Keith Guille

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

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| PEOPLE OF THE STATE OF WYOMING,<br><br>Plaintiff,<br><br>v.<br><br>DAKOTA COAL COMPANY, a North Dakota corporation,<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Docket No. 173-619 |

FILED
APR - 1 2009
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 2008), has filed a Complaint against Defendant Dakota Coal Company, a North Dakota corporation ("Dakota Coal"), alleging that Dakota Coal violated the Act, the Wyoming Air Quality Standards and Regulations ("WAQSR"), and DEQ/AQD operating permit nos. 30-129-1 and 3-1-129 at Dakota Coal's Frannie Lime Plant facility ("Facility") located in Park County, Wyoming. The DEQ/AQD and Dakota Coal (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. Dakota Coal is a North Dakota corporation and is the owner of the Facility.

B. The 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.

## III. Background

### A. Frannie Lime Plant Facility

1. The Facility is located in Park County, Wyoming.

2. At the Facility, limestone is converted to lime through a high-heat calcining (kiln heating) process. The lime is then crushed and either stored or loaded onto railcars or trucks for delivery. Lime has various industrial uses including use in stack emission scrubbers and water treatment plants.

### B. DEQ/AQD Construction and Modification Permitting Program

1. WYO. STAT. ANN. § 35-11-801 and WAQSR Ch. 6, § 2 require that persons obtain a DEQ permit prior to commencing the construction of any new facility or modification of any existing facility which may cause the issuance of air pollution in excess of standards established by the DEQ/AQD.

2. WYO. STAT. ANN. § 35-11-801(a) states in pertinent part: "[i]n 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."

3. WYO. STAT. ANN. § 35-11-801(c) states, "[a] permit to construct is required before construction or modification of any industrial facility capable of causing or increasing air or water pollution in excess of standards established by the [DEQ] is commenced."

4. WAQSR Ch. 6, § 2 prescribes the applicability and procedures for issuing permits to sources under DEQ/AQD's construction and modification permitting program.

5. WAQSR Ch. 6, § 2(a)(i) states: "[a]ny person who plans to construct any new facility or source, modify any existing facility or source, or to engage in the use of which may cause the issuance of or an increase in the issuance of air contaminants into the air of this state shall obtain a construction permit from the State of Wyoming, Department of Environmental Quality before any actual work is begun on the facility."

**C. DEQ/AQD Operating Permit Program**

1. Wyoming's operating permit program for major sources defines sources subject to the operating permit program, procedures for applying for an operating permit, review of permit applications and issuance of operating permits. WYO. STAT. ANN. §§ 35-11-203 through -206.

2. 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 have "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 [.]" WYO. STAT. ANN. § 35-11-203(a)(i)(A).

3. WYO. STAT. ANN. § 35-11-203(b) states in relevant part, "[a]fter 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 operate any source required to have a permit under this section, without having complied with the provisions of the operating permit program."

4. Chapter 6, Section 3 of the WAQSR prescribes the applicability and procedures for issuing permits to sources under Wyoming's operating permit program.

5. Chapter 6, Section 3(d)(ii) of the WAQSR states: "[e]xcept 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."

**D. $NO_x$ and Opacity**

1. "Nitrogen oxides" ($NO_x$) is the generic term for gases containing varying amounts of nitrogen and oxygen. 70 Fed. Reg. 59589 (October 12, 2005). $NO_x$ may be produced naturally or as a result of high-temperature fossil-fuel combustion. *Id.* At elevated concentrations $NO_x$ can affect human health, vegetation, materials and visibility. 60 Fed. Reg. 52874, 52876 (October 11, 1995).

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

**E. DEQ Notice of Violation Docket No. 4186-07**

1. Pursuant to WYO. STAT. ANN. § 35-11-701, the DEQ/AQD issued Notice of Violation Docket No. 4186-07 ("NOV") to Dakota Coal on December 4, 2007, alleging that Dakota Coal violated the Act, the WAQSR, and operating permit nos. 30-129-1 and 3-129-1 by: a) failing to obtain an air quality construction permit for a coal stockpile at the Facility; b) exceeding the permitted $NO_x$ emission limits for the Facility during the fourth quarter of 2006; c) failing to immediately initiate corrective action to eliminate visible emissions from the Facility's baghouse; d) exceeding the Facility's permitted opacity limit; e) failing to have a certified opacity observer conduct Method 9 opacity observations of limestone and fuel unloading operations at the Facility; and f) failing to conduct a quarterly visual observation of the petroleum coke loading operations.

2. 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(a).

**IV. Settlement**

A. Dakota Coal, without admitting any of the facts alleged in the NOV or Complaint and without admitting liability or failure to comply with any statutory or regulatory requirement, agrees to resolve this matter by paying to the DEQ/AQD a Stipulated Civil Penalty of thirty-nine thousand dollars and no cents ($39,000.00) within

thirty (30) days after notice to Dakota Coal of the Court's entry of this Consent Decree. The check shall be made payable to the Department of Environmental Quality and delivered to Nancy Vehr, Sr. Assistant Attorney General, Wyoming Attorney General's Office, 123 Capitol Building, Cheyenne, Wyoming 82002.

B. Payment of the Stipulated Civil Penalty shall constitute full satisfaction of Dakota Coal's obligations under this Consent Decree.

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

A. DEQ/AQD agrees that payment of the Stipulated Civil Penalty as specified in Section IV of this Consent Decree shall constitute full satisfaction of the claims against Dakota Coal that DEQ/AQD alleged in the Complaint initiating this action or in DEQ Notice of Violation Docket No. 4186-07.

B. In consideration of the Stipulated Civil Penalty paid by Dakota Coal, the DEQ/AQD and the State of Wyoming hereby release and covenant not to sue Dakota Coal, 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.

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

D. Within thirty (30) days after receiving Dakota Coal's Stipulated Civil Penalty payment 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 this Consent Decree.

**VI. Parties Bound**

A. This Consent Decree shall apply to and be binding upon Dakota Coal, 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 Dakota Coal of its duty to comply with the Act, WAQSR, Wyoming's SIP, the federal Clean Air Act, and rules, regulations and standards adopted thereunder including any permit requirements.

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. Dakota Coal shall remain solely responsible for its compliance with the terms of this Consent Decree, all permits, and all applicable federal, state and local laws and regulations.

**VII. Terms Not Severable**

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

**VIII. Reservation of Rights**

A. By signing this Consent Decree, Dakota Coal 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. By entering into this Consent Decree, Dakota Coal 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 Dakota Coal's 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 this 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 30 day of March, 2009.

s/ _____
DISTRICT COURT JUDGE

c: Nancy Vehr, Sr. Asst. Attorney General

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 1 day of Apr 09 20__

GERRIE E. BISHOP
Clerk of District Court

By _____
Deputy

**WE HEREBY CONSENT** to the entry of this Consent Decree:

FOR THE WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY:

Date: 3/12, 2009 By: _____
David Finley
Administrator, Air Quality Division

Date: 3/16/09, 2009 By: _____
John Corra, Director
Department of Environmental Quality

FOR DAKOTA COAL COMPANY:

Date: March 3, 2009 By: _____
Bob Bartosh, Sr. Vice-President

APPROVAL AS TO FORM:

Date: 2/25, 2009 By: _____
Stephen N. Sherard (Wyo. Bar. 5-1844)
Sherard, Sherard & Johnson
602 10th Street
Wheatland, WY 82201
(307) 322-5050
Attorney for Dakota Coal

Date: February 24, 2009 By: _____
Nancy E. Vehr (Wyo. Bar. 6-3341)
Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6946
Attorney for DEQ/AQD