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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 PROTESTANTS' MOTION FOR SUMMARY JUDGMENT
REGARDING CLAIM V**

THIS MATTER came before the Environmental Quality Council (EQC) on September 29, 2008, for oral argument on a motion for summary judgment filed by the Protestants. 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, Mark Ruppert. The Department of Environmental Quality, Air Quality Division (DEQ) appeared by and through its counsel, Senior Assistant Attorney General Nancy Vehr.

In Protestants' November 1, 2007 Protest and Petition for Hearing (Petition), Protestants identified eight separate claims of violation of the Prevention of Significant Deterioration (PSD) permitting process. Protestants filed a Motion for Summary Judgment, with attachments, legal memoranda and responses regarding Claim V of the

Petition, as set forth in paragraphs 48-53. 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 by 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 project 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 construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and approved Basin Electric's application to construct Dry Fork Station by issuing Air Quality Permit CT-4631.

On November 1, 2007, Protestants filed the Petition asserting eight separate claims of violations of the PSD permitting process. Specifically, in Claim V of the Petition, Protestants alleged that DEQ failed to set an enforceable and immediate Best Available Control Technologies (BACT) limit for mercury emissions in the final air permit.

Protestants filed a motion for summary judgment on Claim V as set forth in paragraphs 48-53 of the Petition.

III. ISSUES AND CONTENTIONS

The issue raised by Protestants in this September 29, 2008 motion hearing is whether DEQ failed to conduct a complete "top down" BACT analysis and set a limit for mercury emissions in violation of law. Protestants moved for summary judgment on this issue.

DEQ argued that its approach in setting a mercury emission limit, requiring a mercury control system to be installed, and providing for a mercury optimization study combine to form a "design, equipment, work practice" and "operational standards" which were established by DEQ, satisfied the BACT process.

Basin Electric argued that a BACT analysis was not appropriate for mercury emissions because the mercury control technologies are still in the developmental stages and available mercury control systems and associated vendor guarantees are limited to date. Basin Electric asserted there are disputes of material fact regarding this issue.

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 October 15, 2007, the Director of DEQ determined that Basin Electric's application for construction of 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.

3. 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.

See Air Quality Permit CT-4631.

4. In accordance with the appeal right guidance and the DEQ's Rules of Practice and Procedure, Protestants filed their Petition on November 1, 2007. The Protestants asserted eight separate counts or claims of violation of the PSD permitting regulations. The case was thereafter referred to the EQC.

5. Protestants thereafter filed a motion for summary judgment on Protestants' Claim V in its petition. Protestants' asserted in this claim that DEQ failed to comply with PSD regulations by not conducting a complete "top down" BACT analysis on mercury emissions.

6. The November 10, 2005 permit application was filed with DEQ pursuant to the Wyoming Environmental Quality Act (WEQA) and the Prevention of Significant Deterioration (PSD) program created by the federal Clean Air Act (CAA), as administered by the State of Wyoming, Department of Environmental Quality, Air Quality Division (DEQ/AQD), pursuant to Wyoming's state implementation plan (SIP) approved by the Environmental Protection Agency (EPA). The permit application included an ambient air impact analysis and estimation of the boiler's uncontrolled mercury emissions and proposed a controlled mercury emission rate. *See* Schlichtemeier Aff., Exh. D (Basin's Permit Application) at §§ 5.3.2, 5.3.4.

7. Following DEQ's review of Basin Electric's permit application, DEQ requested Basin Electric provide a mercury BACT analysis at emission levels of 10×10^{-6} , 20×10^{-6} and 30×10^{-6} lb/MW-hr and include control efficiencies and cost effectiveness. *Id.* at ¶ 19 (Ex. H, Completeness Review No. 3, at 1).

8. On July 17, 2006, the DEQ received Basin Electric's Response to Completeness Review No. 3 addressing mercury emissions and controls. Basin Electric

noted that, after DEQ had requested the additional information, the EPA had revised the Clean Air Mercury Rule, setting mercury emission limits to 97×10^{-6} lb/MW-hr for new units with dry flue gas desulphurization (FGD) burning subbituminous coal. Basin Electric represented that it would comply with the New Source Performance Standards (NSPS) limit. *Id.* at ¶ 22, Ex. K; Ex. 1.

9. In addition to complying with the NSPS limit, Basin Electric stated that its proposed emission control strategies for other pollutants which included “dry scrubbing for SO₂ control and a fabric filter for control of particulates, represented Best Demonstrated Technology (BDT) for control of mercury.” *See* Ex. 1 Schlichtemeier Aff, Ex. K at 2.

10. Following review of four recently issued permits in Nevada, Iowa, Utah and Colorado, Basin Electric concluded that a true mercury BACT analysis was not possible because control technologies were in the developmental stage so there was limited information regarding possible alternatives and potential control efficiencies.

11. On October 15, 2007, after extensive review and comment, the Director of the DEQ and the Administrator of the AQD issued Air Quality Permit CT-4631 (Permit) to Basin Electric to construct the Dry Fork Station to be located approximately seven (7) miles north of Gillette, Wyoming. *See* Schlichtemeier Aff., ¶ 33, Ex. U.

12. Paragraph 10 of the permit requires Basin Electric to address mercury emissions from the PC Boiler as follows:

A) A one year mercury optimization study **shall** be performed at this facility with a target emission rate of no more than 20×10^{-6} lb/MW-hr, 12 month rolling average. A protocol for the study **shall** be submitted [to] the Division for review and approval prior to commencement of the study. The protocol **shall** include a description of control technique(s) to be employed including type of sorbent, if applicable, and proposed

operational parameters (e.g. carbon injection rate), test methods, and procedures. The optimization study **shall** commence no later than 90 days after initial startup. The results of the study **shall** be submitted to the Division within 30 days of the completion of the study.

B) A mercury control system **shall** be installed and operated at this facility within 90 days of initial startup. This permit **will be reopened to revise the mercury limit** in condition 9 and/or add operational parameters to this condition based on the results of the mercury optimization study.

Air Permit CT 4631 ¶ 10 (emphasis added).

13. All findings of fact set forth in the following conclusions of law section shall be considered a finding of fact and are fully incorporated into this paragraph.

V. CONCLUSIONS OF LAW

A. General Principles of Law

14. The EQC's jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

15. Pursuant to the WEQA, 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) (emphasis added).

16. 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) (emphasis added).

17. All hearings before the Council, 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 (DEQ's Rules).

18. Chapter II, Section 14 of the DEQ Rules of Practice & Procedure (DEQ RPP) makes the Wyoming Rules of Civil Procedure applicable to matters before the EQC. (DEQ RPP Ch. 2, § 14).

19. The Wyoming Rules of Civil Procedure provide that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WYO. R. CIV. P. 56(c).

20. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WYO. R. CIV. P. 56(b), (c).

21. Summary judgment procedures set out in WYO. R. CIV. P. 56 apply to administrative cases. *Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, ¶ 6; 152 P.3d 367, ¶ 6 (Wyo. 2007).

22. The purpose of summary judgment is to dispose of cases before trial that present no genuine issues of material fact. *Id.* A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense. *Id.*

23. Where there are no genuine issues of material fact, summary judgment concerns application of the law. *Bd. of County Comm'rs of County of Laramie v. City of Cheyenne*, 2004 WY 16, ¶ 8; 85 P.3d 999, ¶ 8 (Wyo. 2004).

B. Principles of Law Regarding Mercury BACT Analysis

24. The WEQA requires a permit to construct “before construction or modification of any industrial facility capable of causing or increasing air or water pollution in excess of standards established by the department is commenced.” WYO. STAT. ANN. § 35-11-801(c); WAQSR Ch. 6, § 2.

25. Before the DEQ may issue a permit, the applicant must prove to the DEQ Director’s satisfaction that the applicant has complied with the WEQA and regulations promulgated thereunder. WYO. STAT. ANN. § 35-11-801; WAQSR Ch. 6, § 2.

26. Under the CAA, EPA establishes national primary and secondary ambient air quality standards. 42 U.S.C. § 7409(a).

27. Individual states have the responsibility for assuring air quality within their geographic area will meet the national primary and secondary ambient air quality standards. 42 U.S.C. § 7407(a).

28. The Director of DEQ has authority to perform any and all acts necessary to administer the provisions of the WEQA and any rules, regulations, standards, or requirements established thereunder, and to exercise all incidental powers as necessary to carry out the purposes of the WEQA. WYO. STAT. § 35-11-109(a)(i). The Administrator of DEQ’s Air Quality Division has the “powers as shall be reasonably necessary and

incidental to the proper performance of the duties imposed” on the Air Quality Division by the WEQA. WYO. STAT. § 35-11-110(a)(x).

29. The DEQ/AQD, as Wyoming’s air quality permitting agency, analyzes the air quality impacts of the proposed facility and establishes emission limits which are protective of Wyoming’s air quality. WAQSR Ch. 6, §§ 2(c), 4(a).

30. DEQ/AQD’s air quality construction permitting program requires a BACT analysis for the proposed facility for each pollutant subject to regulation. WAQSR Ch. 6, § 2(c)(v).

31. Pursuant to the WAQSR, BACT is defined as:

. . . an emission limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under these Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for [sic] any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application or [sic] production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, he may instead prescribe a design, equipment, work practice or operational standard or combination thereof to satisfy the requirement of Best Available Control Technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results. Application of BACT shall not result in emissions in excess of those allowed under Chapter 5, Section 2 or Section 3 of these regulations and any other new source performance standard or national emission standards for hazardous air pollutants promulgated by the EPA but not yet adopted by the State of Wyoming.

WAQSR Ch. 6, § 4(a).

C. Application of Principles of Law

32. Generally, DEQ follows EPA's five-step, top-down BACT analysis approach outlined in the EPA's NSR Manual. However, if an emission standard is infeasible, the Administrator may prescribe a "design, equipment, work practice or operational standard or combination thereof" to satisfy BACT.

33. DEQ determined the permit's mercury emission limit and optimization study requirements are a combination of "design, equipment, work practice" and "operational standards" established by the DEQ through the BACT process. Therefore, it reasoned the combined NSPS mercury emission limit, the requirement for a mercury control system to be installed and operated within ninety days of startup, and the mercury optimization requirements satisfy BACT.

34. There is a dispute over the facts material to the question regarding whether a complete BACT analysis was required on mercury emission limits. A one year study has been proposed by DEQ, the results of which are unknown regarding the pollutant reduction technologies' impact on mercury. There are issues of material fact as to whether WAQSR allows design, equipment, work practice or operational standards or combination thereof to satisfy the BACT process in this case.

35. Therefore, based on all the foregoing findings of fact and conclusions of law, Protestants have failed to demonstrate that it is entitled to judgment as a matter of law on Claim V.

ORDER

IT IS THEREFORE ORDERED that:

The Protestants' Motions for Summary Judgment in regard to the issue of whether Department of Environmental Quality properly set a mercury BACT limit is DENIED and Count V of the November 1, 2007 Protest and Petition for Hearing remains an issue for hearing.

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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