

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

NOV 26 2008

IN THE MATTER OF: )  
BASIN ELECTRICAL POWER COOPERATIVE )  
DRY FORK STATION, )  
AIR PERMIT CT-4631 )

Jim Ruby, Executive Secretary  
Docket No. 07-280 Environmental Quality Council

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**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
OPPOSITION TO PROTESTANTS' MOTION TO RECONSIDER ORDER  
GRANTING RESPONDENT'S MOTION TO DISMISS**

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The Wyoming Department of Environmental Quality Air Quality Division ("DEQ/AQD") by and through the Office of the Attorney General, respectfully submits the following OPPOSITION TO PROTESTANTS' MOTION TO RECONSIDER ORDER GRANTING RESPONDENT'S MOTION TO DISMISS in the above-captioned permit appeal.

**I. INTRODUCTION**

On November 19, 2008, Protestants filed a NOTICE OF SUPPLEMENTAL AUTHORITY AND MOTION TO RECONSIDER ORDER GRANTING RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO DISMISS (hereinafter "Motion to Reconsider"). In this document, Protestants direct the Environmental Quality Council ("Council") to a recent decision by the Environmental Appeals Board ("EAB") addressing EPA's justification for not requiring a Best Available Control Technology ("BACT") analysis for carbon dioxide ("CO<sub>2</sub>") and, without citing any authority granting the Council discretion to do so, ask the Council to remand the permitting decision to DEQ. Protestants' Motion to Reconsider should be dismissed based on Protestants' own

admission that is untimely and prohibited by DEQ Rules of Practice and Procedure, Chapter IV, Section 1.

## **II. PROTESTANTS FAILED TO FILE WITHIN TWENTY (20) DAYS OF THE WRITTEN DECISION**

It is uncontested that the Protestants failed to meet the deadline for filing a petition for rehearing. *See* Protestants' Motion to Reconsider at 3. Chapter IV, Section 1 of the DEQ Rules of Practice and Procedure set forth the requirements for parties seeking reconsideration of decisions issued from the Council. Section 1 states:

“(a) Any party seeking any change in any decision of the Council may file a petition for rehearing within twenty (20) days after the written decision of the Council has been issued.”

The Council's order granting DEQ's Motion to Dismiss was entered on August 21, 2008. Protestants' Motion to Reconsider was filed on November 19, 2008, which is exactly 90 days from when the Council issued its written decision. Protestants acknowledge the DEQ Rules of Practice and Procedure allow only for a window of 20 days for filing a petition for reconsideration. *See* Protestants' Motion to Reconsider at 3. Based on this acknowledgement alone, Protestants' Motion to Reconsider should be rejected.

## **III. PROTESTANTS FAIL TO PROVIDE ANY AUTHORITY WHICH GRANTS THE COUNCIL WITH DISCRETION TO GRANT THIS PETITION**

The Protestants ask the Council to ignore the clear violation of the Rule by stating: “[a]lthough the Council's regulations require Protestants to file a Motion for Reconsideration within 20 days, the EAB did not issue the Deseret decision until one

week ago, well after this deadline had passed.” See Protestants’ Motion to Reconsider at

3. Protestants then assert that the Council has discretion to ignore the deadline based on this excuse.

Protestants have failed to provide the Council any legal authority or cogent argument supporting this bold assertion that the Council has discretion to ignore the deadline for any reason, let alone the reason stated by Protestants.

Courts generally refuse to reverse a decision where a party fails to provide cogent argument or legal authority for his or her position. *E.g. Walton v. State ex rel. Wood*, 50 P.3d 693, 697 (Wyo.2002) (“We have consistently refused to address claims not supported by cogent argument or citation to pertinent authority whether a pro se litigant or counsel files the brief.”) The Council acting as a quasi-judicial body should be bound by this principle as well. Protestants have the burden of providing some legal authority or cogent argument for the claim that the Council has discretion to ignore the rules and have failed to do so, therefore, Protestants’ Motion to Reconsider must be rejected.

#### **IV. PROTESTANTS FAIL TO RAISE ANY NEW QUESTIONS**

Even if the Protestants could escape the 20 day deadline of subsection (a), they fail to satisfy remaining requirements of Chapter IV, Section 1. Chapter IV, Section (1)(b), of the DEQ Rules of Practice and Procedure states:

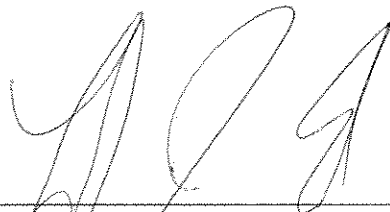
“Any petition for rehearing filed under this section must be confined to new questions raised by the decision and upon which the petitioner had no opportunity to argue before the Council.”

While Protestants cite a new case from another jurisdiction, they fail to address any new questions. Protestants do not address any new questions that have arisen based on the August 21, 2008 decision, and therefore, Protestants' Motion to Reconsider should be rejected.

The requirements of Chapter IV, Section 1, subsections (a) and (b) are clear cut for the purposes of creating finality. The interests of finality would be abridged if Protestants Motion to Reconsider were granted.

Therefore, the Council should reject Protestants' Motion to Reconsider because it is untimely, does not provide any legal basis for the assertion that the Council may use discretion to ignore the clear language of the rules, and does not meet the requirements under Chapter IV, Section 1 for rehearing.

**RESPECTFULLY SUBMITTED** this 26 day of November, 2008.



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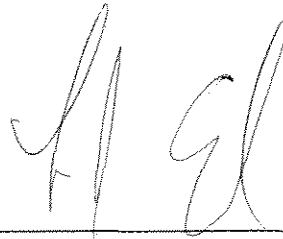
**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the foregoing *Respondent Department of Environmental Quality's Opposition to Protestants' Motion to Reconsider Order Granting Respondent's Motion to Dismiss* through United States mail, postage prepaid on this the 26 day of November, 2008 to the following:

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