



Keith L. Guille

Office of the Attorney General

Governor
Dave Freudenthal

Water and Natural Resources Division
123 State Capitol
Cheyenne, Wyoming 82002
307-777-6946 Telephone
307-777-3542 Fax

Chief Deputy Attorney General
Elizabeth C. Gagen

Attorney General
Bruce A. Salzburg

Division Deputy
Jay A. Jerde

ROUTING MEMO

TO: AQD file

THROUGH: David Finley, Administrator

Bob Gill, Compliance Program Manager

FROM: Nancy Vehr, Sr. Asst. Attorney General

DATE: 1/4/08

RE: State v. Black Hills Bentonite - 1st. Jud. Dist. #170-014
(In re NOV issued to Black Hills Bentonite - DEQ DN 4151-07)

Judge Kalokathis signed the Consent Decree and it was filed with the Court today. Attached are copies of the following pleadings for your records:

- Complaint (12/13/07) ✓
- Notice of Lawsuit and Request for Waiver of Service (12/13/07)
- Waiver of Service of Summons (12/31/07)
- Joint Motion for Entry of Consent Decree (12/31/07) and,
- Consent Decree (1/4/08) and corresponding Certificate of Service (1/4/08) ✓

I have also sent EPA a copy of the Complaint and Consent Decree.

In accordance with section IV of the Consent Decree, BHB has 30 days [2/7/08] within which to pay the settlement amount of \$10,000.00. I am keeping this matter open and will notify you after BHB pays. Please call me if you have any questions (7580).

Nancy Vehr
Wyoming Attorney Generals Office
123 Capitol Building
Cheyenne, Wyoming 82001
(307) 777-6946

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

PEOPLE OF THE STATE OF)
WYOMING,)
)
Plaintiff,)
)
v.)
)
BLACK HILLS BENTONITE, a,)
Wyoming Limited Liability Company,)
)
Defendant.)

Docket No. 171-014

FILED

DEC 13 2007

GERALD E. BISHOP
CLERK OF THE DISTRICT COURT

COMPLAINT

Plaintiff, the People of the State of Wyoming, by and through the Department of Environmental Quality, Air Quality Division (“DEQ/AQD”) and Wyoming’s Attorney General (collectively referred to hereinafter as “Wyoming”), upon information and belief, alleges:

NATURE OF ACTION

1. This is a civil action brought against Black Hills Bentonite, a Wyoming Limited Liability Company (“Black Hills”), pursuant to Sections 901(a) and 903(c) of the Wyoming Environmental Quality Act (“Act”) (WYO. STAT. ANN. §§ 35-11-901(a) and -903(c)(West 2007)) for the opacity of visible emissions from the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile at the Mills Complex located in Natrona County, Wyoming.

2. As set forth in greater detail below, Wyoming alleges that Black Hills violated condition no. F2(b) of DEQ/AQD permit no. 3-1-176, the Wyoming Air Quality Standards and Regulations (“WAQSR”), and the Wyoming Environmental Quality Act (“Act”).

3. Wyoming seeks a civil penalty for this alleged past violation.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter and the parties in this action pursuant to Section 901(a) of the Act. WYO. STAT. ANN. § 35-11-901(a).

5. Laramie County is the proper venue for this action pursuant to Section 903(c) of the Act. WYO. STAT. ANN. § 35-11-903(c).

PARTIES

6. DEQ, pursuant to WYO. STAT. ANN. §§ 35-11-104 and -109, is the executive branch agency of Wyoming state government vested by statute with the responsibility for administering and enforcing the Act, rules promulgated thereunder, and related permits. The DEQ/AQD is also charged with responsibility for administering the Act, the WAQSR, and related permits. WYO. STAT. ANN. § 35-11-110.

7. Defendant Black Hills Bentonite (“Black Hills”), is a Wyoming Limited Liability Company that owns and/or operates the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile at the Mills Complex (“Facility”) in Natrona County, Wyoming.

8. Black Hills is a “person” as defined in Section 103(a)(vi) of the Act and WAQSR Ch. 1 § 3(a). WYO. STAT. ANN. § 35-11-103(a)(vi).

STATUTORY AND REGULATORY BACKGROUND

9. The Act establishes a statutory scheme which is designed in part to enable the State of Wyoming to prevent, reduce and eliminate pollution; to preserve and enhance the State of Wyoming's air, water and land resources; and, to allow the State of Wyoming to plan the development, use, reclamation and enhancement of its air, land and water resources. WYO. STAT. ANN. § 35-11-102.

10. Any person who violates any provision of Article 2 of the Act, the WAQSR, or any standard or permit adopted pursuant to those provisions, is subject to a penalty not to exceed ten thousand dollars (\$10,000.00) for each violation for each day during which the violation continues, a temporary or permanent injunction, or both a penalty and an injunction. WYO. STAT. ANN. § 35-11-901.

BACKGROUND - AQD OPERATING PERMITTING PROGRAM

11. WYO. STAT. ANN. § 35-11-203(a) defines source categories subject to the DEQ/AQD operating permit program. In pertinent part, these sources include any stationary source or group of sources that: “(A) Has the potential to emit one hundred (100) tons or more per year of any pollutant regulated under the Clean Air Act and is a major stationary source as defined in Section 302 of the Clean Air Act” or “(B) Has the potential to emit ten (10) tons per year of any single hazardous air pollutant or twenty-five (25) tons per year of any combination of hazardous air pollutants as defined by Section 112 of the Clean Air Act.”

12. WYO. STAT. ANN. § 35-11-203(b) states, “After the effective date of the operating permit program authorized under W.S. 35-11-203 through 35-11-212, it shall be unlawful for any person to violate any requirement of a permit issued under the operating permit program or to operate any source required to have a permit under this section, without having complied with the provisions of the operating permit program.”

13. WYO. STAT. ANN. § 35-11-801(a) provides in pertinent part, “In granting permits, the director may impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules, regulations and standards.”

14. WAQSR Ch. 6 § 3 prescribes the applicability and procedures for issuing permits to sources under Wyoming’s operating permit program.

15. WAQSR Ch. 6 § 3(a)(i) states that any major source, “[is] subject to the operating permit requirements of this section.”

16. WAQSR Ch. 6 § 3(d)(ii) states, “Except as provided in this paragraph or in Chapter 6, Section 3(d)(iii), no source requiring an operating permit under Chapter 6, Section 3 may operate after the time that it is required to submit a timely and complete application, except in compliance with a permit issued under this section.”

17. WAQSR Ch. 6 § 3(h)(i)(F)(I) requires the permit to include a provision stating: “The permittee must comply with all conditions of the operating permit. Any permit noncompliance constitutes a violation of the Act [CAA], Article 2 of the Wyoming Environmental Quality Act and the WAQSR and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.”

18. “Opacity” is “the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.” WAQSR Ch. 5 § 2(e)(i).

CLAIM I

Failure to Comply with Condition F2(b) of DEQ/AQD Permit No. 3-1-176

19. DEQ/AQD repeats and incorporates by this reference the allegations contained in paragraphs 1 through 18 of this Complaint.

20. Black Hills owns or operates the telescopic chute associated with the one thousand ton crushed and dried bentonite stockpile at the Mills Complex (“Facility”) located in Natrona County, Wyoming.

21. The Facility is subject to the DEQ/AQD's operating permitting program.

22. On or about April 24, 2007, DEQ/AQD issued permit 3-1-176 to Black Hills for the Facility.

23. Condition F2(b) of permit 3-1-176 established an opacity limit of twenty percent (20%) for emissions from the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile.

24. On or about September 5, 2007, DEQ/AQD Engineer Chris Hanify observed significant visible emissions from the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile. Mr. Hanify conducted a Method 9 opacity observation with the resultant opacity of eighty-nine percent (89%).

25. Based upon the results of DEQ/AQD's observations and on information and belief, the DEQ/AQD alleges that Black Hills violated the Act, the WAQSR and condition F2(b) of permit no. 3-1-176 by failing to comply with the twenty percent

opacity limit for emissions from the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile at the Facility on September 5, 2007.

26. Pursuant to WYO. STAT. ANN. § 35-11-701, the DEQ/AQD issued Notice of Violation Docket No. 4151-07 ("NOV") to Black Hills on September 24, 2007, alleging that Black Hills violated the Act, the WAQSR, and permit no. 3-1-176 by failing to comply with the twenty percent opacity limit for emissions from the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile at the Facility on September 5, 2007.

27. Any person who violates any provision of Article 2 of the Act, the WAQSR, or any standard or permit adopted pursuant to those provisions, is subject to a penalty not to exceed ten thousand dollars (\$10,000.00) for each violation for each day during which the violation continues, a temporary or permanent injunction, or both a penalty and an injunction. WYO. STAT. ANN. § 35-11-901(a).

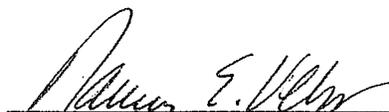
WHEREFORE, Plaintiff prays that:

A. This Court enter judgment in favor of the Plaintiff on the Claim asserted;

B. This Court assess appropriate penalties against Defendant Black Hills as provided in Section 901(a) and 903(c) of the Act, WYO. STAT. ANN. §§ 35-11-901(a) and -903(c); and

C. This Court award such other and further relief as it deems appropriate.

DATED this 13th day of December, 2007.



Nancy E. Wehr
Sr. Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6946

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

PEOPLE OF THE STATE OF)
WYOMING,)
)
Plaintiff,)
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v.)
)
BLACK HILLS BENTONITE, a,)
Wyoming Limited Liability Company,)
)
Defendant.)

Docket No. 171-014

FILED

JAN 04 2008

GERRIE E. BISHOP
CLERK OF THE DISTRICT COURT

CONSENT DECREE

The Wyoming Department of Environmental Quality, Air Quality Division (“DEQ/AQD”) in the name of the People of the State of Wyoming as Plaintiff, pursuant to Sections 901(a) and 903(c) of the Wyoming Environmental Quality Act (“Act”), WYO. STAT. ANN. §§35-11-901(a) and 903(c) (West 2007), has filed a Complaint against Defendant Black Hills Bentonite, a Wyoming Limited Liability Company (“Black Hills”), alleging that Black Hills failed to comply with the permitted opacity limit for the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile at the Mills Complex (“Facility”) located in Natrona County, Wyoming, in violation of the Act, the Wyoming Air Quality Standards and Regulations (“WAQSR”), and permit no. 3-1-176. DEQ/AQD and Black Hills (collectively referred to hereinafter as “Parties”), and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties at arms length and in good faith and will avoid or settle certain litigation among the Parties, and that this Consent Decree is fair, reasonable and in the public interest. THEREFORE, the Parties, by and through their respective attorneys, have agreed to the following terms for resolving this litigation prior to trial, before the taking of evidence, without the adjudication or admission of any issue of fact or law, and with the consent of the Parties, IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

I. Jurisdiction

This Court has jurisdiction over the subject matter and parties in this civil action under Section 901(a) of the Act, WYO. STAT. ANN. § 35-11-901(a) and venue is proper in Laramie County under Section 903(c) of the Act, WYO. STAT. ANN. § 35-11-903(c).

II. Parties

A. Black Hills is a Wyoming Limited Liability Company and is the owner and/or operator of the Facility.

B. DEQ/AQD is the agency of Wyoming state government responsible for enforcing the Act, the WAQSR, the State Implementation Plan (“SIP”) adopted pursuant to the federal Clean Air Act as amended, and permits issued pursuant to those provisions including permit no. 3-1-176.

III. Background

A. Black Hills

1. Black Hills owns and operates bentonite suppling, producing and manufacturing facilities including the Facility. The telescopic chute is used to stack bentonite onto the crushed and dried stockpile.

2. Black Hills holds various DEQ/AQD permits relating to the Facility including permit no. 3-1-176.

B. DEQ/AQD Operating Permit Program

1. WYO. STAT. ANN. § 35-11-203(a) defines source categories subject to the DEQ/AQD operating permit program. In pertinent part, these sources include any stationary source or group of sources that: “(A) Has the potential to emit one hundred (100) tons or more per year of any pollutant regulated under the Clean Air Act and is a major stationary source as defined in Section 302 of the Clean Air Act” or “(B) Has the potential to emit ten (10) tons per year of any single hazardous air pollutant or twenty-five (25) tons per year of any combination of hazardous air pollutants as defined by Section 112 of the Clean Air Act.”

2. WYO. STAT. ANN. § 35-11-203(b) states, “After the effective date of the operating permit program authorized under W.S. 35-11-203 through 35-11-212, it shall be

unlawful for any person to violate any requirement of a permit issued under the operating permit program or to operate any source required to have a permit under this section, without having complied with the provisions of the operating permit program.”

3. WYO. STAT. ANN. § 35-11-801(a) provides in pertinent part, “In granting permits, the director may impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules, regulations and standards.”

4. WAQSR Ch. 6 § 3 prescribes the applicability and procedures for issuing permits to sources under Wyoming’s operating permit program.

5. WAQSR Ch. 6 § 3(a)(i) states that any major source, “[is] subject to the operating permit requirements of this section.”

6. WAQSR Ch. 6 § 3(d)(ii) states, “Except as provided in this paragraph or in Chapter 6, Section 3(d)(iii), no source requiring an operating permit under Chapter 6, Section 3 may operate after the time that it is required to submit a timely and complete application, except in compliance with a permit issued under this section.”

7. WAQSR Ch. 6 § 3(h)(i)(F)(I) requires the permit to include a provision stating: “The permittee must comply with all conditions of the operating permit. Any permit noncompliance constitutes a violation of the Act [CAA], Article 2 of the Wyoming Environmental Quality Act and the WAQSR and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.”

8. “Opacity” is “the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.” WAQSR Ch. 5 § 2(e)(i).

9. Pursuant to WYO. STAT. ANN. § 35-11-701, the DEQ/AQD issued Notice of Violation Docket No. 4151-07 (“NOV”) to Black Hills on September 24, 2007, alleging that Black Hills violated the Act, the WAQSR, and permit no. 3-1-176 by failing to comply with the twenty percent opacity limit for emissions from the telescopic chute associated with the outdoor one thousand ton crushed and dried bentonite stockpile at the Facility on September 5, 2007.

10. Any person who violates any provision of Article 2 of the Act or any rule, regulation, standard or permit issued or adopted pursuant to those provisions may be subject to a penalty not to exceed ten thousand dollars (\$10,000.00) for each violation for each day during which the violation continues, a temporary or permanent injunction, or both a penalty and an injunction. WYO. STAT. ANN. § 35-11-901.

IV. Settlement

A. Within thirty (30) days after notice to Black Hills of entry by the Court of this Consent Decree, Black Hills, without admitting any of the facts alleged and without admitting liability, agrees to pay to the DEQ/AQD the sum of ten thousand dollars and no cents (\$10,000.00) as a full and complete cash payment to resolve this matter ("Settlement Amount"). The check shall be made payable to the Department of Environmental Quality and shall be delivered to Nancy Vehr, Sr. Assistant Attorney General, Wyoming Attorney General's Office, 123 Capitol Building, Cheyenne, Wyoming 82002.

B. Payment of the Settlement Amount shall constitute full satisfaction of Black Hills' obligations under this Consent Decree.

V. Release and Covenant Not to Sue and Dismissal With Prejudice

A. DEQ/AQD agrees that payment of the Settlement Amount as specified in Section IV.A. of this Consent Decree shall constitute full satisfaction of the claims against Black Hills that DEQ/AQD alleged in the Complaint initiating this action or in DEQ Notice of Violation Docket No. 4151-07.

B. In consideration of the Settlement Amount paid by Black Hills as specified under Section IV.A of this Consent Decree, DEQ/AQD and the State of Wyoming hereby release and covenant not to sue Black Hills, its respective successors, assigns, affiliates, parents, officers, directors, employees and representatives, as to any common law claims, statutory claims, or other claims or causes of action which arise out of the facts, transactions, or events which were alleged in the Complaint or in the NOV on the basis of knowledge DEQ/AQD actually had at the time of issuing the NOV.

C. This covenant not to sue is expressly conditioned upon the complete and satisfactory performance by Black Hills as specified in Section IV.A. of this Consent Decree.

D. Within thirty (30) days after payment by Black Hills of the Settlement Amount subject to the conditions stated in Section IV, the DEQ/AQD will request that the Court terminate this Consent Decree and dismiss this action with prejudice to all claims which were made in this lawsuit.

E. The terms of Section IV and V shall survive termination of the Consent Decree.

VI. Parties Bound

A. This Consent Decree shall apply to and be binding upon Black Hills, its successors and assigns and upon the DEQ and the State of Wyoming.

B. The Parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Consent Decree shall not be construed so as to create such status. The rights, duties and obligations contained in this Consent Decree shall operate among the Parties to this Consent Decree.

C. Nothing in this Consent Decree relieves Black Hills of its duty to comply with the Act, WAQSR, Wyoming's SIP, the federal Clean Air Act, and rules regulations and standards adopted thereunder and any permit requirements including permit no. 3-1-176.

D. This Consent Decree is not and shall not be construed to be a permit or permit modification issued pursuant to any federal, state, or local statute, ordinance or regulation. Black Hills shall remain solely responsible for its compliance with the terms of this Consent Decree, all permits, and all federal, state and local laws and regulations.

VII. Terms Not Severable

The terms of this Consent Decree, which embodies the comprehensive stipulated settlement between the Parties, are not severable.

VIII. Reservation of Rights

A. By signing this Consent Decree, Black Hills neither admits nor denies that it violated any provision of the Act, the WAQSR, Wyoming's SIP, the federal Clean Air Act, or permits issued pursuant to such authority including permit no. 3-1-176. By entering into this Consent Decree, Black Hills neither admits nor denies the validity of any allegation contained in the NOV or the Complaint.

B. DEQ and the State of Wyoming reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, including seeking injunctive relief and/or civil penalties.

C. DEQ and the State of Wyoming do not waive sovereign immunity by entering into this Consent Decree and retain immunity and all defenses available to them as sovereigns under all state and federal law, except that any of the Parties may bring an action to seek interpretation or enforcement of this Consent Decree. Each party shall bear its own costs, fees, and expenses in any such action.

IX. Termination of Consent Decree

Except as otherwise provided in Section V, the terms and conditions of this Consent Decree shall terminate upon the DEQ/AQD's filing of written notice to the Court confirming the completion of Black Hills' obligations under this Consent Decree and the Court's entry of a Termination and Dismissal order.

X. Attorneys' Fees/Costs of Action

Each Party shall bear its own attorneys fees and costs of this action.

XI. Retention of Jurisdiction

The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree, to enter such orders as are appropriate under the Consent Decree, and to resolve all disputes as may be necessary or appropriate for the construction or to carry out the terms of this Consent Decree until it is terminated as provided above.

XII. Authority

The signatories certify that they are duly authorized to bind their respective Parties to this Consent Decree.

DATED this 2 day of Jan, 2008.

5/ Nicholas J. Kesteven

DISTRICT COURT JUDGE

c: Nancy Vehr, Asst. AG

STATE OF WYOMING COUNTY OF LARAMIE, SS CHEYENNE
I Gerrie E. Bishop, Clerk of the District Court in and for the County of Laramie, Wyoming, do hereby certify that the within and foregoing is a full true and correct copy of the original thereof as the same appears on file or of record in my office and that the same is in full force and effect as of this date.
Witness my hand and seal of said court this 2 day of Jan 2008.
GERRIE E. BISHOP
Clerk of District Court
By B. N. [Signature]
Deputy

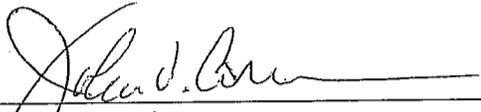
WE HEREBY CONSENT to the entry of this Consent Decree:

FOR THE WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY:

Date: 12/7, 2007

By: 
David A. Finley
Administrator, Air Quality Division

Date: 12/7, 2007

By: 
John Corra, Director
Department of Environmental Quality

FOR BLACK HILLS BENTONITE:

Date: 11-30, 2007

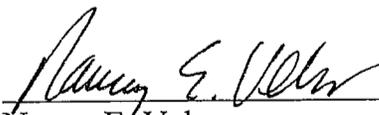
By: 
Larry Madsen
Vice President and CFO

APPROVAL AS TO FORM:

Date: 11-30, 2007

By: 
Weston W. Reeves
Park Street Law Office
242 South Park Street
Casper, WY 82601
(307) 265-3843
Attorney for Black Hills

Date: November 19, 2007

By: 
Nancy E. Vehr
Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6946
Attorney for DEQ/AQD