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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,)	Presiding Officer, F. David Searle
AIR PERMIT CT-4631)	
_____)	

**MOTION TO SUSPEND AIR PERMIT CT-4631 PENDING RESOLUTION OF
PROTESTANTS' APPEAL**

Protestants respectfully request the Environmental Quality Council (“Council”) suspend Air Permit CT-4631, which authorizes construction of the Dry Fork Station coal-fired power plant, pending resolution of this appeal. Once constructed and for decades thereafter, the Dry Fork Station will be a major source of air pollutants that are responsible for health problems, acid rain, haze, and global warming. To help protect Wyoming’s citizens and its environment from these harms, the Council must ensure that the plant employs the Best Available Control Technology (“BACT”) for all air pollutants subject to regulation under the Environmental Quality Act or the Clean Air Act. The Environmental Quality Act allows members of the public impacted by pollution from a major source to participate in the permitting process both before the Department of Environmental Quality (“DEQ”) and by appealing any permit DEQ issues to the Council. The Council serves as the final administrative arbiter in the air permitting process.

Protestants have participated in every stage of the permitting process for the Dry Fork Station, and have filed this appeal of the DEQ-issued air permit with the Council. The Council set a trial on the merits in this case for November 17 through 21, 2008. Accordingly, the Council will likely make a final decision on the air permit before the end of the year.

Despite Protestants' appeal, Basin Electric Power Cooperative ("Basin Electric") is proceeding full speed ahead with construction of the Dry Fork Station. The company commenced construction of the Dry Fork plant immediately after the DEQ issued the permit on October 15, 2007. Even after Protestants filed their appeal to the Council on November 1, 2007, Basin Electric continued to pursue construction and financing. The company has spent more than \$117 million to date, and expects to spend more than \$500 million more.

By commencing construction of the Dry Fork Station, Basin Electric is undermining the role of the Council and potentially rendering the appeals process meaningless. In November, when the Council reviews Protestants' claims that the current design of the Dry Fork Station does not represent the Best Available Control Technology ("BACT"), Basin Electric will likely seek to influence the outcome of the proceeding and the appropriate remedy by relying on the financial loss the company will suffer if forced to redesign and reconstruct plant components. By suspending the permit before Basin Electric proceeds to the point where the company has started construction of the plant and paid for major pieces of equipment, the Council will ensure that these arguments will not sway the Council's final decision and that all appropriate remedies will still be available. Accordingly, to protect the integrity of this process, the Council should exercise its broad authority under the Environmental Quality Act to suspend Basin Electric's permit pending resolution of this appeal.

Alternatively, if the Council is unwilling to suspend Basin Electric's permit, Protestants request that the Council put Basin Electric on notice that the company is proceeding at its own risk, and that the Council's ultimate decision on the merits will not be influenced by investments or other commitments the company makes during this appeal.

LEGAL BACKGROUND

In 1977, Congress added the Prevention of Significant Deterioration ("PSD") program to the Clean Air Act to maintain air quality in areas that remained unspoiled by air pollution. The program was intended "to protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur from air pollution or from exposures to pollutants . . . notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1). Accordingly, the PSD program prevents polluters from driving air quality down to the level of the national ambient air quality standards ("NAAQS"), which set the minimum requirements for maintaining air quality under the Act.

A "major emitting facility" such as the Dry Fork Station is required to obtain a PSD permit. 42 U.S.C. § 7475. The facility must demonstrate that emissions from the facility will not cause or contribute air pollution in excess of either the NAAQS or allowable PSD increments. Id. § 7475(a)(3). It must also utilize BACT for each pollutant subject to regulation. Id. § 7475(a)(4).

Under the Clean Air Act's framework of cooperative federalism, states may take responsibility for administering the Act if they have an EPA-approved State Implementation Plan ("SIP"). 42 U.S.C. §§ 7401(a)(3) & (4), 7410; 40 C.F.R. § 51.166. State requirements must be at least as stringent as corresponding federal requirements. 42 U.S.C. § 7416. Wyoming has an EPA-approved SIP that includes PSD regulations. 40 C.F.R. §§ 52.2620, 52.2630.

Under Wyoming regulations, an applicant proposing any new facility that will cause an increase in air contaminants must obtain a construction permit from DEQ. DEQ, Air Quality Division, Standards and Regulations (“WAQSR”), Chpt. 6 § 2(a)(i). DEQ may not issue a construction permit unless the Administrator finds that the facility (1) will not prevent attainment or maintenance of any ambient air quality standard for criteria pollutants, (2) will not cause significant deterioration of existing ambient air quality in the Region, and (3) will utilize BACT. WAQSR Chpt. 6 § 2(c).

Consistent with the federal Clean Air Act definition, BACT is defined under Wyoming law as:

an emission limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under these Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any proposed major stationary source or major modifications which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application or production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

WAQSR Chpt, 6 § 4(a). Accordingly, BACT analysis requires detailed consideration of all potentially available emission control measures. Further, it requires that a new source comply with emission limits that correspond to the most effective control measures available, unless the permit applicant can affirmatively demonstrate that the use of the most effective control measures would be technologically or economically infeasible. Alaska Dep’t of Env’tl. Conservation v. EPA, 298 F.3d 814, 822 (9th Cir. 2002).

The PSD program is meant to become more stringent over time as control technologies evolve and new, cleaner equipment and processes are introduced. See, e.g., In re Tenn. Valley Authority, 9 E.A.D. 357, 391 (EAB 2000) (citations omitted) (“[T]he program Congress

established was particularly aggressive in its pursuit of state-of-the-art technology at newly constructed sources.”), overruled in part on other grounds by Tenn. Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003). Similarly, the EPA Administrator has explained that the BACT provisions of the PSD program are principally technology-forcing and are intended to foster “rapid adoption” of improvements in emission control technology. In re Columbia Gulf Transmission Co., 2 E.A.D. 824, 828-29 (EAB 1989).

STATEMENT OF FACTS

On February 26, 2007, DEQ provided notice to the public that it intended to issue an air pollution permit to Basin Electric authorizing the construction of the Dry Fork plant. DEQ 1428-29 (attached as Exhibit (“Exh.”) 1).¹ DEQ’s notice invited comments from the public. Id. Protestants timely submitted lengthy comments demonstrating that the proposed permit violated Wyoming law. DEQ 2311-57 (attached as Exh. 2). In particular, Protestants demonstrated that DEQ should have considered a more efficient supercritical boiler as part of its BACT analysis, as well as integrated gasification combined cycle (“IGCC”) technology, which has the demonstrated ability to be used to sequester carbon emissions. Id. at 2320-41. Additionally, Protestants demonstrated that DEQ failed to consider CO₂ or other greenhouse gases in its BACT analysis; failed to set a BACT limit for total PM₁₀ or PM_{2.5}; and failed to require the maximum degree of reduction that can be achieved for NO_x, SO₂, and mercury. Id. at 2313-20, 2341-52.

On October 15, 2007, DEQ responded to these comments and issued permit CT-4631 to Basin Electric. DEQ 3833-59 (attached as Exh. 3); 3823-32 (attached as Exh. 4). DEQ refused to consider either a supercritical boiler or IGCC as BACT. Exh. 3 at 3842-44. DEQ also refused

¹ In response to Protestants’ First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions (Request for Production of Documents No. 1), DEQ provided a bates numbered copy of the administrative record for the air permit. These documents will be cited as “DEQ” followed by the bates number.

to consider CO₂ and other greenhouse gases as part of the BACT analysis. Id. at 3841-42. Nor did the agency make any changes to BACT limits for mercury or impose limits for total PM₁₀, and PM_{2.5}. Id. at 3846. DEQ made minimal changes to the SO₂ and NO_x emission limits. Id. at 3844-45. The changes, however, still do not reflect BACT.

In Air Permit CT-4631, DEQ states the appeal rights available:

Any appeal of this permit as a final action of the Department must be made to the Environmental Quality Council within sixty (60) days of permit issuance per Section 16, Chapter I, General Rules of Practice and Procedure, Department of Environmental Quality.

Exh. 4 at 3832. In accordance with this guidance and the DEQ's Rules of Practice and Procedure, Protestants filed their Protest and Petition for Hearing on November 1, 2007 (attached as Exh. 5). Protestants specifically requested the Council "immediately stay WYDEQ's approval of the Permit for the Dry Fork Station pending the Council's final disposition of this matter." Id. at 18.

Within two days of receiving its permit, Basin Electric announced in the press that it had withdrawn its request for federal funding and commenced construction. Exhs. 6, 7, 8, & 9. Basin Electric withdrew its request for a \$750 million loan from the U.S. Department of Agriculture on October 17, 2007 to avoid the time-consuming and expensive analysis of the environmental impacts of the project required under federal law prior to construction. Exh. 6, 7, & 8. That same day, Basin informed DEQ that it was commencing construction (letter attached as Exh. 10). Basin began initial work at the construction site, including surveying. Exh. 7. On November 2, 2007, the company held a groundbreaking ceremony. Exh. 9.

Protestants submitted extensive discovery to Basin Electric to determine what construction and financing commitments the company planned to make in the next year. Although Basin Electric refused to respond fully to Protestants' discovery requests, the company

did provide general information showing the company has already made substantial investments in the current design of the Dry Fork Station and will only increase those investments over the next year. Basin Electric's Responses and Objections to Protestants' First Set of Interrogatories and Requests for Production of Documents (attached as Exh. 11). Basin Electric has already undertaken site preparation activities, including stripping topsoil, installing and paving access roads, and erecting a construction power substation. Id. at 8-9 (Answer to Interrogatory No. 6). The company's construction schedule shows that significant additional events are planned for 2008, including construction of the foundations for the boiler, steam turbine, air cooled condenser, and air quality control equipment. Id. at Exh. 1 to Interrogatory No. 5. Basin Electric has also entered into contracts with vendors for preliminary site work, construction activities, the boiler, and air quality control systems equipment. Id. at Exh. 1 to Interrogatory No. 3. In fact, the company has already paid more than \$117 million to these vendors, and anticipates making additional payments in excess of \$500 million. Id. at 6 (Answer to Interrogatory No. 3). Additionally, Basin Electric signed a loan agreement with CoBank, ACB to finance construction and intends to initiate a commercial paper program in the Spring 2008. Id. at 5 (Answers to Interrogatories Nos. 1 & 2).

If Protestants prevail in this appeal, Basin Electric will be required to change key components of the Dry Fork Station, including the boiler and air pollution control equipment. Affidavit of Ranajit Sahu ¶ 11 (attached as Exh. 12). For example, if Protestants prevail in their argument that a more efficient supercritical boiler represents BACT for the facility, this will change the boiler design. Id. ¶ 12. Similarly, if Protestants prevail on their claim that a wet scrubber can achieve greater control efficiency for SO₂ emissions, Basin Electric will need to change its air pollution control equipment. Id. Even if the Council finds that current control

technology is appropriate, it may determine that the size of the control technology must change in order to result in lower emissions limits. Id. These changes will require redesign, revisions to construction drawings, and possible restructuring of the plant footprint. Id. If Basin has already laid the foundation of the plant and paid in full for the boiler and air pollution control equipment by the time this appeal is decided, any change in design as result of the appeal will lead to loss of time and money. Id. ¶ 13. Although Protestants are unable to determine from the limited information Basin Electric provided the precise amount of additional funds the company will spend in the next year or what specific losses it might suffer if the Council ordered a change in the design, it is clear that the company is proceeding as quickly as possible and the amounts will be significant.

ARGUMENT

To prevent Basic Electric from effectively predetermining the outcome of this appeal by making premature investments in the design and construction of its challenged Dry Fork plant, the Council should suspend Basin Electric's permit temporarily until the conclusion of this appeal. A determination that Basin Electric's permit is suspended during this appeal is warranted because the Council is vested with final authority for air permitting decisions under the Environmental Quality Act, and the Protestants are entitled to a full and fair hearing *de novo* before the Council. Suspension of the permit will prevent Basin Electric from proceeding to finance and construct outdated technology that does not represent BACT and then claiming the Council cannot force it to implement other more efficient technology because it is too far down the road towards completion of the project. Furthermore, suspension of the permit is consistent with federal Clean Air Act appeal procedures.

I. The Council is Vested with Final Authority for Air Permitting Decisions Under the Environmental Quality Act

The Wyoming Legislature passed the Wyoming Environmental Quality Act “to enable the state to prevent, reduce and eliminate pollution [and] to preserve, and enhance the air, water and reclaim the land of Wyoming.” W.S. § 35-11-102. To achieve these goals, the Legislature created both the DEQ and the “independent” Council. Id. §§ 35-11-104, -105, -111.

Both DEQ and the Council play a role in the air quality permitting process. Initially, DEQ is charged with reviewing applications for air permits and approving or denying them. Id. § 35-11-801. After DEQ makes a decision on the permit, the Council has broad procedural and substantive responsibilities. Procedurally, the Council “shall act as the hearing examiner for [DEQ] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality . . . division[.]” W.S. § 35-11-112(a). More specifically, the Council is responsible for “[c]onduct[ing] hearings in any cases contesting the grant, denial, suspension, revocation or renewal of any permit.” Id. § 35-11-112(a)(iv).² This includes contested cases challenging air permits. Substantively, the Council may “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” Id. § 35-11-112(c)(2).

Indeed, the Council has recognized it has independent authority to review *de novo*³ any permit that is appealed and to suspend the permit, modify its terms, or revoke it altogether. In 2007, the Council stated:

² As discussed above, Air Permit CT-4631 stated explicitly that any appeals were to be made to the Council within sixty days pursuant to DEQ, Rules of Practice and Procedure, Chpt. 1 § 16.

³ According to Black’s Law Dictionary, 5th Ed., “de novo trial” means “trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered.”

Wyo. Stat. § 35-11-112(b)(iv) grants the EQC authority to conduct hearings in cases contesting permits, and Wyo. Stat. § 35-11-112(c)(ii) provides authority to modify permits. The EQC conducts de novo hearings pursuant to the DEQ Rules of Practice and Procedure, the Wyoming Rules of Evidence, and the Wyoming Rules of Civil Procedure.

Appeal of 4W Ranch Objection to NPDES Permits, Docket No. 04-3801 (EQC Mar. 5, 2007)

(Findings of Fact and Conclusions of Law); see also DEQ, Rules of Practice and Procedure, Chpt. 1, § 13(a) & Chpt. 2. Accordingly, the Environmental Quality Act did not create the Council to act as a rubber stamp to DEQ’s permitting decisions. Instead, the Act entrusts the Council—not DEQ—with final administrative decision-making authority when it comes to permits.

The Wyoming Administrative Procedure Act (“APA”) confirms the Council’s role as the final decision-maker in the permitting process. The Environmental Quality Act provides for appeals of “final action” in accordance with the APA. W.S. § 35-11-1001(a); see also DEQ, Rules of Practice and Procedure, Chpt. 1 § 8(a). According to the APA, an agency’s action does not become effective until all administrative appeals have been exhausted:

Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction . . . is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken.

Id. § 16-3-114(a); Rissler & McMurry Co. v. Wyoming, 917 P.2d 1157, 1163 (Wyo. 1996);

Glover v. State, 860 P.2d 1169, 1171-72 (Wyo. 1993). The purpose of the exhaustion requirement is to prevent “premature interruption of the administrative process.” Glover, 860 P.2d at 1172. Where an agency has been created to apply a particular statute, the exhaustion requirement allows the expert agency to act as a trial court in the first instance to “develop the necessary factual background upon which decisions should be based.” Id.

The Wyoming Supreme Court has confirmed that the Council was created to serve as the final expert agency responsible for developing the factual background for permits under the Environmental Quality Act. In a case involving a challenge to a mining permit, the Court discussed the Council’s authority under the Environmental Quality Act provision allowing the Council to grant, deny suspend, or modify any DEQ issued permit. The Court held:

The Legislature has charged the Environmental Quality Council with the responsibility for approving or denying applications for mining permits. Wyo. Stat. § 35-11-112(c)(ii) (1994). Until its determination has been rendered, the courts do not have jurisdiction . . . to . . . entertain an appeal from the denial of an application for a permit.

Rissler, 917 P.2d at 1162. The same authority applies to air quality permits. W.S. § 35-11-112(c)(ii). Because the courts do not have jurisdiction until after the Council reviews the DEQ’s air permit decisions *de novo*, the Legislature’s intent is clear. The administrative process does not end until the Council makes a final decision on the merits of the air permit.

II. To Preserve the Integrity of the Permitting Process, the Council Should Exercise its Authority to Suspend the Air Permit Pending Appeal

To effectuate the Legislature’s intent that the Council play a meaningful role in air permitting decisions, the Council should exercise its authority to suspend the permit in this case pending appeal. W.S. § 35-11-11(c)(ii).⁴ If Basin Electric continues to construct the Dry Fork plant before the Council renders its decision on this appeal, the Council’s obligation to determine BACT for the facility “as if no decision had been previously rendered”—or *de novo*—could be compromised. Basin Electric’s ongoing construction and other financial commitments may influence the Council’s decision on the BACT determination due to the cost of replacing the

⁴ Although neither the Environmental Quality Act nor the Council's regulations specifically address the effective date of the permit or the standards for suspension, the Act does vest the Council with broad authority to act as hearing examiner and to suspend or modify permits as discussed above.

boiler or other pollution control equipment with a more efficient technology. Indeed, Basin Electric has invested substantially in the current design of the plant already and will continue to do so over the next year. Basin Electric is likely to rely on these investments to influence the Council's decision on the outcome of the BACT analysis or appropriate remedy in this case. Accordingly, to protect the integrity of the Council's role in this appeal and to preserve a process that is fair and objective, the Council should exercise its authority to suspend temporarily the effectiveness of the permit.

Indeed, this is the very reason that under the Clean Air Act, an EPA-issued PSD permit does not become effective until after a final decision by the Council's federal counterpart, the Environmental Appeals Board. According to 40 C.F.R. § 124.15(b), a "final permit decision . . . shall become effective 30 days after the service of notice of the decision unless . . . [r]eview is requested on the permit under Sec. 124.19" (emphasis added). Section 124.19 governs appeals to the Environmental Appeals Board. Once a permit is appealed under this section, the permit is not final until the appeal is denied, there is a decision on the merits, or the permit is remanded and the necessary administrative procedures are again exhausted. 40 C.F.R. § 124.19(e), (f). Based on these provisions, the Environmental Appeals Board found there was no reason for a petitioner to request a stay of a PSD permit since the permit was not effective until all administrative procedures, including appeal to the Board, were exhausted. In re: Amerada Hess Corp. Port Reading Refinery, Appeal No. 04-03 (EAB Feb. 1, 2005), available at 2005 WL 289445.

By effectively staying PSD permits until after the Environmental Appeals Board has ruled, the EPA ensures that during the appeal the Board is not prejudiced or limited in selecting the full range of remedies, including denying the permit or ordering major physical modifications

of the facility. If the pollution source is already constructed, largely constructed, or largely paid for by the time an administrative appeal is resolved, the appellant will be prejudiced in his administrative appeal. Indeed, at the merits stage, courts are often influenced by significant construction activities, and may be willing to tolerate more environmental harm than they would otherwise. As the D.C. Circuit stated in a case under the National Environmental Policy Act (“NEPA”):

Once a [nuclear power] facility has been completely constructed, the economic cost of any alteration may be very great. In the language of NEPA, there is likely to be an “irreversible and ir retrievable commitment of resources,” which will inevitably restrict the Commission’s options. Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.

Calvert Cliffs’ Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1128 (D.C. Cir. 1971). Timing is crucial because “[a]fter major investment of both time and money, it is likely that more environmental harm will be tolerated.” Environmental Defense Fund v. Andrus, 596 F.2d 848, 853 (9th Cir.1979). Similarly, once the “bureaucratic momentum” gets going in favor of a particular course of action, it can “skew the analysis and decision-making of [an agency] towards its original non-compliant. . . . decision.” Colorado Wild v. Forest Service, 523 F.Supp.2d 1213, 1221 (D. Colo. 2007).

The same concern is present here. Both the Clean Air Act and Wyoming’s Air Regulations contemplate a full analysis of BACT prior to construction of a major stationary source, like the Dry Fork Station. 42 U.S.C. § 7475; WAQSR Chpt. 6 § 2(a), (c). BACT analysis requires consideration of a range of technologies and selection of the most stringent unless the company can show it is not achievable. Id. § 4(a); Alaska Dep’t of Env’tl. Conservation, 298 F.3d at 822. Currently, Basin is proceeding with outdated technology to the

exclusion of more efficient technology mandated by BACT. The further down the road Basin Electric gets towards completion of the project, the harder it will be for the Council to force the company to implement another alternative. Accordingly, to ensure the BACT process has meaning and the Council can select the most stringent technology available, the Council should not allow any additional progress on the Dry Fork Station until the Council makes a final determination on this appeal.

CONCLUSION

While the Dry Fork Station will contribute to degraded air quality and global warming emissions in Wyoming for at least the next 40 years, the appeals process will be over in less than a year. To ensure that this process for determining the appropriate technology to control those emissions is not based on a predetermined outcome, the Council should exercise its broad authority under the Environmental Quality Act and suspend the air permit pending the outcome of this appeal. At a minimum, the Council should inform Basin Electric that the company is proceeding at its own risk, and that the Council's ultimate decision on the merits will not be influenced any actions the company takes during this appeal.

Dated: February 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James S. Angell, certify that on this day of February 8, 2008, I served a copy of the foregoing **PROTESTANTS' MOTION TO SUSPEND AIR PERMIT CT-4631 PENDING RESOLUTION OF PROTESTANTS' APPEAL** via e-mail and by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

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