

FILED

AUG 28 2012

Jim Ruby, Executive Secretary
Environmental Quality Council

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

**IN THE MATTER OF THE NOTICE OF)
VIOLATION AND ORDER ISSUED TO:)
THOMAS KINDLER) Docket No. 5017-12
FIVE-K, LLC)
P.O. BOX 21)
EVANSTON, WY 82931)**

**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

The Wyoming Department of Environmental Quality (DEQ) moves the Environmental Quality Council to grant DEQ judgment on the pleadings pursuant to Wyoming Rule of Civil Procedure 12(c). Because Five-K, LLC does not deny that it failed to maintain licensed operators for its storage tanks, the Council should grant this Motion, dismiss Five-K's Petition, and uphold DEQ's Order.

I. Background

On July 18, 2012, DEQ issued a notice of violation alleging that Five-K violated the Wyoming Water Quality Rules and Regulations (WQRR), ch. 17, § 46, which requires storage tank owners to maintain licensed storage tank operators. *See* Notice of Violation & Order, docket no. 5017-12, at 1, ¶¶ 2-4. DEQ therefore ordered Five-K either

to retain licensed storage tank operators or to take its storage tanks out of service. *Id.* at 2, ¶ 1.

Five-K, through its principal Thomas Kindler, filed a Petition for a Hearing on the Order with the Council. In that Petition Five-K does not deny that Five-K failed to maintain licensed operators for its storage tanks. *See* Pet. for Hearing (July 28, 2012). Nor does it contest that the WQRR require Five-K to maintain licensed operators. *Id.* Instead, Five-K claims that: (1) Thomas Kindler has twice failed the storage tank operator exam; (2) Thomas Kindler incurred costs taking the exam; (3) the exam does not fairly represent Five-K's operation; and (4) the company administering the exam did not allow Thomas Kindler to review his failed exams. *See generally id.*¹

II. Argument

On a motion for judgment on the pleadings, the Council accepts as true the facts set forth in the petition. *Swinney v. Jones*, 2008 WY 150, ¶ 4, 199 P.3d 512, 515 (Wyo. 2008). The Council interprets those facts in the light most favorable to the non-moving party. *Id.* When the petition makes clear that the petitioner cannot assert any facts that would entitle him to relief on the petition, dismissal is appropriate. *Id.* (internal citations omitted); *see also Ecosystem Resources, L.C. v. Broadbent Land & Resources, L.L.C.*, 2007 WY 87, ¶ 8, 158 P.3d 685, 687 (Wyo. 2007).

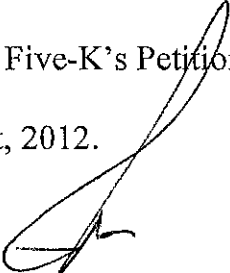
Accepting as true all of the facts that Five-K asserts in its Petition and interpreting those facts in the light most favorable to Five-K, Five-K cannot establish any facts that

¹ In its Petition Five-K has requested only the opportunity to review the failed exams. *Id.* The private entity that administers the storage tank license exam has possession of the failed exams, not DEQ.

would entitle it to relief under the Petition. Five-K does not contest DEQ's allegation that Five-K violated the WQRR. *See* Pet. for Hearing (July 28, 2012). In fact, the claims in Five-K's Petition demonstrate the truth of DEQ's allegation that Five-K has failed to maintain licensed storage tank operators. *See id.* (noting failures to pass license exam). The only facts alleged in Five-K's Petition—Mr. Kindler's failures to pass the exam, payments to take the exam, inability to review failed exams, and the correlation between exam content and Five-K's operation—are not relevant to whether Five-K violated the WQRR and do not establish Five-K's entitlement to relief under the Environmental Quality Act. Because Five-K does not contest DEQ's allegation that Five-K failed to comply with the WQRR, dismissal is appropriate, and DEQ's Order should therefore be upheld.

WHEREFORE, the Wyoming Department of Environmental Quality requests that the Council grant this Motion, dismiss Five-K's Petition, and approve DEQ's Order.

Dated this 28th day of August, 2012.

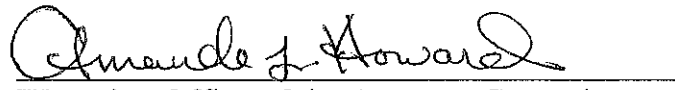


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of August, 2012, a true and correct copy of the foregoing *Wyoming Department of Environmental Quality's Motion for Judgment on the Pleadings* was served by placing the same in the United States registered mail, postage pre-paid, return receipt requested, to the following:

Thomas Kindler
Five-K, LLC
P.O. Box 21
Evanston, Wyoming 82931



Wyoming Office of the Attorney General