

DEC 08 2008

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 GRANTING BASIN ELECTRIC COOPERATIVE'S AND DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTIONS FOR SUMMARY JUDGMENT REGARDING PROTESTANTS' CLAIMS II AND III

THIS MATTER came before the Environmental Quality Council (EQC) on September 29, 2008, for oral argument on motions summary judgment filed by all three parties. 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, James Angell. Basin Electric Power Cooperative (Basin Electric) appeared by and through counsel, Patrick Day. The Department of Environmental Quality, Air Quality Division (DEQ) appeared by and through its counsel, Senior Assistant Attorney General Nancy Vehr.

In the 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. All three parties filed Motions for Summary Judgment, with attachments, legal memoranda and responses regarding Claims II and III

of the November 1, 2007 Petition, as set forth in paragraphs 33-41. The EQC has considered the motions, written responses and arguments 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 purpose 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 November 10, 2005 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 a Protest and Petition for Hearing asserting eight separate claims of violations of the PSD permitting process. Specifically, in Claims II and III of the Petition, the Protestants allege that DEQ erred by failing to consider Integrated Gasification Combined Cycle (IGCC), supercritical and ultra-supercritical technologies as potential pollution control technologies in the "Best Available Control Technologies" (BACT) portion of the permitting process.

All three parties thereafter filed motions for summary judgment on Claims II and III as set forth in paragraphs 33-41 of the Petition.

III. ISSUES AND CONTENTIONS

The issue raised by Protestants in this September 29, 2008 motion hearing is whether DEQ was required to consider IGCC or supercritical technologies to be control technologies that had to be evaluated as part of the BACT process required by WAQSR Ch. 6, § 4(a). This issue was raised in Protestants' November 1, 2008 Petition in Counts II and III.

DEQ argued IGCC, supercritical and ultra-supercritical technologies would have required a redefinition of the source and therefore were not subject to a BACT process. Basin Electric agreed with DEQ's position.

All parties moved for summary judgment on this issue. All parties agreed there were no genuine issues of material fact and argued for summary judgment as a matter of law.

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 rights guidance and the DEQ's Rules of Practice and Procedure, Protestants filed their Protest and Petition for Hearing on November 1, 2007. The Protestants asserted eight separate counts or claims of violations of the PSD permitting regulations. The case was thereafter referred to the EQC.

5. All three parties thereafter filed motions for summary judgment on the Protestants' Claims II and III in its Protest and Petition for Hearing. Protestants asserted in those two claims that the PSD permitting process was flawed because DEQ failed to consider IGCC, supercritical and ultra-supercritical technologies as potential pollution control technologies in the BACT portion of the permitting process.

6. Under the permit application, Basin Electric proposed a mine-mouth 422 megawatt (MW)(gross)/385 MW(net) pulverized coal-fired electric power generating unit. *See* Schlichtemeier Aff., ¶ 34. The 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 Air Quality Division of DEQ (DEQ/AQD), pursuant to Wyoming's State Implementation Plan (SIP) approved by the Environmental Protection Agency (EPA).

7. The DEQ/AQD completed its Permit Application Analysis on February 5, 2007. *See* Schlichtemeier Aff., Ex. N.

8. Basin Electric selected a subcritical pulverized coal boiler as its proposed emission source technology for purposes of its PSD permit application. This technology

has a proven track record burning subbituminous Wyoming coal, at Wyoming elevation, with an availability factor in excess of 90%. *See Williams Aff.*, Ex. A at 3.

9. On April 20, 2007, the DEQ/AQD requested information from Basin Electric regarding its selection of a pulverized coal (PC) boiler instead of IGCC, supercritical or ultrasupercritical technologies. *See Schlichtemeier Aff.*, Ex. P.

10. DEQ/AQD required Basin Electric to provide information regarding its technology selection, but DEQ/AQD did not require Basin Electric to evaluate IGCC or supercritical technologies as part of the BACT analysis. Basin Electric responded to the DEQ/AQD's request. *See Schlichtemeier Aff.*, ¶¶ 29-30, Ex. R, Ex. S, and Ex. T at DEQ/AQD Bates Nos. 004182-4240.

11. Subcritical and supercritical technologies differ in large part due to differences in their main steam turbine operating pressures and temperature. *See Expert Report of Kenneth J. Snell (Snell Report)* at 10-11 and 17 (attached as Ex. 10 to Basin Electric Brief).

12. Supercritical boilers operate at temperatures and pressures above the "critical point" of water, while subcritical boilers operate at temperatures and pressures below the critical point of water. *See Snell Report* at 10 (Basin Electric Ex. 10); June 11, 2007 Memo re: Subcritical – Supercritical Boiler Comparison (Protestants Ex. 28); and *Schlichtemeier Aff.*, Ex. S at DEQ/AQD Bates No. 001013. As a result of these different pressure and temperature conditions, changing from subcritical to supercritical technologies would require a different boiler made with different steel alloys, different water wall tubing, different valves, different turbines, different reheaters, different boiler feed pumps, and a different economizer. *See Sahu Depo.* (excerpts attached as Sahu

Depo. to Basin Electric's Brief) at 58-59, 62-67; Schlichtemeier Aff., Ex. R, Ex. S, and Ex. T; Williams Aff., Ex. C; and Snell Report at 10-11 and 17 (Basin Electric Ex. 10).

13. In an IGCC facility, coal is crushed and then thermally converted to a synthetic gas (syngas) for combustion in a gas turbine. IGCC technology uses two steps: gasification and combined cycle power generation, which are not present in subcritical technologies. The syngas is combusted in a combustion turbine to produce the energy that is converted to electricity. *See* Schlichtemeier Aff., Ex. T at DEQ/AQD Bates No. 004200; Jenkins Depo. at 120:4-125:23 (attached as Ex. 6 to DEQ Motion).

14. In an IGCC plant, no coal-fired boiler is involved. The fuel combusted to generate electricity in a subcritical pulverized coal plant is coal, but an IGCC plant combusts syngas. *See, e.g.,* Jenkins Expert Report at 13-18 (Ex. 4 to Basin Electric Brief); Williams Aff., Ex. D at 4-7.

15. Protestants did not dispute these technical differences between IGCC and a subcritical coal boiler. In a June 26, 2008 e-mail to Mr. Angell, counsel for the Protestants, Protestants' expert Mr. Fowler acknowledged that "Jenkins [Basin Electric's expert] also includes some detail on how an IGCC is very different from a [subcritical] plant. He is basically correct about that" *See* Fowler E-mail, p. 2 (Basin Electric Ex. 5).

16. DEQ did not consider IGCC or supercritical technologies to be control technologies that had to be evaluated as part of the BACT process required by WAQSR Ch. 6, § 4(a). As a consequence, although DEQ did require Basin Electric to explain the reasons for its decision not to employ these technologies, DEQ did not submit these

technologies to a separate “BACT” analysis as potential pollution control options when issuing Basin Electric’s permit. *See* Schlichtemeier Aff., ¶ 34-35, 44-47.

17. DEQ did not do so because it considered these technologies to be fundamentally different emission source technologies than the one proposed by Basin Electric and, if applied, would require Basin Electric to “redefine” its proposed emissions source, a subcritical pulverized coal boiler, contrary to DEQ’s interpretation of WAQSR, Ch. 6, § 4(a).

18. Since at least 1989, and in the more than 40 PSD permit reviews conducted by the DEQ/AQD since 1996, the DEQ/AQD’s policy has been to not require redefinition of a source in the BACT analysis. *See* Schlichtemeier Aff., ¶¶ 34-36, 47; Ex. T at DEQ/AQD Bates Nos. 004159-4161.

19. The DEQ/AQD conducted a site-specific BACT analysis for the Dry Fork Station facility that did not include redefining the source. *See* Schlichtemeier Aff., ¶ 34.

20. 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

21. The Council’s jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

22. 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).

23. 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).

24. 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).

25. 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).

26. 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).

27. 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).

28. 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).

29. 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.*

30. 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 BACT Analysis

31. 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.

32. 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.

33. Under Wyoming law, the applicant proposes the emissions source for which a permit is required. WAQSR Ch. 6, §§ 2(c)(v), 4(a).

34. 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).

35. 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).

36. 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).

37. This regulation requires DEQ to consider emission limitations that can be achieved from a "proposed source." *See also* WAQSR Ch. 6, § 2(c). In this case, the

“proposed source” in the permit application is Basin Electric’s subcritical pulverized coal boiler. The BACT regulation also provides that DEQ is to consider the application of production processes, methods, etc., that may be applied to “such source” for control of pollutants. It therefore follows that the BACT process requires consideration of control technologies that may be available for the source proposed by the permit applicant. In this case, Basin Electric’s proposed emissions source is a subcritical pulverized coal boiler, not IGCC or supercritical technologies.

38. EPA construes the federal BACT statute in this fashion, stating in its New Source Review Workshop Manual (NSR Manual) in 1990 that “EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives.” NSR Manual at B.13 (attached as Ex. 2 to Basin Electric’s Brief). This interpretation of the BACT statute was recently affirmed by the United States Seventh Circuit Court of Appeals. *Sierra Club v. U. S. EPA*, 499 F.3d 653, 655 (7th Cir. 2007). It has also been upheld by the Environmental Appeals Board (EAB) on numerous occasions. *See, e.g., In re Prairie State Generating Station*, PSD Appeal No. 05-05, 13 E.A.D. ____, slip op. at 29 (EAB 8-24-2006) (it is the “proposed facility” identified by the permit applicant that is subject to BACT and that “[i]n this context, the permit applicant initiates the process and, in doing so, we conclude, defines the proposed facility’s end, object, aim or purpose—that is the facility’s basic design”); and slip op. at 27 (“We have specifically stated that ‘EPA has not generally required a source to change (i.e., **redefine**) **its basic design.**’” (quoting *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 136 (EAB 1999)) (emphasis in original); *In the Matter of Hawaiian*

Commercial & Sugar Co., 4 E.A.D. 95, 99 (EAB 1992); *In re Pennsauken County, New Jersey, Resource Recovery Facility*, 2 E.A.D. 667 (EAB 1992).

39. The EQC has followed this interpretation of the BACT regulation in Wyoming. The EQC held in 1993:

The Applicant, Black Hills, defined the proposed source, a coal-fired steam electric generating plant with a pulverized coal boiler. Federal and state laws and regulations do not require the DEQ/AQD to redefine the source and as a result cause Black Hills to build a different type of boiler, such as a circulating fluidized bed boiler, rather than a pulverized coal boiler. The DEQ/AQD properly exercised its discretion not to redefine the source.

In the Matter of a Permit Issued to Black Hills Power & Light Company, Neil Simpson Unit # 2, Permit No. CT-1028, Docket No. 2476-93 at Conclusions of Law ¶ 5 (Basin Electric Ex. 3).

40. An agency may make law through adjudication using prior contested cases as precedent. *Montana-Dakota Util. Co. v. Pub. Serv. Comm'n*, 746 P.2d 1272, 1275 (Wyo. 1987).

41. A rule of law developed in the context of agency adjudication applies to the future conduct of all persons subject to the agency's jurisdiction. *N.L.R.B. v. Bell Aerospace Co.*, 410 U.S. 267, 293-294 (1974).

C. Application of Principles of Law

42. Protestants conceded that DEQ cannot redefine a facility. Rather, Protestants argued that what they perceive to be Basin Electric's basic purpose for this project, generating electricity from coal, can be met with IGCC and supercritical technologies, and therefore requiring these technologies to be considered as control devices does not "redefine" the basic purpose of the project. Basin Electric argued that

employment of IGCC technology would require Basin Electric to scrap its boiler altogether and combust synthetic gas. Employment of supercritical technologies would require changes to Basin Electric's proposed source all the way down to the basic metallurgy of the boiler, and numerous other substantial changes to the design of the subcritical boiler, associated turbines, and additional plant equipment, as acknowledged by Protestants' expert, Dr. Sahu.

43. DEQ argued that the permitting process required DEQ to look at the emission points on the **proposed source**. Here, the applicant proposed a pulverized coal source, and DEQ performed a BACT analysis on that source. DEQ did not perform a BACT analysis on IGCC, supercritical and ultra-supercritical sources because that was not the source presented by the applicant.

44. Protestants' interpretation of the BACT statute has been rejected by the EAB and the U.S. Seventh Circuit Court of Appeals. In response to this argument, the EAB stated that: "We . . . specifically reject Petitioners' contention that an electric generating facility's purpose must be viewed as broadly as 'the production of electricity, from coal.'" *Prairie State*, slip op. at 32. On appeal, the Seventh Circuit affirmed the EAB decision, stating that: "Refining the statutory definition of 'control technology' – 'production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques' –to exclude redesign is the kind of judgment by an administrative agency to which a reviewing court should defer." *Sierra Club v. EPA*, 499 F.3d at 655.

45. The question that arises, when redefinition of the source is implicated, is "where control technology ends and a redesign of the 'proposed facility' begins." *Sierra*

Club v. EPA, 499 F.3d at 655. Here, the facts applicable to this evaluation are not disputed. The application of IGCC or supercritical technologies would require Basin Electric to reconfigure its proposed plant, which the U.S. Seventh Circuit Court of Appeals has acknowledged would constitute an improper redesign of the applicant's proposed major stationary source. *Id.* The definition of BACT "does not include redesigning the plant proposed by the permit applicant" and requiring the permit applicant to make changes to the plant that would be required to accept a different kind of coal would be a "reconfiguration [that] would constitute a redesign." *Sierra Club*, 499 F.3d at 654, 657.

46. DEQ's determination that IGCC and supercritical technologies were not required for consideration in the BACT process was therefore in accord with the law. DEQ did not err in concluding that IGCC and supercritical technologies would require Basin Electric to redefine its proposed subcritical boiler, and these technologies were not required to be considered as pollution control technologies under the BACT process.

47. This conclusion is in accord with the EQC's prior holdings in the *Neil Simpson* permit appeal cited above, and with EPA's interpretation of the BACT statute. DEQ properly followed the approach required under the Clean Air Act (CAA) and the WEQA permitting process: "...we conclude that the permit issuer appropriately looks to how the applicant, in proposing the facility, defines the goals, objectives, purpose, or basic design for the proposed facility. Thus, the permit issuer must be mindful that BACT, in most cases, should not be applied to regulate the applicant's objective or purpose for the proposed facility" *In re Prairie State Generating Station*, slip op. at

30.


48. Based on all the foregoing findings of fact and conclusions of law, DEQ/AQD's decision to not require IGCC, supercritical and ultra-supercritical technologies in the BACT analysis was authorized under the WAQSR, the WEQA, and the CAA.

ORDER

IT IS THEREFORE ORDERED that:

1. The Department of Environmental Quality and Basin Electric Power Cooperative's Motions for Summary Judgment in regard to the issues of IGCC, supercritical and ultra-supercritical technologies is GRANTED. Protestants' Motion for Summary Judgment on these same issues is DENIED, and the Department of Environmental Quality's decision to issue the Permit as it relates to the contentions set forth in Counts II and III of the November 1, 2007 Protest and Petition for Hearing is affirmed.

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


Dennis M. Boal, Chairman
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CERTIFICATE OF SERVICE

I, Joe F. Girardin, certify that at Cheyenne, Wyoming, on the 8th day of December, 2008,
I served a copy of the foregoing document by electronic email to the following persons:

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