

FILED

SEP 26 2008

*Jim Ruby, Executive Secretary
Environmental Quality Council*

Patrick R. Day, P.C., Bar No. 5-2246
Mark R. Ruppert, Bar No. 6-3593
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
Facsimile: (307) 778-8175

ATTORNEYS FOR BASIN ELECTRIC
POWER COOPERATIVE

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

In the Matter of:)
Basin Electric Power Cooperative) Docket No. 07-2801
Dry Fork Station,)
Air Permit CT – 4631)

**BASIN ELECTRIC POWER COOPERATIVE'S RESPONSE TO
PROTESTANTS' MOTION TO STRIKE THE AFFIDAVIT OF
KENNETH J. SNELL AS TO PM_{2.5} AND MERCURY**

Basin Electric Power Cooperative ("Basin") submits its Response to Protestants' Motion to Strike.

The Affidavit of Kenneth J. Snell is a reiteration of previously disclosed expert opinions. It does not contain "entirely new expert testimony" and it is not "prejudicial to Protestants. Protestants' Motion to Strike Aff. of Kenneth J. Snell at 1 (Sept. 19, 2008). Mr. Snell is a designated expert in this case in addition to being Basin's most integral fact witness. Because Mr. Snell's involvement with this project has been continuous and ongoing, the administrative record is packed with Mr. Snell's work product. Any assertion that he or Basin have

“sandbagged” opposing counsel in incorrect. His opinions and assertions have been on display throughout the record, including in his expert report, and were open to examination at all times.

Mr. Snell’s involvement with the Dry Fork Project began with the initial “kick-off meeting” in December 2004 and continues to this day. Expert Report and Analysis of Kenneth J. Snell at 4 (June 16, 2008). The original permit application, responses to comments, and requests for additional information were written in a large part by Mr. Snell. He also submitted information on behalf of Basin to the WYDEQ-AQD that included:

technical descriptions and evaluations of PC boiler generating technology, descriptions of potentially available emission control technologies, information regarding emission rates achieved in practice by best controlled similar sources, technical information from emission control equipment vendors, anticipated vendor guarantees, and emission rates included in recently issued permits for similar sources.

Id.

In their motion, Protestants ask the Council to strike Mr. Snell’s affidavit because it “introduce[es] entirely new expert testimony after the deadlines for discovery have long passed.” Protestants’ Mot. to Strike at 1, 3 (Sept. 19, 2008). To support this Protestants state, “[i]n the affidavit, Mr. Snell offers new expert opinions with respect to PM_{2.5} and mercury.” Protestants’ Mot. to Strike at 3. Beyond this short statement, Protestants have not identified the opinions they find objectionable. Their argument seemingly is that an expert may no longer be allowed to articulate or reiterate any opinion after the close of discovery. This argument has no support in case law or logic. The affidavit of Mr. Snell simply articulates his previously held, long-disclosed, and discoverable opinions. The affidavit introduces no new expert opinions and is not

in violation of the Council's deadline for expert designation. Without new opinions there can be no surprise or prejudice from the affidavit.

Snell Affidavit

Basin filed the Snell affidavit with its Response to Protestants' Motion for Summary Judgment. The affidavit is six pages long and contains 28 paragraphs. It contains statements by Mr. Snell about PM_{2.5} and mercury. Resp. to Protestants' Mot. for Summary J., Aff. of Kenneth J. Snell (Sept. 12, 2008). These statements consist of information already contained in the administrative record, in Mr. Snell's expert designation, and in Mr. Snell's deposition. The Affidavit of Kenneth J. Snell, filed pursuant to Wyo. R. Civ. P. 56(e), was subscribed and sworn to on September 12, 2008. The report contains previously asserted opinions and facts known to Mr. Snell. Protestants err in asserting that the affidavit contains new expert opinions with respect to PM_{2.5} and mercury. In addition, the majority of the information contained in the affidavit is fact evidence from Mr. Snell, an important fact witness, and is not constrained by expert discovery rules.

PM_{2.5}

Protestants' Motion lacks specificity as to which of Mr. Snell's opinions are new. However, one can intimate from the Motion to Strike that the Protestants feel Mr. Snell should never again discuss PM_{2.5} because his expert designation states that PM₁₀ is a proper surrogate for PM_{2.5}. Expert Report and Analysis of Kenneth J. Snell at 3 (June 16, 2008). Mr. Snell has

maintained throughout this action that PM₁₀ is the proper surrogate, not that he possesses no opinions or intent to discuss PM_{2.5}.

Protestants set up this obfuscation at Mr. Snell's deposition, where Mr. Snell was asked whether he intended to testify about PM_{2.5}. Protestants' Motion for Summary J., Exh. 54 at 35 (Sept. 2, 2008).

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 – I don't know if it will come up as an issue that is something that I will be asked to address.

Id.

The examination of Mr. Snell on PM_{2.5} ended at that point. Protestants had the opportunity to examine Mr. Snell about PM_{2.5} and chose to end the examination without doing so. Protestants' failure to examine Mr. Snell at the deposition, when they broached the subject, does not constitute an ambush from Basin. As further evidence, Protestants point to Mr. Snell's August 14, 2008, deposition testimony where he was asked whether the expert designation deadline had passed. He correctly answered in the affirmative. Protestants couple this with his expert report statement that he did not address PM_{2.5} because PM₁₀ is a proper surrogate and conclude that he is estopped from ever addressing PM_{2.5}.

In the one-sided vacuum of advocacy, Protestants' assertion is compelling. However, the record shows that Mr. Snell has neither denied nor hidden any opinion concerning PM_{2.5}. Mr.

Snell stated his position that “BEPC and WYDEQ-AQD properly used PM₁₀ as a surrogate for PM_{2.5} pursuant to EPA policy.” Expert Report at 3. He further set forth that “[a]fter my extensive review of the permit limits for NO_x, SO₂, PM₁₀, and mercury, how those permit levels were established, and Dr. Sahu’s criticism of those limits, I remain convinced that the limits represent BACT for the Dry Fork Station.” *Id.*

The opinion of Mr. Snell is and always was that using PM₁₀ as a surrogate for PM_{2.5} is appropriate. This opinion was clear and available for examination by Protestants at Mr. Snell’s deposition and during discovery. Protestants themselves raised the issue that PM₁₀ is not an acceptable surrogate for PM_{2.5}. The progression of the case necessitated Mr. Snell’s further articulation of his longstanding, openly held opinion. Protestants have been on notice of Mr. Snell’s opinion and cannot at this late date claim to have been themselves ambushed. The issue was discussed at the deposition and was not hidden at any time by Basin or Mr. Snell. Additionally, the final permit and Basin’s response to comments contain discussions of PM_{2.5}. See Basin July 11, 2006 Comments in Response to Permit Application at 111; DEQ Oct. 15, 2007 Decision Comments at 14. Mr. Snell himself drafted and reviewed Basin’s comments. Expert Report at 4. This information has been discussed repeatedly by all parties, Mr. Snell’s affidavit therefore cannot constitute a modification of the Scheduling Order.

Mercury

The alleged new opinions regarding mercury are similarly not appropriate for exclusion. This information has been available for the entirety of this action. As with the alleged PM_{2.5} opinions, Protestants have not identified with any specificity the opinions that are new or

changed. Basin and the Council are left to guess. Basin's responses to comments, which Mr. Snell participated in drafting, contain much of the same information as the affidavit. Basin July 11, 2006 Comments in Response to Permit Application at 37-38, 109. The claim of surprise relating to mercury is wholly unsupported. The information was disclosed and available from several sources. The majority of the affidavit concerning mercury is a reiteration of the expert report and a collection of previously disclosed information. It is mostly fact evidence not subject to the Scheduling Order or expert discovery rules. The opinions expressed are the same as those already disclosed. That information is the same Protestants used in their deposition of Mr. Snell. The Scheduling Order was not modified or disobeyed.

Exclusion is Not Appropriate

Protestants ask for exclusion because the alleged new opinions in the affidavit are highly prejudicial and constitute sandbagging. Protestants' Mot. to Strike at 3. There can be no sandbagging or prejudice to the Protestants from previously disclosed opinion evidence. Exclusion 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). Exclusion is therefore inappropriate for Mr. Snell's affidavit. The policy of the Wyoming Supreme Court is "*to resolve doubts in favor of permitting parties to have their day in court on the merits of the controversy.*" *Id.* at 628 (quoting *Waldrop v. Weaver*, 702 P.2d 1291, 1294 (Wyo. 1985))(emphasis in original).

Conclusion

Basin did not improperly modify the Scheduling Order. The Affidavit of Kenneth J. Snell contains only previously disclosed expert opinions and is not late supplementation of the expert report. The affidavit contains only non-expert fact evidence and further explanation of previously disclosed opinions. Because no improper modification of the Scheduling Order occurred, there can be no prejudice to Protestants.

For these reasons, the Council should deny the Protestants' Motion to Strike the Affidavit of Kenneth J. Snell.

DATED September 26, 2008.



Patrick R. Day, P.C., #5-2246
Mark R. Ruppert, # 6-3593
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
Facsimile: (307) 778-8175
pday@hollandhart.com
mruppert@hollandhart.com

ATTORNEYS FOR BASIN ELECTRIC POWER
COOPERATIVE

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2008, I served the foregoing by electronic service and by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

James S. Angell
Robin Cooley
Andrea Zaccardi
Earthjustice
1400 Glenarm Place, #300
Denver, CO 80202
rcooley@earthjustice.org
azaccardi@earthjustice.org
jangell@earthjustice.org

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
rzars@lariat.org

Jay A. Jerde
Deputy Attorney General
Nancy E. Vehr
Senior Assistant Attorney General
Luke J. Esch
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
NVEHR@state.wy.us
jjerde@state.wy.us

