

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE) Docket No. 07-2801
DRY FORK STATION,)
AIR PERMIT CT-4631)
_____)

**PROTESTANTS’ MOTION TO STRIKE THE AFFIDAVIT OF KENNETH J. SNELL
AS TO PM_{2.5} AND MERCURY**

Protestants move to strike the Affidavit of Kenneth J. Snell as to PM_{2.5} and Mercury (“Snell Affidavit”) submitted by Basin Electric Power Cooperative (“Basin”) with its Memorandum in Opposition to Protestants’ Motion for Summary Judgment, dated September 12, 2008. Basin’s attempt to introduce entirely new expert testimony after the deadlines for discovery have long passed is entirely prejudicial to Protestants, leaving them without an opportunity to respond or to explore Mr. Snell’s opinions through depositions. Therefore, Protestants request that the Council strike the Affidavit from the record.

I. BACKGROUND

On January 11, 2008, this Council issued a Scheduling Conference Order designating deadlines for expert designation, expert reports, and all discovery. According to the Order:

1) Protestants’ expert designation and reports were due April 15, 2008; 2) Permittee’s and DEQ’s counter-expert designations and reports were due June 2, 2009; 3) Protestants’ rebuttal expert designations and reports were due July 1, 2008; and 4) All discovery, both written and oral, was to be completed by August 1, 2008.

On March 25, 2008, the parties filed a Stipulated Motion for Continuance of Expert Designation and Report deadlines, which was granted on April 11, 2008. The new deadlines were as follows: 1) Protestants’ designation and expert reports deadline were due May 1, 2008;

2) Basin's and DEQ's counter-expert designations were due June 16, 2008; and 3) The parties would still complete all discovery by August 1, 2008.

On July 11, 2008, the parties requested another extension, filing a Stipulated Motion for Extension of Deposition and Dispositive Motion Deadlines. The Motion requested that expert depositions be extended, to be completed by August 15, 2008. The Order was granted on July 14, 2008.

In accordance with the Councils' Orders, Protestants filed their expert reports on May 1, 2008, including the expert report of Dr. Ranajit Sahu. Dr. Sahu expressed his opinions with respect to DEQ's flawed analysis regarding PM_{2.5} and mercury. Protestants' Exh. 29 at 9-14 (PM_{2.5}); *id.* at 24-25 (mercury).

On June 16, 2008, Basin filed three expert reports, one each by Kenneth Snell, Robert Pearson, and Stephen Jenkins. See Basin Exh. 4 (expert report of Stephen Jenkins), Basin Exh. 10 (expert report of Kenneth Snell), and Protestants' Exh. 43 (expert report of Robert Pearson). In his report, Mr. Snell responded to Dr. Sahu's expert report regarding Protestants' claim that Basin and DEQ failed to conduct a BACT analysis for mercury. Basin Exh. 10 at 56-62. None of Basin's experts responded to Dr. Sahu's expert report regarding Protestants' claim that Basin and DEQ failed to conduct a BACT analysis for PM_{2.5}. Mr. Snell stated: "I have not specifically addressed PM_{2.5} emissions because BEPC and WYDEQ-AQD properly used PM₁₀ as a surrogate for PM_{2.5} pursuant to EPA policy." Basin Exh. 10 at 3. DEQ offered no expert reports.

During the week of August 12 to 15, 2008, the parties conducted depositions of all expert witnesses based on these expert reports. On August 15, 2008, the parties concluded depositions and all expert discovery. During the deposition of Mr. Snell, Mr. Snell acknowledged that his report did not cover PM_{2.5}. Although Mr. Snell was unable to state whether he planned to testify

about PM_{2.5}, he stated that he was aware of Basin's deadline for expert reports, and that the deadline had passed. Protestants' Exh. 54 at 34-36. Protestants also deposed Mr. Snell regarding opinions about mercury that were articulated in his expert report.

On September 12, 2008, Basin filed the Snell Affidavit along with the Affidavit of Robert L. Pearson Regarding PM_{2.5} with its Memorandum in Opposition to Protestants' Motion for Summary Judgment. In the affidavit, Mr. Snell offers new expert opinions with respect to PM_{2.5} and mercury.¹ Protestants' deadline for their Reply Brief was one week later on September 19, 2008. Protestants have had no time to prepare an expert rebuttal report or to depose Mr. Snell regarding his new opinions.

II. PROTESTANTS REQUEST THE COUNCIL STRIKE THE SNELL AFFIDAVIT.

Basin attempts to sandbag Protestants with new expert testimony well after the deadline for discovery and depositions has passed. This attempt to unilaterally modify the scheduling order is a clear violation of this Council's Orders and is highly prejudicial to Protestants. Therefore, this Council should strike the Snell Affidavit.

This Council may strike the Snell Affidavit under Wyo. R. of Civ. Pro. 37(b)(2)(B). This rule permits an "order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters into evidence." In determining whether late supplementation of expert disclosures should be excluded from evidence, Wyoming courts look to the prejudice to the respective parties, whether the parties have failed to comply with the rules inadvertently or willfully, whether the proposed testimony will disrupt the proceedings, and the completeness of the information in the case. See

¹ Although equally untimely, Protestants have chosen not to move to strike Pearson's Affidavit because it largely contains factual information found on EPA's website, and not opinion testimony.

Johnson v. Sikorski, 100 P.3d 420, 426 (Wyo. 2004); Winterholler v. Zolessi, 989 P.2d 621, 628 (Wyo. 1999). The courts consider supplementation on a case-by-case basis.

In this case, there is great prejudice to Protestants if the Council considers the Snell Affidavit with respect to the pending motions for summary judgment, but little prejudice to Basin if the Council strikes the Affidavit. Basin had a deadline for submitting expert reports of June 16, 2008. Although Protestants' expert, Dr. Sahu, raised issues with respect to PM_{2.5}, Mr. Snell expressly declined to respond. Basin Exh. 10 at 3. Mr. Snell acknowledged in his deposition that he was aware of the deadline for expert reports and that his report did not cover PM_{2.5}. Protestants' Exh. 54 at 34-36. Furthermore, Protestants deposed Mr. Snell on the opinions regarding mercury contained in his expert report, not these newly offered opinions. Basin had over two months to supplement its expert reports between the time Protestants filed expert reports and the start of depositions.

Indeed, Basin delayed filing the Snell Affidavit until it filed its Response to Protestants' Motion for Summary Judgment. Protestants had only one week to respond. This short time-frame precluded Protestants from preparing a rebuttal report or from deposing Mr. Snell with respect to his new opinions. Accordingly, the Council should not consider the Snell Affidavit in resolving the pending motions. "[T]he rules of civil procedure were designed to make pretrial and discovery uniform across the country and to prevent 'trial by ambush.'" Johnson, 100 P.3d at 426 (citing Smith v. Ford Motor Co., 626 F.2d 784, 797 (10th Cir. 1980)). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Smith, 626 F.2d at 798 (citing Hickman v. Taylor, 329 U.S. 495, 507 (1947)). Moreover, because the issues of whether DEQ was required to comply with NAAQS and BACT for PM_{2.5} and BACT for

mercury are legal issues, Protestants do not believe it is necessary for the Council to consider the Snell Affidavit to resolve the pending motions.

Due to the necessity of resolving this Motion prior to the pending motions for summary judgment, Protestants request that the Council address it first at the upcoming September 29, 2008 hearing.

CONCLUSION

For the foregoing reasons, Protestants request that the Council strike the Snell Affidavit.

DATED: September 19, 2008

/s/ Andrea Zaccardi
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CERTIFICATE OF SERVICE

I certify that on this day of September 19, 2008, I served a copy of the foregoing PROTESTANTS' MOTION TO STRIKE AFFIDAVIT OF KENNETH J. SNELL AS TO PM_{2.5} AND MERCURY via e-mail and Federal Express addressed to:

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