

FILED

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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE) EQC DOCKET NO. 07-2801
DRY FORK STATION)
AIR PERMIT CT-4631)

**ORDER DENYING PROTESTANT'S MOTION TO STRIKE AFFIDAVIT OF
KENNETH J. SNELL AS TO PM_{2.5} AND MERCURY**

THIS MATTER came before the Environmental Quality Council (EQC) on September 29, 2008, for oral argument upon Protestants' September 19, 2008 Motion to Strike the Affidavit of Kenneth J. Snell as to PM_{2.5} and Mercury and upon Basin Electric Power Cooperative's Response to Protestants' Motion to Strike the Affidavit of Kenneth J. Snell as to PM_{2.5} and Mercury filed on September 26, 2008. EQC members present at the September 29, 2008 motion hearing included Dennis M. Boal, Chairman, F. David Searle, Vice-Chair and Presiding Officer in this case, John N. Morris, Thomas Coverdale, Tim Flitner and Dr. Fred Ogden. Jim Ruby, Executive Secretary of EQC and Marion Yoder, Assistant Attorney General were also present. Deborah A. Baumer from the Office of Administrative Hearings served as the Hearing Examiner. The Protestants, Earthjustice, Powder River Resource Council, the Sierra Club and the Wyoming Outdoor Council appeared by and through counsel, Robin Cooley. Basin Electric Power Cooperative (Basin Electric) appeared by and through counsel, Patrick Day. The Department of Environmental Quality, Air Quality Division (DEQ) did not participate in the September 29, 2008 motion hearing. The EQC has considered the motion, written responses and argument of the parties, and finds as follows:

I. JURISDICTION

“The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007).

The issuance or denial of a permit is a final agency action of the Department for purposes of appeal. The council shall, “Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007).

The Protestants disputed the Director of DEQ’s approval of Basin Electric’s Air Quality Permit CT-4631 for the Dry Fork Station and requested a hearing before the EQC. Therefore, the EQC has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Wyoming Environmental Quality Act (WEQA) and DEQ regulations, an air quality construction permit is needed before any person commences construction of any new facility or modifies any existing facility which may cause the issuance of air pollution in excess of the standards set by the DEQ. On November 10, 2005, Basin Electric submitted an air quality construction permit application to DEQ to construct a coal-fired power generating station, known as Dry Fork Station, near Gillette, Wyoming. On October 15, 2007, after nearly two years of technical review and analysis by the Air Quality Division, the Director of DEQ determined that Basin Electric’s application for the Dry Fork Station satisfied the applicable statutory and

regulatory requirements and approved Basin Electric's application to construct by issuing Air Quality Permit CT-4631.

The Protestants filed a Protest and Petition for Hearing on November 1, 2007. On September 19, 2008 the Protestants filed a Motion to Strike the Affidavit of Kenneth J. Snell as to PM_{2.5} and Mercury. The affidavit was filed by Basin Electric as an exhibit to their Response to Protestants' Motion for Summary Judgment. The Protestants alleged paragraphs 6, 7, 9 and 10 of the affidavit contained previously undisclosed expert opinions on PM_{2.5}. The Protestants asserted the late disclosure of these opinions was in violation of EQC's Scheduling Conference Order and was therefore unduly prejudicial.

Basin Electric argued the affidavit was a reiteration of previously disclosed expert opinions and the Protestants had an opportunity to examine Kenneth J. Snell (Snell) about PM_{2.5} during an August 14, 2008 deposition and chose not to do so.

DEQ did not participate in this argument.

III. ISSUES AND CONTENTIONS

The issue raised by the Protestants in this motion is whether Protestants can prove that Basin Electric's Affidavit of Kenneth J. Snell should be stricken as to his opinions on PM_{2.5} and Mercury because Snell's opinions were not previously disclosed and as such are unduly prejudicial to the Protestants.

IV. FINDINGS OF FACT

1. On November 10, 2005, Basin Electric submitted an air quality construction permit application to construct a coal-fired electric power generating plant, known as Dry Fork

Station, near Gillette, Wyoming. *See* Schlichtemeier Aff., ¶ 15; Schlichtemeier Aff., Ex. D; DEQ Annex ¶ 1; Protestants' Response to DEQ Annex ¶ 1.

2. On February 26, 2007, DEQ provided notice to the public that DEQ intended to issue an air quality permit to Basin Electric authorizing the construction of Dry Fork Station. The DEQ notice invited comments from the public and the Protestants submitted lengthy comments in support of their position that the proposed permit violated Wyoming law.

3. On October 15, 2007, the Director of DEQ determined that Basin Electric's application for the Dry Fork Station satisfied the applicable statutory and regulatory requirements and issued Air Quality Permit CT-4631. By issuing the permit, the Director of DEQ determined the application satisfied both New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements. *See* Schlichtemeier Aff., ¶¶ 32-33, Ex. T and Ex.

U.

4. In Air Quality Permit CT-4631, DEQ states the appeal rights available as follows:

Any appeal of this permit as a final agency action of the Department must be made to the Environmental Quality Council within sixty (60) days of permit issuance per Section 16, Chapter 1, General Rules of Practice and Procedure, Department of Environmental Quality.

5. In accordance with the permit appeal rights guidance and the DEQ's Rules of Practice and Procedure, Protestants filed their Protest and Petition for Hearing on November 1, 2007 and the case was referred to the EQC for hearing.

6. On July 14, 2008, the EQC issued an Order Granting Stipulated Motion for Extension of Deposition and Dispositive Motion Deadlines. The EQC set the deadline for expert depositions to be completed by August 15, 2008. On August 14, 2008, Snell was deposed by the parties. *See Protestant's Reply in Support of Motion for Summary Judgment, Exhibit 54.*

7. A motion hearing was held by EQC on September 29, 2008. Prior to the September 29, 2008 motion hearing, the Protestants, Basin Electric and DEQ filed Motions for Summary Judgment. In its response to Protestants' Motion for Summary Judgment, Basin Electric attached the Affidavit of Kenneth J. Snell.

8. The Snell Affidavit is six pages long and contains 28 paragraphs. The Protestants asserted that paragraphs 6, 7, 9 and the last sentence of paragraph 10 contain previously undisclosed expert opinions on PM_{2.5}.

9. Pages from the transcript of the August 14, 2008 deposition of Snell reflected the following exchange:

Q. (By Ms. Cooley) Sure. Do you at this point in time have any plans to testify on PM_{2.5} in this case?

...

A. I'll say, as far as I know, I don't plan on it. But if PM_{2.5} comes up as a BACT issue, I could offer my opinions as to PM_{2.5} and BACT. So I don't know if it will come up as an issue that is something that I will be asked to address.

Id. at Exhibit 54, p. 35.

The examination of Snell on PM_{2.5} ended at that point.

V. CONCLUSIONS OF LAW

A. Principles of Law

10. A presumption exists that members of this Council, "**are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.**" *Dorr v. Bd. Of Cert. Public Accountants*, 146 P.3d 943,

959 (Wyo. 2006), citing *Fallon v. Wyoming State Board of Medical Exam*, 441 P.2d 322, 329 (Wyo. 1968) (emphasis added).

11. All hearings before the EQC, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. § 35-11-101 through 1104 and the Wyoming Administrative Procedure Act. Department of Environmental Quality, Rules of Practice and Procedure, Chapter 1, Section 3 and Chapter 2.

12. Exclusion of expert opinion evidence is a remedy where a party would be prejudiced by the inclusion of previously undisclosed opinion evidence. *Winterholler v. Zolessi*, 989 P.2d 621 (Wyo. 1999).

B. Application of Principles of Law

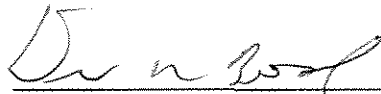
13. The EQC finds that the opinions expressed in the Affidavit of Kenneth J. Snell do not constitute a violation of the Scheduling Conference Order. As evidenced by the exchange between Protestants' counsel and Snell at the August 14, 2008 deposition of Snell. Protestants had an opportunity to depose Snell on his opinions pertaining to the PM_{2.5} issue and chose not to do so.

ORDER

IT IS THEREFORE ORDERED that:

1. The Protestants' September 19, 2008 Motion to Strike the Affidavit of Kenneth J. Snell as to PM_{2.5} and Mercury is hereby DENIED.

SO ORDERED this 2 day of ^{December}~~November~~, 2008.



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CERTIFICATE OF SERVICE

I, Joe F. Girardin, certify that at Cheyenne, Wyoming, on the 8th day of December, 2008,
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