAQSR has separate requirements for commencement and continuation of construction: construction must "commence" within 24 months after the permit is issued, and construction must not be "discontinued" for a period of 24 months or more. 6 WAQSR § 2(h). The DEQ reiterated these requirements in Paragraph 4 of Permit CT-1352B. Petitioners cannot read the standard for continuation of construction into the requirement for commencement of construction when the rule contains a separate requirement as to each. The gravamen of Petitioners' complaint

concerns whether construction at the Two Elk Plant was "discontinued" for a period of 24 months or more within the intent of the rule. That issue was the subject of EQC No. 07-2601 and the Joint Stipulated Settlement Agreement approved by the Council's December 3, 2007 Order. Petitioners' challenge to the DEQ's 2005 finding that TEGP had "commenced" construction is more than two years late, and their distorted reading of the applicable rule cannot resurrect their claim. Petitioners failed to appear at the starting line in 2005; they are in no position now to complain about the officiating at the start of the race. Because Petitioners' appeal of the DEQ's 2005 decision is untimely, it should be dismissed.

III. PETITIONERS HAVE NOT DEMONSTRATED STANDING TO BRING THIS APPEAL

In their Response, Petitioners' argument that they have standing to challenge the DEQ's November 21, 2007 decision relies upon a simple re-statement of the text from their Petition. The quoted language, however, does not address the Petition's failure to allege any connection between the DEQ's November 21, 2007 decision and the potential for "perceptible" harm to any of their members. *Roe v. Bd. of County Comm'rs, Campbell County*, 997 P.2d 1021, 1023 (Wyo. 2000) (quoting *Foster's, Inc. v. City of Laramie*, 718 P.2d 868, 872 (Wyo. 1986)). Petitioners cannot evade the constitutional mandate that judicial and quasi-judicial bodies decide only justiciable controversies by focusing narrowly on the Council's definition of "protestant." *See State ex. rel. Bayou Liquors, Inc. v. City of Casper*, 906 P.2d 1046, 1048 (Wyo. 1995). This reading would allow the Council's rules to reduce the constitutional minimum beyond that determined by the Wyoming Supreme Court to be required for both judicial and quasi-judicial proceedings. *Id.* Because Petitioners have not demonstrated standing, the Appeal should be dismissed.

CONCLUSION

For the reasons set forth in its Motion and this Reply, and pursuant to WYO. R. CIV. P. 12(b)(1), TEGP respectfully requests that the Council dismiss Petitioners' Appeal.

Respectfully submitted this 24th day of April, 2008.

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CERTIFICATE OF SERVICE

On this 24th day of April, 2008, in accordance with the requirements of Chapter I, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure and Rule 5 of the Wyoming Rules of Civil Procedure, I caused the foregoing TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL to be served by registered mail, return receipt requested, and electronic mail to:

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