

COPY FOR YOUR INFORMATION

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF AIR QUALITY )  
CONSTRUCTION PERMIT FOR )  
RING-NECK ENERGY & FEED, LLC, )  
ONIDA, SOUTH DAKOTA )  
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**MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
REQUEST FOR PRE-HEARING CONFERENCE**

Ring-Neck Energy & Feed, LLC (“Ring-Neck”), by and through its attorneys, submits the following Motion to Dismiss the contested case matter before Dennis Landguth, Hearing Chair and member of the Board of Minerals and Environment. In brief, this matter relates to the Department of Environment and Natural Resources’ (“DENR’s”) air quality construction permit for a proposed ethanol plant to be operated by Ring-Neck near the City of Onida, in Sully County, South Dakota.

DENR received a total of seven letters during the comment period on DENR’s draft permit.<sup>1</sup> Four of these merely provided comments. The DENR reviewed and responded to the comments in letters to the commenters dated April 14, 2016, informing the commenters that no changes to the draft permit would be made and that the DENR is recommending that the draft permit be issued as proposed.

The letters to the commenters dated April 14, 2016 to Complainants Clark Guthmiller, Lisa Guthmiller, Kathy Hyde, included the DENR acknowledgement their requests for a

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<sup>1</sup> For convenience, this memorandum shall refer to all of the individuals that submitted written comments during the comment period as the “Complainants.”

Contested Case Hearing.<sup>2</sup> For a contested case hearing to proceed, the Complainants were required to serve Ring-Neck with a contested case petition by May 17, 2016. They have failed to do so. Accordingly, this matter must, in all respects, be dismissed. Furthermore, the Hearing Chair should direct DENR to issue the final construction permit, as DENR is required to do by ARSD § 74:36:20:13. The Motion to Dismiss is supported by the affidavit of Peder Larson, counsel for Ring-Neck, filed herewith. If the Motion to Dismiss is denied, or if the Hearing Chair determines relief may only be granted after hearing, Ring-Neck requests a prehearing conference (ARSD 74:09:01:10) be scheduled at the earliest possible opportunity.

### **FACTUAL BACKGROUND**

#### **A. Ring-Neck Files a Permit Application With The DENR.**

On or about September 30, 2015, Ring-Neck filed a permit application with DENR. Ex. A to Affidavit of Peder A. Larson (“Larson Aff.”) dated May 23, 2016, p. 1.<sup>3</sup> In March 2016, the Secretary of DENR, Steven M. Pirner, issued a Draft Air Quality Construction Permit, No. 28.0505-59-01C (the “Draft Permit”). In issuing the Draft Permit, Secretary Pirner imposed certain conditions, including so-called standard conditions. *See, e.g.*, Larson Aff. Ex. A, p. 1. Having examined Ring-Neck’s application and accompanying materials, Mr. Pirner determined that:

A review of this facility indicates it can construct and operate in compliance with South Dakota’s Air Pollution Control rules and the federal Clean Air Act. The Secretary, therefore, recommends the Board of Minerals and Environment issue this air quality construction permit with conditions to ensure compliance with SDCL 34A-1 and the federal Clean Air Act.

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<sup>2</sup> Of these three requests, one was jointly submitted by two individuals, Clark Guthmiller and Lisa Guthmiller, and one was submitted solely by Clark Guthmiller.

<sup>3</sup> Additional information related to the application was provided on December 14, 2015, February 5, 2015, and March 7, 2015. Larson Aff. Ex. A, p. 1.

Larson Aff. Ex. A, p. 52. In accordance with South Dakota law, DENR published a public notice in the Onida Watchman.<sup>4</sup> *See* Larson Aff. Ex. F. A thirty- (30) day comment period ensued where members of the public were invited to submit feedback to DENR on the Draft Permit.

**B. Comments Received During The Comment Period.**

During the comment period, members of the public submitted comments. *See* Larson Aff. Exs. B-I. Specifically, DENR received the following letters:

1. Correspondence from Lynne McKee dated March 31, 2016. Larson Aff. Ex. B. Ms. McKee expressed her “concerns” over the Draft Permit, but did not request a contested case hearing, or in any way refer to her letter as a “petition.” *See id.*
2. Correspondence from Clark and Lisa Guthmiller dated March 31, 2016. Larson Aff. Ex. C. Handwritten on this correspondence is the statement that the Guthmillers “wish[ed] to contest your issuance of this air quality construction permit.” *Id.*<sup>5</sup> The correspondence contains numerous allegations that are unsubstantiated, conclusory, and without any demonstrated factual basis. *See id.* Moreover, the Guthmillers fail to allege any legal authority or jurisdiction under which a hearing was requested, and omitted reference to any South Dakota statutes or rules.
3. Correspondence from Dan Leonard dated March 31, 2016. Larson Aff. Ex. D. Mr. Leonard expressed his “concerns” over the Draft Permit, but did not request a contested case hearing, or in any way refer to his letter as a “petition.” *See id.*

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<sup>4</sup> *See* ARSD § 74:36:20:11 (providing that “[t]he department shall publish a public notice of the draft permit once in a legal newspaper in the county where the source is located).

<sup>5</sup> Other than this handwritten message, the correspondence submitted by the Guthmillers is essentially identical to the correspondence submitted by Lynne McKee, Dan Leonard, and James Thibodeau.

4. Correspondence from James Thibodeau dated March 31, 2016. Larson Aff. Ex. E. Mr. Thibodeau expressed his “concerns” over the Draft Permit, but did not request a contested case hearing, or in any way refer to his letter as a “petition.” *See id.*
5. Correspondence from Kathy Hyde dated April 4, 2016. Larson Aff. Ex. F. Ms. Hyde stated that she “would like to contest” the Draft Permit. *Id.* Ms. Hyde never alleged her interest in the issuance of the permit. *See id.* Nor did Ms. Hyde allege the legal authority/jurisdiction under which a hearing was requested, or allege the statutes and rules involved. *See id.* Although Ms. Hyde made various factual allegations about supposed consequences of ethanol production, she provided no citation and no basis for any of her allegations. *See id.*
6. Correspondence from Steve Hyde dated April 4, 2015 [the date evidently contains a typo]. Larson Aff. Ex. G. Mr. Hyde expressed his “concerns” over the Draft Permit, but did not request a contested case hearing, or in any way refer to his letter as a “petition.” *See id.*
7. (Second) Correspondence from Clark Guthmiller dated April 6, 2016. *See* Larson Aff. Ex. H. Mr. Guthmiller wrote that he “wish[ed] to contest the issuance of [the Permit], and have a contested case hearing[.]” Mr. Guthmiller wrote that he was therefore “filing this petition in accordance with ARSD 74:09:01:01.” *Id.* This correspondence does not allege Mr. Guthmiller’s interest in the issuance of the construction permit; does not state the relief requested; nor does it provide any citation or basis for its factual allegations.

DENR received and considered these comments. Thereafter, DENR published a Response to Comments that fully addressed the concerns raised in the aforementioned letters. *See* Larson Aff. Ex. I. DENR ultimately decided to approve a final permit under the same specifications as the Draft Permit. *See* Larson Aff. Ex. J.

**C. DENR Advises The Complainants That Petitions For A Contested Case Hearing Must Be Served By May 17, 2016.**

## ARGUMENT

### I. THIS MATTER MUST BE DISMISSED BECAUSE RING-NECK WAS NOT TIMELY SERVED WITH A PETITION.

ASRD § 74:09:01:01 sets forth requirements that govern petitions for contested case proceedings. The rule unequivocally states that its requirements are prerequisites for a contested case proceeding to be initiated. *See* ASRD § 74:09:01:01 (**In order to request a contested case hearing**, a person shall file a petition which . . .”). In other words, a party that does not follow ASRD § 74:09:01:01 has not made a proper request for a contested case hearing. Absent a proper request for a contested hearing, there is no jurisdiction here for a contested hearing. Accordingly, this matter must be dismissed.

One requirement imposed by ASRD § 74:09:01:01 is that “[t]he petitioner **shall** serve a copy of the petition upon all known persons affected by the request who shall be considered parties to the proceeding.” (Emphasis added.) This requirement must be viewed in conjunction with ARSD § 74:09:01:07, which requires that “[t]he person filing the pleading **shall** serve copies of the documents or pleadings on the chair of the hearing, the hearing examiner if applicable, **and all parties of record**.” (Emphasis added). Service of pleadings must be made by first class mail, personal service, or facsimile. ARSD § 74:09:01:15.

At no time have the Complainants served Ring-Neck with a petition. Affidavit of Walter Wendland. Therefore, no request for a contested case hearing has been made. The Hearing Chair should accordingly dismiss this matter in its entirety.

#### A. No Request For a Contested Case Hearing Was Made During The Comment Period.

The administrative rules permit a party to petition for a contested case hearing during the comment period (i.e., even a draft permit may be contested). *See* ARSD § 74:36:20:14. For a

petition to request a contested hearing for a draft permit, it “must comply with the provisions of article 74:09.” *Id.* Again, Article 74:09 unambiguously requires that any persons requesting a contested case hearing must serve their petition on all parties.

DENR has concluded that three requests for hearings were received during the comment period: the March 31 correspondence from Clark and Lisa Guthmiller, the April 4 correspondence of Kathy Hyde, and the April 6 correspondence of Clark Guthmiller. Although these letters were filed with DENR, they were never served on Ring-Neck. *See Larson Aff.* ¶ 3. Therefore, the three letters did not validly request a contested case hearing. *See ARSD* § 74:09:01:01 (“[t]he petitioner **shall** serve a copy of the petition upon all known persons affected by the request who shall be considered parties to the proceeding.”). The Hearing Chair must therefore disregard these requests and dismiss this matter.

**B. No Complainant Timely Served a Petition Contesting DENR’s Final Permit Decision.**

ARSD § 74:36:20:13 governs the initiation of contested case proceedings to challenge a final permit decision of DENR. This rule permits thirty (30) days after the written notice of DENR’s final permit decision for a party to “request” a contested case hearing. ARSD § 74:36:20:13. This language should be examined together with ARSD § 74:09:01:07, which provides the prerequisites for a party “to request a contested case hearing[.]” Clearly, for a person to initiate a contested case proceeding relating to a final permit decision, it must follow § 74:09:01:07. If in thirty (30) days a party has not validly requested a contested case hearing, the rules mandate that DENR “shall” issue the permit. ARSD § 74:36:20:13.

The Complainants were specifically told by DENR that they “must” submit a contested case petition to Ring-Neck in order to request a contested hearing. A petition needed to be served by May 17, 2016 to be timely. *See Larson Aff. Ex. J*; ARSD § 74:36:20:13. The

Complainants have never served Ring-Neck with a petition. Affidavit of Walter Wendland. Accordingly, no request for a contested case hearing has been made. ARSD § 74:09:01:07. As more than thirty (30) days have elapsed since the written notice of DENR's final permit decision—and as no contested case proceeding has been “requested” within the meaning of South Dakota law—the final construction permit “shall” issue. ARSD § 74:36:20:13. The Hearing Chair should dismiss this matter and direct DENR to issue the final permit.<sup>6</sup> See Larson Aff. Ex. A.

**II. EVEN HAD THE COMPLAINANTS PROPERLY SERVED RING-NECK, THEY STILL FAILED TO REQUEST A CONTESTED HEARING BY NOT COMPLYING WITH THE OTHER REQUIREMENTS OF ARSD § 74:09:01:15.**

ARSD § 74:09:01:15 requires that a petition state certain essential pieces of information, including:

- (1) the petitioner's interest in the involved matter (§ 74:09:01:15(1));
- (2) the recommendation contested and the relief and decision requested from the board (§ 74:09:01:15(2));
- (3) the relevant facts and issues upon which the contest is based (§ 74:09:01:15(3));
- (4) the legal authority and jurisdiction under which a hearing would be held (§ 74:09:01:15(4)); and
- (5) the particular statutes and rules involved (§ 74:09:01:15(5)).

If a petition does not contain this information, no contested case hearing has properly been requested. Here, the three letters deemed to request a hearing failed in numerous respects

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<sup>6</sup> No hearing is required for the Hearing Officer to grant this relief. ARSD § 74:09:01:09 states that “[t]he chair of the hearing **may** hear [a] motion and decide on it at the prehearing conference[.]” “May” should be interpreted in a permissive sense. See *Breck v. Janklow*, 623 N.W.2d 449, 455 (S.D. 2011). Accordingly, the Hearing Chair retains discretion to decide a motion to dismiss without the necessity of an administrative hearing. Given that no hearing has validly been requested under South Dakota law, dismissal without unnecessary and costly procedure should be granted here.

to provide information required by § 74:09:01:15. Accordingly, even if service on Ring-Neck had timely been made—as was discussed in Section I above, it was not—dismissal of this matter would still be required as the Complainants failed to properly initiate a contested case hearing.

Kathy Hyde never alleged an interest in the issuance of the construction permit, in contravention of § 74:09:01:15(1). Neither the Guthmiller correspondence of March 31, the Hyde correspondence, or the correspondence of Clark Guthmiller dated April 6, provides a basis for the factual allegations made. *See* § 74:09:01:15(3). Furthermore, neither the Guthmiller correspondence of March 31, nor the Hyde correspondence, state any legal authority or jurisdiction under which a hearing was requested, despite § 74:09:01:15(4). Finally, irrespective of § 74:09:01:15(5), the Complainants did not allege any statutes or rules involved. Because the letters fail to satisfy § 74:09:01:15, no valid petition has been filed. Accordingly, this matter should be dismissed.

### **III. REQUEST FOR PREHEARING CONFERENCE.**

ARSD § 74:09:01:10 reads that, upon the request of a party, the chair of the hearing may hold a prehearing conference. If the Hearing Chair denies Ring-Neck's Motion to Dismiss, or is not inclined to grant the Motion to Dismiss administratively (i.e., without a hearing), Ring-Neck requests that a prehearing conference be held at the earliest possible opportunity.

## CONCLUSION

The Complainants were clearly told by the DENR that South Dakota law required that they serve Ring-Neck with a contested case petition. Any such petition was required to be served on Ring-Neck by May 17, 2016. Nevertheless, no petition has been served on Ring-Neck. As it has now been over thirty (30) days since notice was given of DENR's final permit decision, the final permit "shall" issue. ARSD § 74:36:20:13. Thus, the Hearing Officer should dismiss this matter and direct DENR to issue the final permit. And even if the Complainants had timely served Ring-Neck, no comment letter meets the minimum requirements of ARSD § 74:09:01:15 to qualify as a petition. Finally, if the Hearing Officer is not inclined to grant the Motion to Dismiss, Ring-Neck requests that a prehearing conference be scheduled as soon as possible.

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