

BEFORE THE STATE OF WYOMING
ENVIRONMENTAL QUALITY COUNCIL

DISPOSITIVE MOTION HEARING IN THE MATTER OF THE BASIN
ELECTRIC POWER COOPERATIVE, DRY FORK STATION

VOLUME I
TRANSCRIPT OF HEARING PROCEEDINGS

Transcript of Hearing Proceedings in the above-entitled matter before the Environmental Quality Council, commencing on the 29th day of September, 2008, at 1:00 p.m., at the Wyoming Game and Fish Office, 3030 Energy Lane, Casper, Wyoming, Ms. Deborah A. Baumer presiding, with Councilmembers Mr. Dennis Boal, Mr. F. David Searle, Mr. John Morris, Mr. Thomas Coverdale, Mr. Tim Flitner and Dr. Fred Ogden in attendance. Also present were Mr. Jim Ruby, Executive Secretary, Ms. Terri Lorenzon, Director/Attorney, Ms. Marion Yoder, Counsel from Attorney General's Office, Mr. Joe Girardin, Paralegal to the Council, and Ms. Kim Waring, Executive Assistant.

A P P E A R A N C E S

1

2 For Basin Electric: MR. PATRICK R. DAY
MR. MARK R. RUPPERT
3 Attorneys at Law
HOLLAND & HART
4 2515 Warren Avenue, Suite 450
P.O. Box 1347
5 Cheyenne, Wyoming 82003-1347

6

7 For DEQ: MS. NANCY E. VEHR
MR. LUCAS J. ESCH
Assistant Attorneys General
8 WYOMING ATTORNEY GENERAL'S OFFICE
123 Capitol Building
9 Cheyenne, Wyoming 82002

10

11 For Protestants: MR. JAMES S. ANGELL
MS. ROBIN COOLEY
12 MS. ANDREA ZACCARDI
Attorneys at Law
EARTHJUSTICE
13 1400 Glenarm Place, Suite 300
Denver, Colorado 80202

14

15 MR. REED ZARS
Attorney at Law
16 910 Kearney Street
Laramie, Wyoming 82070

17

18

19

20

21

22

23

24

25

1 they quote that, that refining that definition to exclude
2 redesign -- in other words, you don't read that language
3 to be so broad as to require redesign -- is the kind of
4 judgment by an administrative agency to which the
5 reviewing court should defer.

6 The production process -- and the other cite I
7 had to you here was the lower court's decision that was
8 on appeal, where they specifically rejected the
9 contention that protestants make here. So we believe
10 it's dispositive.

11 DR. OGDEN: Being a thoughtful person, I
12 think I have more questions, and they're just not coming
13 to mind immediately. So if someone else has one, please
14 go ahead.

15 HEARING OFFICER BAUMER: Mr. Morris?

16 Mr. Searle?

17 CHAIRMAN SEARLE: Thank you, Ms. Baumer.

18 Mr. Day, it seemed to me, when I was reading
19 through my bale of paper, it seemed like you had a few
20 words in there about the fact that your client did
21 consider IGCC, at least at some level?

22 MR. DAY: Yes.

23 CHAIRMAN SEARLE: Supercritical at some
24 level?

25 MR. DAY: Yes, extensively.

1 CHAIRMAN SEARLE: And that was during your
2 early design process?

3 MR. DAY: It was both before the permit
4 application was filed, during the period of time that the
5 permit was under consideration and afterward while in
6 response to public comments. At all three phases, Basin
7 reconsidered both technologies and submitted comments to
8 DEQ on its assessment of the pros and cons of each. The
9 ultimate judgment didn't change that PC technology is the
10 right choice here.

11 But, yes, all of those technologies were
12 extensively considered. And we attached all of that to
13 our motions. That's some of that bale of paper. So it
14 is in the record.

15 CHAIRMAN SEARLE: And so during the
16 process, even though, technically, I guess, it wasn't
17 included in the BACT process as such --

18 MR. DAY: Right.

19 CHAIRMAN SEARLE: -- there was
20 communication and probably meetings that you've had with
21 the DEQ to talk about --

22 MR. DAY: Yes. DEQ, in fact, expressly
23 asked Basin to report on its consideration on the
24 technologies. And so formal reports were filed with DEQ.

25 CHAIRMAN SEARLE: Just to make one

1 statement, I may have an advantage over some at the table
2 here, in the sense that I've actually done BACT analysis,
3 which I try not to remember.

4 MR. COVERDALE: How is that an advantage,
5 then --

6 CHAIRMAN SEARLE: I don't know.

7 MR. COVERDALE: -- if you can't remember?

8 CHAIRMAN SEARLE: May find it's a real
9 advantage. But my concern is -- and I'm reading this
10 language similar -- just make the statement, I'm reading
11 it similar to what Mr. Coverdale has in regards to the
12 definition of the source. And I get concerned as a
13 businessperson. I certainly don't want to put myself in
14 Basin's place. But if I design and make a facility
15 application and all that goes with that over many years
16 and design, to think that that basic design is going to
17 be -- or facility could be redefined through this
18 process, it doesn't seem very efficient. So I'd just add
19 that.

20 HEARING OFFICER BAUMER: Dr. Ogden?

21 DR. OGDEN: The argument was made earlier
22 that if the technology proposed that it's not technically
23 feasible that it meet emission standards, that
24 technology, by default, will not be constructed. The
25 proposed station will meet air quality standards as the

1 fuel combustion techniques. So I think that's an issue
2 of fact in this motion. I'm going to vote against it.

3 CHAIRMAN SEARLE: Thank you, Mr. Boal.
4 Mr. Coverdale?

5 MR. COVERDALE: I'm going to vote for it.
6 I think that the language in the BACT definition is
7 pretty clear. It says proposed. And if we grant this
8 motion and go to hearing, I don't know where we end up.
9 And we take away the ability of individual industrial
10 entities to propose how they want to generate power and
11 what makes economic sense for their business. I think
12 that's heading down a road that the legislature may want
13 to go down, but I don't think we should.

14 Dennis, I hear you, but I also notice that you
15 had to catch yourself when you started to say best
16 available control technology. I think the language in
17 that definition is very clear, that once the thing is
18 proposed, DEQ can reject it. But it's basically that
19 proposed manufacturing process around what kind of
20 control should be imposed on them.

21 And I don't think that DEQ, under BACT
22 definition, can tell somebody submitting a proposal that,
23 no, you can't use your proposed technology. You need to
24 use some totally different technology that may not be as
25 reliable, may not work at high altitude. Those are all

1 facts that they can argue about. But for BACT, I think
2 it's very clear, and therefore, I will be voting for it.

3 CHAIRMAN SEARLE: Thank you,
4 Mr. Coverdale.

5 Dr. Ogden?

6 DR. OGDEN: I'm in doubt of the motion for
7 one reason. And that is, I don't quite understand the
8 legislative intent that's behind this section of Wyoming
9 statute. As I understand, it was taken verbatim from the
10 federal statute. What do they mean when they say,
11 including fuel cleaning or treatment or innovative fuel
12 combustion techniques? Do they mean -- do they intend to
13 mean things like the advanced techniques that we're
14 talking about today? Until I know the answer to that
15 question, I would hesitate to vote yes on this.

16 CHAIRMAN SEARLE: Thank you.

17 Mr. Flitner?

18 MR. FLITNER: I'm going to vote yes on it
19 for almost all the same reasons that Mr. Coverdale
20 expressed. I could go on, but he covered the two or
21 three main points that I had. So I'll just leave it
22 there.

23 CHAIRMAN SEARLE: Thank you.

24 Mr. Morris?

25 MR. MORRIS: I support the motion. Tom

1 brought up most of them. But I think the facts have been
2 considered. I think DEQ considered these facts. They
3 considered these facts, and so did EPA consider these
4 facts. And if they have been considered and they approve
5 them and they meet the requirements for the permit, then
6 let's go with it.

7 CHAIRMAN SEARLE: Thank you, Mr. Morris.

8 I also intend on voting for it for some of the
9 same reasons Mr. Morris alluded to. This program has a
10 long history of how it has done its analysis. And it has
11 been accepted not only by the DEQ, but it's also been
12 accepted by EPA. And I believe that's enough
13 clarification on the intent of what that language is that
14 I can support the way they've applied it.

15 At this point, I'll ask roll call vote again.
16 Let's start down with Mr. Boal.

17 MR. BOAL: I vote against the motion.

18 CHAIRMAN SEARLE: Mr. Coverdale?

19 MR. COVERDALE: I vote for the motion.

20 CHAIRMAN SEARLE: Thank you.

21 MR. MORRIS: I vote aye.

22 CHAIRMAN SEARLE: Thank you, John.

23 Tim?

24 MR. FLITNER: Aye.

25 DR. OGDEN: Against.

1 MS. VEHR: SIL hasn't. DEQ permits have
2 had SIL, but they have not been challenged.

3 MR. BOAL: But those weren't the issues?

4 Reed, there's no dispute that the models showed
5 de minimus exceedence of the increment? Do you dispute
6 that fact?

7 MR. ZARS: I would like to know what your
8 definition of de minimis is. So if you'd tell me, are
9 you referring to like the .2?

10 MR. BOAL: Uh-huh.

11 MR. ZARS: Is there no dispute that Dry
12 Fork's influence at any time is over? That's correct.
13 And you can see the table is on 5 or 6.

14 MR. BOAL: I think I agree with you. This
15 case is -- this issue is ripe for summary judgment.
16 There's no allegation that I know of that the modeling
17 was done improperly. Is that correct?

18 MR. ZARS: That's right.

19 MR. BOAL: There's no dispute that the
20 modeling showed an exceedence of the PSD increment on at
21 least a couple of occasions. Is that right?

22 MR. ZARS: 27, I think.

23 MR. BOAL: Is there any dispute that the
24 modeling showed that the contribution from the Basin
25 Electric is more than de minimis? Are you contending

1 around the impacted area, rather than the source itself.
2 That's the difference -- that's where I became mistaken
3 through the procedures. And I wanted to clarify that
4 with Council.

5 MR. BOAL: Thank you.

6 CHAIRMAN SEARLE: Mr. Boal, do you want to
7 start the conversation? Everybody's being kind of quiet.
8 You're usually good as a starting point. Or if somebody
9 else would. Tim just smiled at me.

10 MR. FLITNER: Are we still in discussion?

11 CHAIRMAN SEARLE: Yeah. We're in
12 deliberation amongst us, is where we're at.

13 MR. FLITNER: Well, I guess with the
14 motion that's on the table, I have a few things that lead
15 me to vote for the motion. One is it's just -- it's
16 still just a model. We don't really know. It's not an
17 exact science yet. So there's quite a bit of guesswork
18 involved. And you add that to the possibility of the
19 NCIR and Coalstrip to some degree holding Wyoming hostage
20 to any development that may or may not occur, I'm really
21 uncomfortable with that. Those of us on this Council
22 were put here as custodians of Wyoming, if you will, and
23 we're kind of duty-bound to look out after Wyoming.

24 And the numbers with Coalstrip, versus this
25 one, and yet we're going to be -- we're going to be held

1 accountable for that, I'm uncomfortable with. And so
2 that's weighing pretty heavy. I kind of have to go that
3 way on this, I think, for those reasons. And, hopefully,
4 we can work this out. As time goes on, maybe we can come
5 to some sort of compromise that keeps us under.

6 The other thing is these are still, if I'm
7 reading everything correctly, allowable numbers on the
8 model. They're not actual numbers. So we're not
9 actually over five yet. And that, to me, gives us just
10 enough wiggle room to let this thing go as it is when you
11 consider the model and all that. We're still squeaking
12 in under the bar. And what we really need is some time
13 to get some of these other things under control, some of
14 which are happening in Montana.

15 So those are my thoughts, for what they're
16 worth.

17 CHAIRMAN SEARLE: Thanks, Tim.

18 Mr. Boal, I'll let you off the hook. I'll lead
19 through my logic. And bear with me. Because that way it
20 gives you something to correct when it's your turn.

21 I think, like many of us, as I was awake early
22 this morning, I think what was flashing in my head was
23 the highlighted stuff that was presented by the
24 protestants on Chapter 6, Section 4B of the regulations,
25 which I'm not going to read. We've all seen it. But it

1 the surrogate policy until the final rules are adopted.

2 The protestants and others have challenged the
3 rule that Mr. Esch was talking about as outside EPA
4 authority in a lawsuit in the D.C. Circuit Court of
5 Appeals that was filed a few months ago, I believe. You
6 should know that the legality of nationwide EPA
7 regulations can only be litigated -- there's an exclusive
8 jurisdiction clause in the Clean Air Act. Only the D.C.
9 Circuit Court of Appeals has the authority to litigate
10 the legality of EPA guidance on an issue like this, which
11 is nationwide in implementation.

12 There are arguments made by protestants here
13 that the EPA guidance is illegal because it violates
14 EPA's powers under the Act, but this Council doesn't have
15 subject matter jurisdiction to determine the legality of
16 EPA's conduct. That puts Wyoming in a position where its
17 choice is to follow the guidance or not and follow the
18 surrogate policy. And as you heard from Mr. Esch, the
19 State has always, since 1997, chosen to follow the
20 guidance..

21 This is from the affidavit that's in the
22 record. Since 1997, DEQ has made the formal decision, as
23 you heard, to follow the surrogate policy for PM 2.5 in
24 Wyoming. And this permit was issued on the strength of
25 that choice in accordance with what virtually all states

1 all around the country have all been doing since 1997.

2 Nobody's ever really had a dispute with this
3 policy until recently, when protestants of others have
4 decided to use PM 2.5 as an avenue of attack on PSD
5 permits. But this issue has been -- this is how it's
6 been done for the last eleven years nationwide, is what
7 it boils down to.

8 Let's talk about this permit and what it does
9 and how it affects PM 2.5. EPA has concluded that the
10 primary precursors for the formation of secondary PM 2.5
11 are NOx and SO2. So if you want to limit the creation of
12 secondary PM 2.5, you limit NOx and SO2. This permit has
13 the strictest NOx standard that's ever been issued in the
14 country and I think the second strictest, or nearly so,
15 on SO2 anywhere in the country. So we already have the
16 tightest possible controls for PM 2.5 precursors.

17 The PM 10 emission limit in this permit is
18 exceptionally low. You heard Mr. Ruppert say yesterday
19 that you've had to install innovative technologies like
20 circulating dry scrubbers because of these low
21 requirements. And the PM 10 emission limit, which is so
22 low, means, by definition, as much as has been done to
23 lower PM 2.5 as can be done.

24 In addition to all of that, Basin has made the
25 choice to install a special PTFE -- I'm not going to try

1 the word. I've been practicing, but I'd never get the
2 word right the first time. It's a chemical that coats
3 the bag house, which is the filter that catches the
4 particulates. And the coating that's been selected for
5 this project, PTFE, is one of the technologies that's
6 used to control PM 2.5. So we have actually done --
7 taken the step with our filter for PM 10, and it's also
8 going to be very effective for PM 2.5.

9 I also want to stress that Wyoming is in
10 attainment statewide with PM 2.5, which means everywhere
11 in Wyoming we are below the National Ambient Air Quality
12 Standard of 35 micrograms, which was the really
13 aggressive one EPA set three years ago.

14 In another case just like this, where just this
15 argument was made that you shouldn't rely on surrogate
16 policy -- this is the same Prairie State case I talked
17 about yesterday out of Illinois that went to the Seventh
18 Circuit Court of Appeals -- the Environmental Appeals
19 Board affirmed the use of the surrogate policy in part
20 because the facts demonstrated that the plant itself was
21 unlikely to have any significant impact on PM 2.5 and
22 that that had been demonstrated by -- by looking at PM
23 2.5 if you just assumed 100 percent of the particulates
24 were PM 2.5 and not PM 10.

25 Well, we've done that calculation and put it in

1 the record for you. And it's very clear what the data
2 here is in Wyoming. Dry Fork's maximum modeled emission
3 of PM 10 over a 24-hour period is 4.2 micrograms. Now,
4 only a portion of that would actually be PM 2.5. Because
5 this is -- this includes all of the particulate matters.

6 But if we assume, for the purposes of
7 understanding the impact of this permit, that 100 percent
8 of what's being emitted is PM 2.5, it's 4.2. The nearest
9 monitoring station that monitors PM 2.5 near the
10 Triton -- what was the Triton Coal Company Mine reports
11 12.6 micrograms over a three-year average, which is sort
12 of their worst case. Then if you add our worst case, you
13 get a total PM 2.5 concentration in the Dry Fork area of
14 16.8 micrograms, and the 24-hour NAAQS for PM 2.5 is 35
15 micrograms.

16 So under all conservative assumptions that you
17 can make, worst-case everything, it's less than half of
18 the NAAQS. So when DEQ, when Mr. Esch said that the
19 State has chosen not to make this an issue so they can go
20 elsewhere, there's a scientific reason behind that.
21 There isn't any health quality issue here at all.

22 Thank you.

23 HEARING OFFICER BAUMER: Thank you,
24 Mr. Day.

25 Ms. Cooley?

1 been done pursuant to that section of the regulation, and
2 what they did is they relied upon a surrogate that
3 satisfied the need for them to do an analysis of 2.5.
4 And I think that you may disagree with that. Is that
5 correct?

6 MS. COOLEY: I agree that's their
7 position.

8 CHAIRMAN SEARLE: Do you disagree that the
9 analysis has been done? I guess I'm asking that.

10 MS. COOLEY: Yes, I disagree that an
11 analysis has been done for PM 2.5.

12 CHAIRMAN SEARLE: Just so formally I've
13 asked, Mr. Esch, would you say that an analysis has been
14 done pursuant to that section or not?

15 MR. ESCH: Yes. DEQ believes an analysis
16 has been done under the surrogate policy.

17 CHAIRMAN SEARLE: Mr. Day, just so I
18 get --

19 MR. DAY: Yeah. Our position on the law
20 is that the BACT analysis which was done for PM 10 is a
21 BACT analysis for PM 2.5 under the surrogate policy. And
22 protestants' argument, as we understand it, is we
23 shouldn't follow surrogate policy and do a separate BACT
24 review for PM 2.5 alone.

25 CHAIRMAN SEARLE: You just confirmed that