

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

SEP 08 2008

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE)
ADMINISTRATIVE ORDER)
ISSUED TO ARP & HAMMOND) DOCKET NO. 08-5201
HARDWARE CO. AND/OR OLD)
HORSE PASTURE, INC.)

DEQ'S MOTION TO DISMISS

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to Chapter II, Sections 3 & 14 of the DEQ Rules of Practice & Procedure and Rule 12 of the Wyoming Rules of Civil Procedure, moves to dismiss Petitioners Arp & Hammond Hardware Co.'s (A&H) and/or Old Horse Pasture, Inc.'s (OHP) Petition for Review and Request for Hearing in the above-captioned matter before the Wyoming Environmental Quality Council's (EQC) on grounds of mootness and lack of subject matter jurisdiction.

Background

DEQ issued an Administrative Order (DEQ Docket No. 4316-08) dated July 21, 2008 to Petitioners A&H and/or OHP, ordering them to grant Frontier Refining Inc. (Frontier) and its contractors access to their property adjacent to the southern and eastern boundary of Frontier's Cheyenne refinery as needed for Frontier to install the barrier wall boundary control system required by the DEQ's February 19, 2008 Final Decision letter to Frontier. Petitioners filed a Petition for Review and Request for Hearing before the EQC on July 31, 2008 to contest the DEQ's Administrative Order. By letter addressed to both DEQ and Frontier dated July 31, 2008, Petitioners simultaneously made a "proposal to Frontier to resolve the issues and facilitate the timely construction of the barrier wall." On August 12, 2008, the DEQ issued a Notice of Compliance to A&H and/or OHP, finding that, for the reasons explained therein, "Alternative 1" in Petitioners' July 31,

2008 written offer of access to Frontier constitutes compliance with the contested July 21, 2008 Administrative Order.

After filing a Petition for Leave to Intervene and Review of DEQ's Notice of Compliance on August 14, 2008, Frontier filed a Withdrawal of Petition for Leave to Intervene and Review of DEQ's Notice of Compliance on August 21, 2008. Petitioners A&H and/or OHP and Respondent DEQ are the only parties in this contested case.

Mootness and Subject Matter Jurisdiction

Respondent DEQ's issuance of the Notice of Compliance finding that Petitioners' July 31, 2008 written offer of access to Frontier constitutes compliance with the contested Administrative Order makes Petitioners' appeal of that Administrative Order moot. A case will be dismissed when, pending appeal, an event occurs which renders a cause moot and makes a determination of the issues unnecessary or an advisory opinion. *Graham v. Wyoming Peace Officers Standards and Training Com'n*, 737 P.2d 1060, 1062-1063 (Wyo. 1987). A tribunal should not undertake to decide a question which by a change in the condition of affairs has become moot before or after commencement of the action. *International Ass'n of Fire Fighters, Local No. 279 v. Civil Service Com'n of the Fire Dept. of the City of Cheyenne*, 702 P.2d 1294, 1297 (Wyo. 1985).

Standing to sue is closely related to the doctrine of mootness, and involves a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. 702 P.2d at 1297. Standing to sue is jurisdictional in nature. *Id.*

Time for Responsive Pleading Altered by Motion to Dismiss

The EQC's August 8, 2008 Response Order calls for Respondent DEQ to file a response to Petitioners A&H's and/or OHP's appeal by September 8, 2008. Chapter II, Section 3 of the DEQ Rules of Practice & Procedure provides that the EQC may hear any motion filed in connection with hearings before the EQC.

Pursuant to Chapter II, Section 14 of the DEQ Rules of Practice & Procedure, the Wyoming Rules of Civil Procedure generally apply to matters before the EQC. Rule 12(a) of the Wyoming Rules of Civil Procedure provides that the time for filing a responsive pleading will be 10 days after notice of the tribunal's action on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. Accordingly, this motion to dismiss tolls the deadline for DEQ to file a response to A&H/OHP's petition until after the EQC decides this motion. WHEREFORE, Respondent DEQ requests that this appeal be dismissed on grounds of mootness and lack of subject matter jurisdiction.

DATED this 8th day of September, 2008.



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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing DEQ'S MOTION TO DISMISS was served this 8th day of September, 2008 by United States mail, first class postage prepaid, and by e-mail, addressed as follows:

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