

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
(Claims II and III—IGCC and Supercritical Technologies)**

Protestants object to DEQ’s and Basin’s Proposed Findings of Fact and Conclusions of law (Claims II and III—IGCC and Supercritical Technologies) on the following grounds:

1. The proposed Findings of Fact cover issues that were not resolved by the Council or part of its justification for granting DEQ’s and Basin’s motions for summary judgment. Mr. Coverdale moved to grant DEQ’s and Basin Electric’s motions concerning IGCC and supercritical boiler as “supported by the law and the BACT control technology definition.” Dispositive Motion Hearing Transcript, pp. 85-86 (excerpt attached as Exh. 1). As the Motion and the Council’s subsequent discussion reveals, the Council’s ruling was based on the definition of BACT and a legal conclusion that the only source considered in the BACT analysis is the source proposed by the applicant. *See* Transcript at 88 (Mr. Coverdale stating, “I think the language in the BACT definition is pretty clear. It says proposed. . . . And I don’t think that DEQ, under BACT definition, can tell somebody submitting a proposal that, no, you can’t use your proposed technology.”); *id.* at 89 (Mr. Flitner stating, “I’m going to vote yes on it for almost all the same reasons that Mr. Coverdale expressed.”); *id.* at 89-90 (“I support the motion. Tom brought up most of them.”). Chairman Searle also commented on the historical practice of DEQ and EPA. *Id.* at 90 (Chairman Searle stating that the DEQ and EPA practice is “enough clarification on the intent of what that language is that I can support the way they’ve applied it.”). Therefore, the Council’s Order should be limited to these issues.

However, DEQ and Basin’s proposed Findings of Fact and Conclusions of Law go well beyond the legal issue regarding the BACT definition. In particular, they include numerous statements about the extent to which Basin and DEQ actually considered IGCC or supercritical during the permitting process. These statements are irrelevant with respect to the legal definition of BACT and were not part of the Council’s justification for its ruling. Therefore, the proposed Findings of Fact in paragraphs 4, 6, and 8-9 should be eliminated in their entirety. The following Findings of Fact also should be modified as shown.

5. Basin Electric selected a subcritical pulverized coal boiler as its proposed emission source technology for purposes of its PSD permit application. ~~This technology has a proven track record burning sub-bituminous Wyoming~~

coal, at Wyoming elevation, with an availability factor in excess of 90%. See Williams Aff., Ex.A at 3.

7. ~~DEQ/AQD required Basin Electric to provide information regarding its technology selection, but~~ DEQ/AQD did not require Basin Electric to evaluate IGCC or supercritical technologies as part of the BACT analysis. See Schlichtemeier Aff., ¶¶ 29-30, Ex. R, Ex. S, and Ex. T at DEQ/AQD Bates Nos. 004182-4240.

15. DEQ did not consider IGCC or supercritical technologies to be control technologies that had to be evaluated as part of the BACT process required by WAQSR Ch. 6, § 4(a). As a consequence, ~~although DEQ did require Basin Electric to explain the reasons for its decision not to employ these technologies,~~ DEQ did not submit these technologies to a separate “BACT” analysis as potential pollution control options when issuing Basin Electric’s permit. See Schlichtemeier Aff., ¶ 34-35, 44-47.

2. With respect to the proposed Finding of Fact in paragraph 16, there is no support for the proposition that DEQ relied on the Council’s decision in *In the Matter of a Permit Issued to Black Hills Power & Light Company, Neil Simpson Unit #2* as a justification for its decision to issue Basin’s permit. The decision is not mentioned in DEQ’s response to comments. Therefore, paragraph 16 should be modified as follows:

16. DEQ did not do so because it considered these technologies to be fundamentally different emission source technologies that the one proposed by Basin Electric and, if applied, would require Basin Electric to “redefine” its propose emission source, a subcritical pulverized coal boiler, contrary to DEQ’s interpretation of WAQSR, Ch. 6, § 4(a) ~~and prior precedent from this Council affirming DEQ’s interpretation of the BACT regulation. See *In the Matter of a Permit Issued to Black Hills Power & Light Company, Neil Simpson Unit #2*, Permit No. CT 1028, Docket No. 2476-93 at Conclusions of Law ¶ 5 (attached as Ex. 3 to Basin Electric Brief).~~

3. DEQ and Basin’s proposed Conclusion of Law in paragraph 20 contains statement of facts and not law. These statements of fact are repetitive of information in the proposed Findings of Fact and therefore should be removed.

4. DEQ and Basin also include restatements of Protestants’ legal positions in proposed Conclusions of Law 21 and 22. Not only do DEQ and Basin mischaracterize Protestants’ legal positions, but the Council’s Order is not the appropriate place to articulate Protestants’ arguments. Therefore, proposed Conclusions of Law 21 and 22 should be deleted.

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 (Claims II and III—IGCC and Supercritical Technologies), and accompanying exhibits 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 I
TRANSCRIPT OF HEARING PROCEEDINGS

Transcript of Hearing Proceedings in the above-entitled matter before the Environmental Quality Council, commencing on the 29th day of September, 2008, at 1:00 p.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 HEARING OFFICER BAUMER: You can make a
2 decision after the discussion, or you can make a decision
3 at the end of the day.

4 MR. COVERDALE: Do we need a motion to
5 have a discussion?

6 HEARING OFFICER BAUMER: Yes.

7 MR. COVERDALE: Can I make a motion?

8 HEARING OFFICER BAUMER: This is going to
9 be up to Presiding Officer Searle, how he wants to
10 proceed with this.

11 CHAIRMAN SEARLE: Before I have a motion,
12 Mr. Coverdale --

13 MR. MORRIS: Let's have a recess.

14 CHAIRMAN SEARLE: Let's have a recess. We
15 will stand adjourned until ten after 3:00, ten minutes.

16 (Hearing proceedings recessed
17 2:58 p.m. to 3:10 p.m.)

18 CHAIRMAN SEARLE: We will reconvene. We
19 will start with -- Mr. Coverdale, would you like to make
20 a motion in this regard?

21 MR. COVERDALE: Sure. Based on the
22 agreement of the facts, I move we grant DEQ and Basin
23 Electric summary judgment request for dismissal of Issues
24 2 and 3 concerning IGCC and supercritical boiler
25 supported by the law and the BACT control technology

1 definition.

2 MR. MORRIS: I'll second it.

3 CHAIRMAN SEARLE: Thank you,
4 Mr. Coverdale.

5 Thank you, Mr. Morris.

6 We've decided -- I don't know what we told you
7 before. We're going to decide each issue as we go along.
8 Originally we were going to try and save them all until
9 the end. We decided our heads might blow up by then. So
10 we'll do each one as we go along. So at this point,
11 since we have a motion and a second, I'd just ask if
12 there's any discussion of the motion.

13 MR. BOAL: Mr. Chairman?

14 CHAIRMAN SEARLE: Mr. Boal.

15 MR. BOAL: I'm going to vote against the
16 motion. I think this is one issue where we need to have
17 a hearing. And at that hearing, the parties should
18 present their facts on whether or not a BACT
19 consideration of this technology constitutes a redesign
20 or redefinition of facility or whether it's a production
21 process as anticipated by the definition of best
22 available control technology.

23 And, you know, I'd just hold up for you this.
24 This is the response of the protest -- the protestants to
25 the supposed undisputed facts on this issue. And you can

1 fuel combustion techniques. So I think that's an issue
2 of fact in this motion. I'm going to vote against it.

3 CHAIRMAN SEARLE: Thank you, Mr. Boal.

4 Mr. Coverdale?

5 MR. COVERDALE: I'm going to vote for it.
6 I think that the language in the BACT definition is
7 pretty clear. It says proposed. And if we grant this
8 motion and go to hearing, I don't know where we end up.
9 And we take away the ability of individual industrial
10 entities to propose how they want to generate power and
11 what makes economic sense for their business. I think
12 that's heading down a road that the legislature may want
13 to go down, but I don't think we should.

14 Dennis, I hear you, but I also notice that you
15 had to catch yourself when you started to say best
16 available control technology. I think the language in
17 that definition is very clear, that once the thing is
18 proposed, DEQ can reject it. But it's basically that
19 proposed manufacturing process around what kind of
20 control should be imposed on them.

21 And I don't think that DEQ, under BACT
22 definition, can tell somebody submitting a proposal that,
23 no, you can't use your proposed technology. You need to
24 use some totally different technology that may not be as
25 reliable, may not work at high altitude. Those are all

1 facts that they can argue about. But for BACT, I think
2 it's very clear, and therefore, I will be voting for it.

3 CHAIRMAN SEARLE: Thank you,
4 Mr. Coverdale.

5 Dr. Ogden?

6 DR. OGDEN: I'm in doubt of the motion for
7 one reason. And that is, I don't quite understand the
8 legislative intent that's behind this section of Wyoming
9 statute. As I understand, it was taken verbatim from the
10 federal statute. What do they mean when they say,
11 including fuel cleaning or treatment or innovative fuel
12 combustion techniques? Do they mean -- do they intend to
13 mean things like the advanced techniques that we're
14 talking about today? Until I know the answer to that
15 question, I would hesitate to vote yes on this.

16 CHAIRMAN SEARLE: Thank you.
17 Mr. Flitner?

18 MR. FLITNER: I'm going to vote yes on it
19 for almost all the same reasons that Mr. Coverdale
20 expressed. I could go on, but he covered the two or
21 three main points that I had. So I'll just leave it
22 there.

23 CHAIRMAN SEARLE: Thank you.
24 Mr. Morris?

25 MR. MORRIS: I support the motion. Tom

1 brought up most of them. But I think the facts have been
2 considered. I think DEQ considered these facts. They
3 considered these facts, and so did EPA consider these
4 facts. And if they have been considered and they approve
5 them and they meet the requirements for the permit, then
6 let's go with it.

7 CHAIRMAN SEARLE: Thank you, Mr. Morris.

8 I also intend on voting for it for some of the
9 same reasons Mr. Morris alluded to. This program has a
10 long history of how it has done its analysis. And it has
11 been accepted not only by the DEQ, but it's also been
12 accepted by EPA. And I believe that's enough
13 clarification on the intent of what that language is that
14 I can support the way they've applied it.

15 At this point, I'll ask roll call vote again.
16 Let's start down with Mr. Boal.

17 MR. BOAL: I vote against the motion.

18 CHAIRMAN SEARLE: Mr. Coverdale?

19 MR. COVERDALE: I vote for the motion.

20 CHAIRMAN SEARLE: Thank you.

21 MR. MORRIS: I vote aye.

22 CHAIRMAN SEARLE: Thank you, John.

23 Tim?

24 MR. FLITNER: Aye.

25 DR. OGDEN: Against.

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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