

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)	
_____)	

**OPPOSITION TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Claim VII—PM_{2.5})**

Protestants object to DEQ’s and Basin’s Proposed Findings of Fact and Conclusions of law (Claim VII – PM_{2.5}) on the following grounds:

1. The Council did not hear expert testimony on technical issues regarding PM_{2.5}. In particular, the Council did not hear any expert testimony related to the technical difficulties associated with regulation of PM_{2.5} or what a NAAQS or BACT analysis of PM_{2.5} would have revealed if DEQ had done one. The motion passed orally by the Council at the hearing was to “grant DEQ and Basin Electric’s motion for summary judgment and deny [Protestants’]¹ motion for summary judgment on the basis of long-standing policy with EPA and DEQ following the surrogate policy and the fact that Wyoming is an attainment area for 2.5.” Dispositive Motion Hearing Transcript, pp. 223-224 (excerpt attached as Exh. 1). Accordingly, the Council’s Order should be limited to the surrogate policy and Wyoming’s attainment status. The proposed Findings of Fact and Conclusions of Law go way beyond these issues.

The Council should reject paragraphs 9, 15-16, 21-22, and 25 in their entirety because they involve disputed issues of fact that the Council did not resolve, and they were not part of basis for the Council’s decision. For the same reasons, if the Council accepts the Finding of Fact in paragraph 20 and the Conclusion of Law in paragraphs 12 and 20, they should be modified as follows:

Findings of Fact:

20. The DEQ/AQD’s BACT analysis concluded that a baghouse and an emission limit of 0.012 lb/MMBTU for filterable PM/PM₁₀ represented BACT for the boiler, ~~one of the lowest emission limits in the country for PM-~~ Schlichtemeier Aff., Ex. N at DEQIAQD Bates No. 001444; Ex. T at DEQIAQD Bates No. 004170; Snell Aff., ¶10 (attached to Basin Electric’s Memo in Opposition).

¹ Although the Council stated that it was “Earthjustice’s” motion, Earthjustice is not a party to this action. Earthjustice is the law firm representing Protestants, Powder River Basin Resource Council, Wyoming Outdoor Council, and Sierra Club.

Conclusions of Law:

12. ~~Because the science underlying regulation of PM_{2.5} remains unresolved,~~ EPA has not yet issued all of the final rules establishing a regulatory framework for separately regulating PM_{2.5} without a surrogate policy. Basin Electric filed its permit application in November of 2005, just as EPA's first proposed rule for establishing a regulatory framework for the PM_{2.5} NAAQS was published. In September of 2007, EPA proposed key elements for the PSD program for PM_{2.5}, including PM_{2.5} "increments," SILs, and SMCs (Proposed Rule), 72 Fed. Reg. 54,112 (Sept. 21, 2007), but EPA again reaffirmed in the Proposed Rule that "[a] State implementing a NSR program in an EPA approved State Implementation Plan (SIP) may continue to rely on the interim surrogate policy[.]" *Id.* at 54,114.

20. ~~Reliance on EPA's Surrogate Policy is appropriate in this case. PM_{2.5} emissions from the Dry Fork Station will fall below the applicable NAAQS for PM_{2.5}. BACT analysis and emission controls have been applied under this permit for PM_{2.5} precursors and controls effective for PM_{2.5} have been adopted as part of the BACT analysis for PM₁₀, as contemplated by the EPA Surrogate Policy. See, *In re Prairie State Generating Co.*, PSD App. No. 05-05, 13 E.A.D. ___ (EAB Aug. 24, 2006), slip op. at 127-128.~~

2. Protestants also object to DEQ and Basin's characterization of fact versus law. In particular, the proposed findings of fact in paragraphs 18 and 19 state that DEQ's actions satisfied EPA's surrogate policy. Whether DEQ's actions are consistent with EPA policy is a conclusion of law rather than a finding of fact. Therefore, Protestants recommend the following modifications to these proposed Findings of Fact:

18. Basin Electric conducted an ambient air impact analysis and demonstrated that the Dry Fork Station's impact on ambient air quality will be less than applicable SILs and therefore will not cause or contribute to any exceedance of any ambient air quality standard or PSD increment for PM₁₀, ~~thereby satisfying the ambient air quality impact analysis requirement for PM_{2.5} under EPA's Surrogate Policy.~~ Schlichtemeier Aff., Exh. N at DEQ/AQD Bates Nos. 001443-1444, 001459, 001483; Ex. T at DEQ/AQD Bates Nos. 004170-4171.

19. The DEQ's review of Basin Electric's modeling analysis concluded that the total PM₁₀ concentrations from Dry Fork were below the PM₁₀ NAAQS, below the PSD increments for PM₁₀, and also less than the Class II SILs for PM₁₀ for both the 24-hour and annual averaging periods and therefore Dry Fork will not cause or contribute to any NAAQS or increment exceedance for PM₁₀, ~~thus satisfying the PM_{2.5} ambient air quality impact analysis requirements pursuant to EPA's Surrogate Policy.~~ *Id.*

Additionally, any statements regarding the timeline for Basin Electric's permit application and any EPA statements regarding the surrogate policy made in the Federal Register are facts, not legal conclusions. Accordingly, proposed Conclusions of Law in paragraphs 6, 12-18 should be deleted.

3. Protestants also object to the following proposed Findings of Fact because the citations provided do not support DEQ and Basin's contention.

4. Wyoming has incorporated the 1997 PM_{2.5} NAAQS into the Wyoming Air Quality Standards and Regulations, but has not yet amended its rules to reflect the PM_{2.5} NAAQS established by EPA in 2006 ~~notwithstanding DEQ is and has been in compliance with the 2006 PM_{2.5} NAAQS standards.~~ WQSR Ch. 2, §2(b).

Nowhere in WAQSR Ch. 2, § 2(b) does it state that DEQ is and has been in compliance with the 2006 PM_{2.5} NAAQS standards.

~~7. Pursuant to this federal guidance for implementing the CAA, states around the country, including Wyoming, follow this policy, and virtually all states have continued to do so. 73 Fed. Reg. 28,321, 28,340-28,341.~~

Nowhere in the Federal Register pages cited does EPA state that Wyoming follows the surrogate policy or that "virtually all states" follow the surrogate policy. *See* 73 Fed. Reg. 28321, 28,340-28,341. In fact, those pages make it clear that all delegated states no longer rely on the surrogate policy.

Dated: October 23, 2008

Respectfully submitted,

/s/ Robin Cooley

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CERTIFICATE OF SERVICE

I certify that on October 23, 2008, I served a copy of the foregoing Opposition to Proposed Findings of Fact and Conclusions of Law (Claim VII—PM_{2.5}), and accompanying exhibit via e-mail, addressed to:

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EXHIBIT 1

BEFORE THE STATE OF WYOMING
ENVIRONMENTAL QUALITY COUNCIL

DISPOSITIVE MOTION HEARING IN THE MATTER OF THE BASIN
ELECTRIC POWER COOPERATIVE, DRY FORK STATION

VOLUME II
TRANSCRIPT OF HEARING PROCEEDINGS

Transcript of Hearing Proceedings in the above-entitled matter before the Environmental Quality Council, commencing on the 30th day of September, 2008, at 9:00 a.m., at the Wyoming Game and Fish Office, 3030 Energy Lane, Casper, Wyoming, Ms. Deborah A. Baumer presiding, with Councilmembers Mr. Dennis Boal, Mr. F. David Searle, Mr. John Morris, Mr. Thomas Coverdale, Mr. Tim Flitner and Dr. Fred Ogden in attendance. Also present were Mr. Jim Ruby, Executive Secretary, Ms. Terri Lorenzon, Director/Attorney, Ms. Marion Yoder, Counsel from Attorney General's Office, Mr. Joe Girardin, Paralegal to the Council, and Ms. Kim Waring, Executive Assistant.

A P P E A R A N C E S

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1 I think we may have a dispute in the fact there. I think
2 that's all for now.

3 HEARING OFFICER BAUMER: Any other
4 questions?

5 Mr. Searle, turn the matter over to you for
6 deliberation.

7 CHAIRMAN SEARLE: Thank you. The matter
8 before us is motions. And I believe -- let's make sure
9 everybody understands. This is also a topic -- I think
10 you led in your introduction that we have motions from
11 all three parties. Is that correct?

12 HEARING OFFICER BAUMER: That's correct.

13 CHAIRMAN SEARLE: Is the motions by Basin
14 and the DEQ similar in nature?

15 HEARING OFFICER BAUMER: They are, yes.

16 CHAIRMAN SEARLE: Basically one asking us
17 to dismiss this issue -- or two parties asking us to
18 dismiss this issue --

19 HEARING OFFICER BAUMER: For the same
20 reasons.

21 CHAIRMAN SEARLE: -- for the same reasons?
22 Okay, great. Well, that's the issue before us, folks.
23 We need a motion, I guess, to start the conversation.

24 Mr. Coverdale?

25 MR. COVERDALE: I move we grant DEQ and

1 Basin Electric's motion for summary judgment and deny
2 Earthjustice's motion for summary judgment on the basis
3 of long-standing policy with EPA and DEQ following the
4 surrogate policy and the fact that Wyoming is an
5 attainment area for 2.5.

6 CHAIRMAN SEARLE: Do I have a second for
7 that motion?

8 MR. MORRIS: I'll second it.

9 CHAIRMAN SEARLE: Thank you, Mr. Morris.
10 Discussion?

11 MR. FLITNER: I have a quick question, if
12 that's all right. Do we have a disputed fact of whether
13 we can at this point accurately measure 2.5 on its own
14 without the surrogate? Is that something we can agree or
15 disagree on? Do we have the tools available for that, I
16 guess is what I mean?

17 MR. DAY: No. I mean, our position is no.
18 Protestants may disagree. One of the problems, for
19 example, is that the formation of PM 2.5 secondary
20 particulates in the atmosphere post stack, the computer
21 models that are used to model emissions are not designed
22 to model those kinds of post-stack formations. And so
23 these are the technical -- these are some of the
24 technical problems that EPA is still addressing.

25 MS. COOLEY: And I think we do have a

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C E R T I F I C A T E

I, RANDY A. HATLESTAD, a Registered Merit Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein constituting a full, true and correct transcript.

Dated this ____ day of _____, 2008.

RANDY A. HATLESTAD
Registered Merit Reporter