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ATTORNEYS FOR BASIN ELECTRIC
POWER COOPERATIVE

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

BASIN ELECTRIC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Basin Electric has moved for summary judgment on three of Protestants' claims of error: 1) "redefinition of the source"; 2) whether DEQ was entitled to rely on the EPA's $PM_{2.5}$ surrogate policy; and 3) whether DEQ was entitled to apply a "*de minimis*" interpretation of the regulations regarding increment violations with respect to Class I areas. All of the parties seek summary judgment on these legal issues, and they are ripe for resolution.

I. Introduction.

These issues can be simply posed and simply answered.

1. Redefinition of the source.

Protestants admit that the statutory definition of "BACT" and its phrases "production processes" and "innovative combustion techniques" cannot be so broadly construed as to require a permit applicant to "redefine" its chosen emissions source, in this case Basin Electric's subcritical pulverized coal boiler. Protestants' Response to DEQ's and Basin's Motions for Summary Judgment (Prot. Response) at 1.

The parties simply disagree on what constitutes a "redefinition of the source." Basin Electric and DEQ contend that this means requiring a permit applicant to fundamentally change the design of its **proposed plant** – the "source" of the emissions that then have to be controlled with BACT. Protestants, on the other hand, make the novel and unprecedented argument that no "redesign of the source" is involved as long as the same fuel, in this case coal, would be used, even if that means requiring Basin Electric to scrap its proposed plant altogether.

The legal issue before the Council is which interpretation of "redefinition of the source" is correct. In Wyoming, this issue was long ago decided in Basin Electric and DEQ's favor. DEQ's approach to this question is in accord with prior Council decisions in Wyoming and with numerous decisions from the Environmental Appeals Board and the Seventh Circuit Court of Appeals. All Protestants can find to support their novel argument is a suspended Georgia state court opinion that fails even to mention the entire weight of contrary federal authority interpreting BACT.

2. **$PM_{2.5}$.**

DEQ issued Basin Electric's permit in reliance upon EPA's longstanding surrogate policy, which treats control of PM_{10} as a surrogate for insuring control of $PM_{2.5}$, which is a particulate subset of PM_{10}. This EPA policy has been in effect for more than 10 years and DEQ has followed this guidance in issuing many Wyoming air quality permits, for many years. Here, Protestants admit DEQ followed the $PM_{2.5}$ surrogate policy and thus Protestants admit DEQ issued Basin Electric's permit in compliance with EPA guidance.

Protestants simply disagree with the guidance. However, this is not the venue for litigating the legality of EPA's guidance – that lawsuit belongs in federal court, where the claim now resides. In the interim, DEQ was legally entitled to rely upon EPA guidance. Although

Protestants contend that DEQ is not regulating $PM_{2.5}$ at all, and thus violating the Clean Air Act, this argument is false. Pursuant to guidance from EPA, DEQ is regulating $PM_{2.5}$ by regulating PM_{10}, an approach EPA has determined is technically justified pending final rules relating to $PM_{2..5}$. This technical determination by EPA is entitled to deference, as the Clean Air Act cannot be administered without giving EPA latitude to issue technical guidance and the states authority to follow it. If DEQ and its counterpart agencies cannot rely upon EPA guidance, and upon guidance that has now been codified as a rule (73 Fed. Reg. 28321), then the EPA's ability to administer the Act and achieve uniformity in the implementation of the law is completely gutted. The question before the Council on $PM_{2.5}$ is therefore simple: can DEQ rely upon published EPA guidance and formally adopted rules when interpreting and applying the Clean Air Act and Wyoming's implementing regulations? For the last thirty years in Wyoming the answer to that question has been yes.

3. **SO_2 Increments.**

It is undisputed that SO_2 emissions from the Dry Fork Station will **never** exceed significant impact levels (SILs) on the Northern Cheyenne Indian Reservation (NCIR). As a result, under the well-established "*de minimis*" interpretation of the statutory phrase "cause or contribute," the Dry Fork Station will **never** "cause or contribute" to an SO_2 increment violation, even under DEQ's extremely strict practice of requiring modeling based upon maximum allowable emissions, rather than actual emissions, from other sources.

Protestants nevertheless argue that Wyoming's regulations implementing the federal Clean Air Act leave no room for a "*de minimis*" interpretation and therefore **any** impact, however microscopic, is prohibited in Wyoming. Protestants even seem to suggest in their Brief that no permit can be issued if there are modeled increment violations from other sources even if

Basin Electric's plant were to have zero emissions. This is not the law, and it would be absurd to so construe Wyoming's regulations. Like their federal counterparts, Wyoming's regulations employ the "cause or contribute" requirement. *See, e.g.*, WAQS&R Chapter 6, § 2(c); § 4(b)(i)(A). "Cause or contribute" is not separately defined, and needs to have meaning. DEQ has properly given this language meaning by recognizing certain threshold levels below which an impact is so insignificant has to have no legal effect. DEQ has authority to do so. *See* WAQS&R Ch. 6, § 2(c)(iii) ("No approval to construct . . . shall be granted unless the applicant shows ... that .. [t]he proposed facility will not cause **significant** deterioration of existing ambient air quality . . . .") (emphasis added); *EOG Res., Inc. v. Dep't of Revenue*, 2004 WY 35, ¶ 25, 86 P.3d 1280 (Wyo. 2004) (Department of Revenue properly pointed out *de minimis* differences in statutory interpretation).

If adopted, Protestants' argument may well stop the permitting of any major new sources in northern Wyoming, as computer models can almost always be made to show some tiny impact even below monitoring levels. The choice for the Council is therefore clear: either recognize the legal validity and practical wisdom of DEQ's "*de minimis*" interpretation of Wyoming's regulations, or risk permanently shutting down new emission sources in northern Wyoming for reasons having nothing to do with meaningful environmental impacts.

II. Argument in Reply.

Protestants' Response to Basin Electric's Motion for Summary Judgment (Prot. Response) does not identify any basis for denying Basin Electric's Motion, which is based upon settled law and policy both in Wyoming and elsewhere.

A. Redefinition of the source.

Protestants concede that "a BACT analysis need not consider alternatives whose adoption would 'redefine the source.'" Prot. Response at 1. This is the law. *Sierra Club v. U. S. EPA*,

499 F.3d 653, 654 (7th Cir. 2007) ("*Sierra Club*") (the definition of BACT "does not include **redesigning the plant** proposed by the permit applicant.") (emphasis added). Nevertheless, Protestants make the novel and illogical argument that "**redesigning the plant**" does not really mean "redesigning the plant." Rather, Protestants argue it means "redesigning the fuel" that might be used. Therefore, according to Protestants, switching from a subcritical coal boiler to an IGCC plant with a synthetic natural gas turbine does not "redesign the plant" because both technologies "each use the very same 'raw material,' Powder River Basin coal, to produce the very same end product, electricity." Prot. Response at 5-6.

This argument defies common sense and has no support in the law. Basin Electric could not switch from its chosen subcritical pulverized coal boiler to IGCC or supercritical technologies without tearing down its entire plant and starting over. That constitutes "**redesigning the plant**" by any stretch of the imagination. It is therefore not surprising that Protestants' effort to reframe the redefinition issue as a function of redesigning the fuel, rather than the plant itself, has no support in the law. In fact, the cases cited by Protestants actually support Basin Electric's position. *In re Hibbing Taconite Co.*, 2 E.A.D. 838 (EAB 1989) involved a plant that sought to change from natural gas to petroleum coke to fire its furnaces. EPA held that considering natural gas as an alternative to petroleum coke in the BACT analysis did not redefine the source because that merely involved "the continued burning of natural gas at the same source—an alternative that **will not require any fundamental change to** Hibbing's product, **purpose, or equipment**." 2 E.A.D. at *11 (emphasis added). And in *In re Prairie State Generating Station*, PSD Appeal 05-05, 13 E.A.D. ____ (EAB Aug. 24, 2006), cited by Protestants as "particularly instructive," the EAB held that a change from a mine-mouth coal

source to a different coal source would redefine the source **even though in both cases coal would be used as a raw material to produce electricity**.

Other arguments made by Protestants' are equally unpersuasive:

- Protestants assert that Basin Electric's and DEQ's "crabbed" and "cramped" interpretation of BACT fails to include consideration of "inherently lower-emitting processes" and "innovative fuel combustion techniques". Prot. Response at 2-6. In fact, Basin Electric simply relies on what is clear in the law—production processes and innovative combustion techniques may be part of the BACT analysis, but **only if they do not fundamentally redefine the basic design or scope of the facility**. Basin Electric's Memorandum in Support of Motion for Summary Judgment (Basin Electric's Memo) at 10-11. Protestants hope to avoid this basic principle by "careful[ly] parsing the Clean Air Act" to promote a "more expansive view" of the BACT definition and consideration of "production processes." Prot. Response at 1. However, as Judge Posner pointedly observed in the *Sierra Club* case, an expansive reading of the BACT definition could require consideration of nuclear power plants and hydroelectric dams, an absurd result. That is why such an "expansive view" of the BACT statute has been soundly rejected.
- In trying to make their argument appear less absurd, Protestants claim that IGCC and supercritical plants are the "same type" of source as a subcritical plant because they all are subject to the New Source Performance Standards (NSPS) for electric utility steam generating units, 40 C.F.R. § 60.40Da *et. seq.* Prot. Response at 6-8. However, the NSPS cited by Protestants applies to a wide variety of sources, including various combined cycle gas turbines. Even Protestants concede, consistent with the NSR Manual, that a gas turbine would redefine a coal-fired plant. Therefore, even though some gas turbines may be subject to the same NSPS as some coal plants, that does not change the fact that a gas turbine would redefine a coal plant. Similarly, the fact that some IGCC and supercritical units may be subject to the same NSPS as Dry Fork Station's subcritical plant does not change the fact that such units would redefine the plant.
- Protestants completely ignore the plain language of the BACT statute. BACT is defined as "an emission limitation . . . based on the maximum degree of reduction of each

pollutant . . . which would be emitted from . . . **any proposed major stationary source** . . . which the Administrator . . . determines is achievable **for such source[.]**" WAQS&R Ch. 6, § 4(a). Protestants claim that in this definition "such source" refers to "major stationary source" and therefore BACT applies broadly to encompass any other major stationary source of the same type. Prot. Response at 6-7. Protestants' interpretation misreads the actual words of the definition. "Such source" refers to not just **any** major stationary source, but to the permit applicant's "**proposed** major stationary source." BACT applies to the applicant's **proposed** source, it does not redefine it.

- Protestants complain that Basin Electric's position that a BACT "production process" does not include a different power generation technology means that the term "production process" would be rendered meaningless. Prot. Response at 5-8. Clearly that is not so. For example, low NOx burners and overfire air (both employed at Dry Fork Station) are production processes that lower NOx emissions by changing the way coal is combusted in the proposed subcritical boiler to make steam. Consideration of such production processes is alive and well—as long as they are applied to the source as proposed, not to something fundamentally different. Basin Electric's Memo at 10-11.
- Protestants argue that the DEQ, not Basin Electric, has a right to choose the electric generating technology for Dry Fork because "the BACT analysis process specifically includes power need." Prot. Response at 3-4. In fact, the NSR Manual page Protestants cite says the opposite: "[t]he energy impact should still focus on the application of the control alternative and **not** a concern over general energy impacts associated with the project under review as compared to alternative projects for which a permit is not being sought[.]" (at B.30) (emphasis in original). This NSR Manual discussion demonstrates that BACT does not include comparing the general energy impacts of one power generation technology against another power generation technology. Certainly this entry in the NSR Manual does not override the basic rule, conceded by the Protestants, that BACT does not include a redefinition of the proposed source.
- Protestants contend that the inability of IGCC to provide 90 to 95% availability is not germane to whether IGCC would redefine Dry Fork because this is just an "economic issue." Prot. Response at 3, n.3. This ignores the fundamental criteria and objectives of the project to provide power with high availability using proven and commercially

available technology. Environmental Appeals Board's (EAB) *Prairie State* decision makes clear that **changing the basic purpose and objectives of the project is a redefinition**, not just an economic issue. *Prairie State*, slip op. at 27. Protestants ask that BACT trump all other considerations affecting the ability to provide reliable power to consumers.

The bottom line on the "redefinition of the source issue" is that DEQ acted consistently with years of previous policy and practice when it decided that IGCC and supercritical power generation technologies would redefine the source selected for Dry Fork Station. *See* Schlichtemeier Affidavit, ¶¶ 34, 35 and 45, Ex. 1 to DEQ Motion. Both the DEQ and this Council have long adhered to the position that redefinition of the source means a fundamental change or redesign **of the plant,** not a change in fuel.

Protestants' suggestion that the BACT statute and regulation must be given a new and more "expansive" interpretation than that previously adopted in Wyoming is not only wrong, it cannot be applied retroactively to Basin Electric's final permit. New statutory interpretations that reverse prior settled interpretations of the governing statute are not generally applied retroactively because the public is entitled to rely upon the law as previously announced, particularly where, as here, such a retroactive change in the law would work a severe inequity after a final permit has already been issued and relied upon in compliance with prior law. *Wyoming State Tax Com'n v. BHP Petroleum Co. Inc.*, 856 P.2d 428 (Wyo. 1993); *Hanesworth v. Johnke*, 783 P.2d 173 (Wyo. 1989) (citations omitted).

B. DEQ is entitled to rely on EPA guidance to regulate $PM_{2.5}$.

EPA has issued formal guidance allowing states like Wyoming to regulate $PM_{2.5}$ emissions for PSD permitting purposes by using PM_{10} as a surrogate for $PM_{2.5}$. DEQ has followed that guidance and used PM_{10} as a surrogate for $PM_{2.5}$ since 1997, including

approximately 10 PSD permitting actions when PM_{10} was significant. *See* Schlichtemeier Affidavit, ¶ 48.

Protestants disagree with the guidance and EPA's authority to issue it, and thus urge this Council to ignore it. Prot. Response at 12-13, 18. However, DEQ was entitled to rely on the surrogate policy – again as it has in numerous other permit decisions – when it acted on the Dry Fork permit application. *See, e.g.*, Basin Electric's Memo at 25-40, and Basin Electric's Memorandum in Opposition to Protestants' Motion (Basin Electric's Opposition) at 8-16. As the U.S. Supreme Court noted in *U. S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001):

> [T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Bragdon* v. *Abbott,* 524 U.S. 624; 642, [] (1998) (quoting *Skidmore*, 323 U.S. 134, 139-140), and "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron[U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837,] 844 (footnote omitted).

As Basin Electric noted in its Opposition, Protestants are asking this Council to prohibit DEQ's reliance on the guidance by making the legal determination that EPA exceeded its statutory authority under the Clean Air Act and therefore DEQ's lawful reliance on EPA's guidance is automatically illegal as well. Basin Electric's Opposition at 8-16. However, the clear weight of authority supports the surrogate policy: 1) EPA has repeatedly reiterated its surrogate policy over the past 11 years; 2) EPA recently incorporated that policy in a final regulation as part of its $PM_{2.5}$ implementation policy issued on May 16, 2008 (73 Fed. Reg. 28321); and 3) the EAB has upheld the use of EPA's surrogate policy to address PM_{10} and $PM_{2.5}$ in a PSD permit for a 720 MW cogeneration facility in the state of Washington. *In re BP Cherry Point*, 12 E.A.D. 209, 222 (EAB 2005).

Protestants note that EPA's May 16, 2008 final implementation rule has been appealed to the Circuit Court of Appeal for the D.C. Circuit. Prot. Motion at 44, n.31. The Sierra Club is a party to that appeal. Because the disagreement is over an EPA policy with nationwide applicability, the correct forum to resolve the disagreement is the D.C. Circuit, not this Council. If state agencies were unable to rely on EPA guidance to carry out their responsibilities without constantly having to defend EPA's policies in state administrative proceedings, their ability to do their job would be severely compromised. Basin Electric's Opposition at 10-11. Until and unless the NRDC and Sierra Club persuade the D.C. Circuit to vacate the $PM_{2.5}$ implementation rule, use of the surrogate policy should continue to be respected.

Not only is the surrogate policy legal, its use in this case is consistent with good policy and good common sense. Although not legally required to do so, Basin Electric has demonstrated that public health will not be adversely affected by $PM_{2.5}$ emissions and that $PM_{2.5}$ will be well controlled at Dry Fork. Contrary to Protestants' assertions that a "do-nothing" approach would violate this Council's obligation to protect the public health, and their selective reference to ambient $PM_{2.5}$ levels measured at Lander and Sheridan, Prot. Response at 10, 20, Basin Electric has demonstrated, with PM_{10} modeling for Dry Fork and data from nearby monitors, that $PM_{2.5}$ levels will be well below the NAAQS. Basin Electric's Opposition at 12-13.

Basin Electric also has demonstrated that, in practice, all components of $PM_{2.5}$ emissions will be well-controlled. Basin Electric's Opposition at 13-14. Protestants exhort this Council to make DEQ and Basin Electric go through a top-down BACT analysis for $PM_{2.5}$ and argue that this might result in components of $PM_{2.5}$ being reduced to even lower levels. However, they do not dispute that most components of $PM_{2.5}$ (SO_2, NOx, sulfuric acid mist, hydrogen fluoride) are

already subject to BACT limits in the Dry Fork permit or that primary $PM_{2.5}$ emissions will be controlled by the baghouse that controls PM_{10}.

Protestants simply want the Council to make a different policy choice than EPA has made, even though the legal challenge to EPA's authority and policy choice has already been made in the federal courts but not yet decided. Protestants have not identified an error of law by DEQ; they merely complain about EPA policy, upon which states are entitled to rely, and are once again asking this Council to abruptly reverse course on a longstanding DEQ practice, notwithstanding the fact that $PM_{2.5}$ will be well controlled under the existing permit and will not harm public health.

C. DEQ is entitled to rely on the "*de minimis*" exception approved and used by EPA.

EPA policy and the law is settled that a source does not "cause or contribute" to an increment violation if its contribution to the increment is below the "significant impact level" or "SIL" promulgated for that pollutant. Basin Electric's Memo at 40-53; Basin Electric's Opposition at 16-21. Protestants do not dispute that the modeling confirms that Dry Fork Station will never have an impact on any SO_2 increment violation that exceed the SILs for SO_2. Thus, as a matter of law, Dry Fork Station's impact is **never** more than *de minimis* and **never** "causes or contributes" to an increment violation.[1] Like other states and like the EPA, DEQ employs the

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[1] In deciding whether DEQ may use EPA's approved *de minimis* approach to determine whether a proposed source such as Dry Fork does not "cause or contribute" to an increment violation, it remains important to remember that Wyoming and federal regulations and EPA's NSR Manual call for increment consumption by existing sources to be based on increases in actual emissions, not allowable emissions. Basin Electric's Memo at 51-52. Increment modeling in this case that used actual emissions from the Colstrip power plant (by far the largest contributor to increment consumption in the NCIR) showed no increment violation at all Even when Colstrip is modeled at allowable levels, Dry Fork does not cause or contribute to any increment violation; but when the actual emissions are used, as commonly done, there are no increment violations at all.

Class I SILs proposed by EPA and the associated guidance on applying those SILs to Class I areas based on the reasoning that a *de minimis* threshold is needed to screen out potentially insignificant sources Rairigh Affidavit, Ex. 2 to DEQ Motion ¶ 22. DEQ has followed this practice for the last six years. *Id.* at ¶ 23.

Although Protestants argue that Wyoming's regulations do not expressly articulate a "de minimis" approach to determining whether a source will actually "cause or contribute" to a Class I increment violation, this argument misses the point regarding agency authority to adopt reasonable interpretations. EPA has reasonably construed federal law to incorporate this concept by applying SILs to determine whether a source will "cause or contribute" to an increment violation. Basin Electric's Memo at 45-51; Basin Electric's Opposition at 16-21. DEQ has simply followed EPA's lead and done the same with respect to Wyoming's implementing regulations, which also incorporate the undefined "cause or contribute" concept. *See, e.g.*, WAQS&R Chapter 6, § 2(c); § 4(b)(i)(A); § 4(b)(v). Nothing in the law prohibits either the EPA or DEQ from interpreting the phrase "cause or contribute" to exclude "de minimis" impacts. Basin Electric's Memo at 45-51; Basin Electric's Opposition at 16-21; *see* WAQS&R Ch. 6, § 2(c)(iii) ("No approval to construct . . . shall be granted unless the applicant shows ... that .. [t]he proposed facility will not cause **significant** deterioration of existing ambient air quality ....") (emphasis added). Wyoming law does not require mindless adherence to the literal terms of statutes or regulations when doing so serves no purpose. *See, e.g., EOG Res., Inc. v. Dep't of Revenue*, 2004 WY 35, ¶ 25, 86 P.3d 1280 (Wyo. 2004) (Department of Revenue properly pointed out *de minimis* differences in statutory interpretation); *see also Closs v. Schell*, 2006 WY 95 ¶ 30, 139 P.3d 435 (Wyo. 2006).

Protestants' only response is that Wyoming should not follow these sensible principles but instead should forfeit all common sense and take an absolute and rigid stance that would treat **any** predicted impact from a proposed source—a trillionth of a gram or even less—as "causing or contributing" to an increment violation. However, Protestants offer no **reason** to forsake normally applicable legal principles to follow this absolutist approach, and they offer no **reason** why Wyoming should concern itself with trifling matters. They rely instead on the legalistic proposition that the DEQ should not apply *de minimis* principles because Wyoming regulations are not ambiguous, but the regulations themselves expressly adopt a "significance" threshold. In addition, Protestants are wrong about lack of ambiguity in the regulations. The regulations do not define what level of impact should be deemed to "cause or contribute" to an increment violation, so there is a need to interpret the rules to address this ambiguity. Protestants argue for the interpretation that "cause or contribute" means anything greater than zero. Basin Electric and the DEQ, relying on EPA guidance, EAB decisions and court decisions as well as Wyoming regulations, argue for a common sense *de minimis* approach instead of Protestants' absolutist approach.

Finally, Protestants object to the use of SILs in Class I areas because Class I SILs have not been formally adopted as Wyoming regulations. The authorities cited by Basin Electric make clear that formal adoption of regulations is not a prerequisite for applying common sense *de minimis* principles. Basin Electric's Memo at 48-51; Basin Electric's Opposition at 17-21. "Unless a statute or regulation employs 'extraordinarily rigid' language, courts recognize an administrative law principle that allows agencies to create **unwritten exceptions** to a statute or rule for '*de minimis*' matters." *Kentucky Waterways Alliance v. Johnson*, 2008 WL 4057140, *21 (6th Cir. Sept. 3, 2008) (quoting *Greenbaum v. EPA*, 370 F.3d 527, 534 (6th Cir. 2004)

(emphasis added). The Class I SILs are based on levels proposed by EPA and widely used in practice—a firm foundation for DEQ's action in this case.

III. Conclusion.

DEQ followed the law and followed longstanding policies employed in Wyoming for decades when it decided (1) that IGCC and supercritical power generation technologies would not be analyzed as part of the BACT process because they would redefine the source selected by Basin Electric; (2) that it would regulate $PM_{2.5}$ using PM_{10} as a surrogate pursuant to EPA policy; and (3) that it would employ a *de minimis* approach using EPA Class I SILs to determine if a proposed source causes or contributes to a modeled increment violation in a Class I area. DEQ has committed no error of law. Basin Electric therefore respectfully requests that its Motion on these claims be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 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:

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