

FILED

AUG 21 2008

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE) EQC DOCKET NO. 07-2801
DRY FORK STATION)
AIR PERMIT CT-4631)

**ORDER DENYING BASIN ELECTRIC POWER COOPERATIVE INC'S
MOTION TO DISMISS APPEAL**

THIS MATTER came before the Environmental Quality Council (Council) on April 29, 2008, for oral argument on Basin Electric Power Cooperative Inc's Motion to Dismiss Appeal filed on February 8, 2008, Protestant's March 12, 2008 Response to Basin Electric Power Cooperative Inc's Motion to Dismiss Appeal, and Basin Electric's Reply in Support of its Motion to Dismiss filed April 3, 2008. Council members present at the motion hearing included Dennis M. Boal, Chairman, F. David Searle, Vice-Chair and Presiding Officer in this case, Richard C. Moore, P.E., John N. Morris, Kirby L. Hedrick and Thomas Coverdale. Terri A. Lorenzon, Executive Director of EQC and Marion Yoder, Assistant Attorney General were also present. Deborah A. Baumer from the Office of Administrative Hearings served as the Hearing Examiner. Basin Electric Power Cooperative Inc. (Basin Electric) appeared by and through counsel, Patrick Day. The Protestants, Earthjustice, Powder River Resource Council, the Sierra Club and Wyoming Outdoor Council appeared by and through counsel, Andrea Zaccardi. The Department of Environmental Quality, Air Quality Division (DEQ) appeared by and through Senior Assistant Attorney General, Nancy Vehr. The Council has considered the motion, written responses and argument of the parties, and makes the following:

I. JURISDICTION

“The council shall act as the hearing examiner for the department 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, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007).

The council shall, “Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007).

The Protestants disputed the Director of DEQ’s approval of Basin Electric’s Air Quality Permit CT-4631 for the Dry Fork Station project and requested a hearing before the Council. Therefore, this Council has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Wyoming Environmental Quality Act (WEQA) and DEQ regulations, an air quality construction permit is needed before any person commences construction of any new facility or modifies any existing facility which may cause the issuance of air pollution in excess of the standards set by the DEQ. On November 10, 2005, Basin Electric submitted an air quality construction permit application to DEQ to construct a coal-fired power generating station, known as Dry Fork Station, near Gillette, Wyoming. On October 15, 2007, after nearly two years of technical review and analysis by the Air Quality Division, the Director of DEQ determined that Basin Electric’s application for construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and approved Basin Electric’s application to construct Dry Fork Station by issuing Air Quality Permit CT-4631.

Basin Electric filed a Motion to Dismiss Protestant's appeal in this matter asserting the Protestants have no statutory right to appeal the air quality permit issued to Basin Electric.

Protestant's responded that EQC is required to hear Protestant's appeal to the Council prior to proceeding to District Court. Protestant's also argued that the WEQA as well as DEQ's Rules of Practice and Procedure allow for this appeal.

DEQ did not take a position on this motion.

III. ISSUES AND CONTENTIONS

The issue raised by Basin Electric in its Motion to Dismiss is whether Protestants can appeal, to this Council, the Director's decision to issue Basin Electric an air quality permit. Basin Electric argued the right to appeal any agency action is entirely statutory and therefore must be found in the WEQA. According to Basin Electric, there is no statute which authorizes this Council to hear the appeal, therefore the Council lacks jurisdiction in this matter, and the proper venue for this case is the district court.

Protestants argued Wyo. Stat. Ann. § 35-11-112 (LEXIS 2007) and DEQ's Rules of Practice and Procedure provides a general right to appeal any case contesting the grant of any permit. Protestants additionally argued the Wyoming Administrative Procedures Act (WAPA) requires exhaustion of administrative remedies prior to appealing a case directly to District Court and therefore, this Council has jurisdiction to hear this matter.

IV. FINDINGS OF FACT

1. On November 10, 2005, Basin Electric submitted an air quality construction permit application to construct a coal-fired electric power generating plant, known as Dry Fork Station, near Gillette, Wyoming.

2. On February 26, 2007, DEQ provided notice to the public that it intended to issue an air quality permit to Basin Electric authorizing the construction of Dry Fork Station. The DEQ notice invited comments from the public and Protestants submitted lengthy comments in support of their position that the proposed permit violated Wyoming law. *Protestants' Exhibits 1 and 2.*

3. On October 15, 2007, the Director of DEQ determined that Basin Electric's application for construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and issued Air Quality Permit CT-4631. By issuing the permit, the Director of DEQ determined the permit satisfied both New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements. *Protestants' Exhibits 3 and 4.*

4. In Air Quality Permit CT-4631, DEQ states the appeal rights available as follows:

Any appeal of this permit as a final agency action of the Department must be made to the Environmental Quality Council within sixty (60) days of permit issuance per Section 16, Chapter 1, General Rules of Practice and Procedure, Department of Environmental Quality.

Protestants' Exhibit 4.

5. 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 and the case was referred to the EQC. *Protestants' Exhibit 5.*

6. Basin Electric thereafter filed its February 8, 2008 Motion to Dismiss this appeal asserting that Protestants have no statutory right to appeal and therefore this Council lacks jurisdiction in this matter. According to Basin Electric, DEQ's decision to issue the air quality permit is a final agency action and the Protestants must appeal the decision directly to the district court.

V. CONCLUSIONS OF LAW

A. Principles of Law

7. The Council's jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

8. Pursuant to the WEQA, the council **shall**, "Act as the hearing examiner for the department 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, land quality, solid and hazardous waste management or water quality divisions." Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007) (emphasis added).

9. The Council **shall**, "Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007) (emphasis added).

10. All hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. § 35-11-101 through 1104 and the Wyoming Administrative Procedure Act. Department of Environmental Quality, Rules of Practice and Procedure, Chapter 1, Section 3 (DEQ's Rules).

11. The Wyoming Administrative Procedures Act (WAPA) requires exhaustion before going to district court. WAPA contains a specific provision addressing the requirement

for 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.

Wyo. Stat. Ann. § 16-3-114(a).

12. Chapter 1, Section 2(a)(ii) of DEQ's General Rules of Practice and Procedure defines Protestant as, "Any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief."

B. Application of Principles of Law

13. The WEQA specifically designated the Council as the "hearing examiner" in "any case" contesting DEQ's "grant" of a permit and gave this Council broad authority to pass regulations to govern those hearings.

14. Basin Electric argued the specific statutes in the WEQA that actually provide a party with a right to a hearing before this Council become meaningless if this Council relies upon the general statutory authority to hold contested case hearings in Wyo. Stat. Ann. § 35-11-112. This Council disagrees with Basin Electric's position in this matter. The Council's contested case hearing authority exists so that a separate statutory right to review is not required in this case.

15. This Council's practice has always been to allow permit appeals by aggrieved parties who are not permit applicants. The DEQ has also provided such right in the issuance of

the permit itself. In the body of the permit, Protestants are specifically provided a right of review before the Council.

16. The Council's decision to allow this appeal to proceed supports the underlying purpose of the Environmental Quality Act which is the protection of public health and welfare, as well as provide an avenue for third party appeals of DEQ issued permits. It is the place for citizens who feel aggrieved by some environmental action to have their complaints heard. Basin Electric is asking this Council to ignore the underlying premise of the act. It has been an agency practice for nearly 30 years to hear appeals in any case where DEQ grants a permit. Therefore, there is a presumption in favor of this appeal to be heard by the council.

17. Likewise, Basin Electric's argument that Wyo. Stat. Ann. § 35-11-208 is the only section that authorizes an appeal in this matter, is not persuasive. By its reference to Wyo. Stat. Ann. § 35-11-802, the section is clearly pertinent to operating permits, not construction permits.

18. DEQ's decision to issue an air quality permit becomes a final agency action only if the decision to issue the permit is **not** appealed. DEQ provides this very right to appeal in its permit, wherein it advises the public that its decision to issue the permit will, in fact, become a final agency action **unless** appealed within 60 days. Therefore, the issuance of the air permit is not a final agency action in this case until this appeal has been heard and decided. Upon filing a petition for review of the agency's action with this Council, a full evidentiary, *de novo* hearing is required for further appellate review.

19. Finally, Basin Electric argued that since DEQ only issued the air quality permit after an exhaustive investigation into all of the available emission control technologies and reviewed and evaluated complex data and evidence, the permit to construct is a final agency

action not subject to review by the Council because they lack the expertise to review the matter. This Council disagrees with Basin Electric's argument.

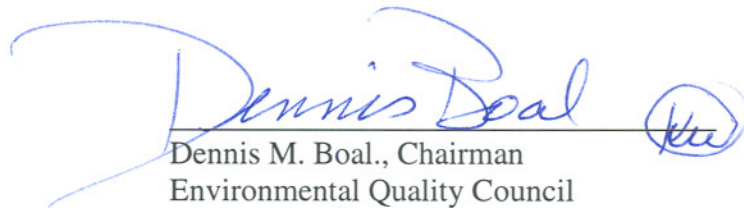
20. The Legislature established this Council to use **its** expertise in environmental matters and charged it to act as hearing examiner. In fact, if the district court would hear this appeal with no evidentiary record, it would be unable to make an informed decision. There must be a record for the appellate court to review in order to determine if DEQ's decision to issue an air quality permit was proper, and the record is developed through a due process hearing. The WAPA clearly requires exhaustion of administrative remedies and in the absence of statutory preclusion of review, this Council has jurisdiction.

ORDER

IT IS THEREFORE ORDERED that:

1. Basin Electric Power Cooperative Inc's February 8, 2008 Motion to Dismiss Appeal is hereby DENIED.
2. The hearing remains set in this matter for November 17, 2008.

SO ORDERED this 21st day of August, 2008.



Dennis M. Boal., Chairman
Environmental Quality Council
122 West 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, Wyoming 82002
(307) 777-7170

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 21st day of August, 2008, I served a copy of the foregoing ORDER DENYING BASIN ELECTRIC POWER COOPERATIVE INC'S MOTION TO DISMISS APPEAL by electronic email to the following persons:

James S. Angell
Robin Cooley
Andrea Zaccardi
Earthjustice
1400 Glenarm Place, #300
Denver, CO 80202
jangell@earthjustice.org
rcooley@earthjustice.org
azaccardi@earthjustice.org

Patrick R. Day, P.C.
Mark Ruppert
Holland & Hart LLP
2515 Warren Ave., Ste. 450
Cheyenne, WY 82001

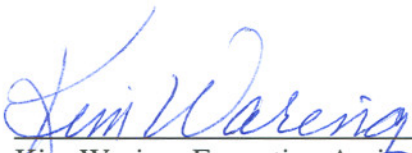
pday@hollandhart.com
mruppert@hollandhart.com

Reed Zars
Attorney at Law
910 Kearney St.
Laramie, WY 82070
rzars@lariat.org

Jay A. Jerde
Nancy Vehr
Kristen Dolan
Office of Attorney General
123 State Capitol
Cheyenne, WY 82002
jjerde@state.wy.us
nvehr@state.wy.us
kdolan@state.wy.us

John Corra, Director
David Finley, AQD Administrator
Department of Environmental Quality
122 W. 25th St., Herschler Bldg.
Cheyenne, WY 82002

jcorra@state.wy.us
dfinle@state.wy.us


Kim Waring, Executive Assistant
Environmental Quality Council
122 W. 25th Street,
Herschler Bldg., Rm. 1714
Cheyenne, WY 82002
Tel: (307) 777-7170
Fax: (307) 777-6134