

FILED

AUG 21 2008

*Jim Ruby, Executive Secretary
Environmental Quality Council*

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE)
DRY FORK STATION)
AIR PERMIT CT-4631)

EQC DOCKET NO. 07-2801

ORDER DENYING PROTESTANT'S MOTION TO SUSPEND AIR PERMIT CT-4631
PENDING RESOLUTION OF PROTESTANTS' APPEAL

THIS MATTER came before the Environmental Quality Council (EQC) on April 28, 2008, for oral argument on Protestants' February 8, 2008 Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants' Appeal, Basin Electric's Opposition to Protestant's Motion to Suspend Permit filed on March 12, 2008, Respondent Department of Environmental Quality's Response Opposing Protestants' Motion to Suspend Air Permit filed March 12, 2008 and Protestants' Reply in Further Support of Their Motion to Suspend Permit filed April 4, 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. The Protestants, Earthjustice, Powder River Resource Council, the Sierra Club and the Wyoming Outdoor Council appeared by and through counsel, Reed Zars. Basin Electric Power Cooperative (Basin Electric) appeared by and through counsel, Patrick Day. 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 and requested a hearing before the Environmental Quality Council (EQC). Therefore, the EQC 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 the Dry Fork Station satisfied the applicable statutory and regulatory requirements and approved Basin Electric’s application to construct by issuing Air Quality Permit CT-4631.

Protestants filed a Protest and Petition for Hearing on November 1, 2007. On February 8, 2008, Protestants moved to suspend Air Quality Permit CT-4631 pending resolution of Protestant's Protest and Petition for Hearing. Protestants argued that 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. Basin Electric proceeded with construction of the Dry Fork Station plant immediately after DEQ issued its air permit and continued to pursue construction after Protestant's filed their appeal to this Council. Protestants argued that by commencing construction of Dry Fork Station, Basin Electric is undermining the role of this Council and potentially rendering the appeals process meaningless. Protestants also argued that Basin Electric will likely seek to influence the outcome of the appeal by relying on the financial loss the company will suffer if forced to redesign and reconstruct components. Protestants argued in order to protect the integrity of the process, the permit must be suspended before Basin Electric proceeds to the point where the company has started construction of the plant and paid for major pieces of equipment, in order to ensure that these arguments will not sway the Council's final decision in this matter.

Basin Electric argued there were no legal or practical grounds for permit suspension in this case.

DEQ argued the legislature has vested permit issuing authority with the DEQ. The DEQ reviews, analyzes and issues air quality construction permits, not the EQC. Additionally, DEQ argued that permit suspension is only available in DEQ enforcement actions or for failure to substitute acceptable surety bonds, following a contested case hearing. Finally, an EQC *de novo* hearing on appeal is limited to surface coal mine appeals.

III. ISSUES AND CONTENTIONS

The issue raised by Protestants in this motion is whether Protestants can prove that Basin Electric's Air Quality Permit CT-4631 should be suspended in order to protect the integrity of the appeals process.

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 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 Exhibit 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. *Protestant's Exhibit 5*.

6. Upon receiving its air permit, Basin Electric commenced financial investment and construction of its Dry Fork Station project, which intended to generate electricity by 2011. Basin Electric's affidavits showed that the impacts of its \$1.35 billion dollar project, if suspended, would result in a \$124 million dollar loss if the permit was suspended. *Basin Electric's Exhibit A*.

7. Basin Electric also submitted affidavits that it would lose skilled workers and housing opportunities in the Gillette area during a time of suspension. *Basin Electric's Exhibit B*.

8. Affidavits on behalf of Basin Electric's opposition showed that Dry Fork Station is critical to meet Basin Electric's power obligations and needs in northeast Wyoming. *Basin Electric's Exhibit C*.

V. CONCLUSIONS OF LAW

A. Principles of Law

9. A presumption exists that members of this Council, "**are presumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.**" *Dorr v. Bd. Of Cert. Public Accountants*, 146 P.3d 943, 959 (Wyo. 2006), *citing Fallon v. Wyoming State Board of Medical Exam*, 441 P.2d 322, 329 (Wyo. 1968) (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.

11. The Wyoming Environmental Quality Act vests both the EQC and the DEQ with the authority to suspend permits in the following situations:

Wyo. Stat. Ann. § 35-11-306(k), authorizing the Director to suspend an oil field waste disposal facility upon failure of the operator to provide substitute bond surety;

Wyo. Stat. Ann. § 35-11-409, authorizing the Director to show cause why a mining permit should not be suspended for violations of the EQA and then authorizing the Council to suspend the mining permit after a hearing;

Wyo. Stat. Ann. § 35-11-420, authorizing the Director to suspend a mining permit if surety is not substituted on a bond;

Wyo. Stat. Ann. § 35-11-504, authorizing the Director to suspend a solid waste management permit for failure to substitute surety on a bond.

12. The Wyoming Administrative Procedures Act (WAPA) contains a specific provision addressing the requirement for a contested case hearing over a suspension of a license, which under the WAPA specifically includes permits:

No ... suspension ... of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail of the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for retention of the license.

Wyo. Stat. Ann. § 16-3-113(c) (LEXIS 2007).

13. “License” includes the whole or any part of any agency permit. Wyo. Stat. Ann. §16-3-101(b)(iii) (LEXIS 2007).

B. Application of Principles of Law

14. Protestants have not identified any legal standards or criteria that should be employed should this Council make the determination that it has the authority to suspend the permit in this case. Basin Electric argued there is no practical reason for this Council to suspend the permit because Basin Electric is proceeding with construction fully aware that a permit appeal could lead to changes that impact its project. This Council finds this argument persuasive. Basin Electric has fully admitted that it is aware of the risk of later changes and has decided to proceed while an appeal is pending. Basin Electric has carefully weighed the arguments raised on appeal, the costs of delay, the need for power, the possible expense of change and has concluded that it will proceed with construction. Basin Electric bears the consequences of any change required by an adverse decision on appeal.

15. Protestants' argument that this Council will somehow be influenced by the financial investment incurred by Basin Electric is not persuasive. Additionally, there are no conditions or rules in place setting forth the standards for this Council to suspend the issuance of the air quality permit. Protestants have asked this Council to take the responsibility of weighing the competing factors and decide whether or not to continue construction. This Council declines to do so and Basin Electric has accepted the full responsibility of the consequences of such decision.

16. Both Basin Electric and DEQ argued this Council has no statutory authority to suspend the air quality permit. Both argue that Protestants Motion to Suspend is merely an effort to "stay" the issuance of the permit and construction of the project. This Council agrees with the legal interpretation of Basin Electric's response and DEQ's response in that the effect of suspending the permit in this case is equivalent to "staying" the issuance of the permit. A permit

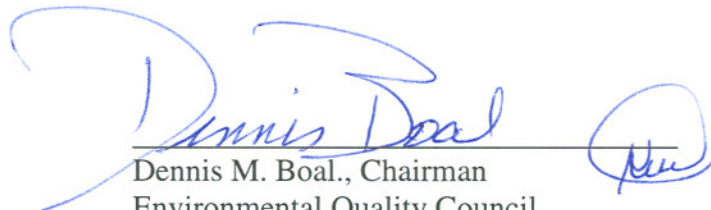
“suspension” is the outcome of a contested case proceeding in which an existing permit is suspended as a consequence of a finding that the permittee has violated the terms of its permit. A “suspension” is not the temporary cessation or delay granted at the request of a third party. This Council does not have the authority to suspend a permit on the grounds that an appeal is pending. No grounds to support a stay were presented.

ORDER

IT IS THEREFORE ORDERED that:

1. The Protestant’s February 8, 2008 Motion to Suspend Air Permit CT-4631 Pending Resolution of Protestants’ Appeal is hereby DENIED.
2. The hearing remains set in this matter beginning November 17, 2008.

SO ORDERED this 25 day of August, 2008.


Dennis M. Boal., Chairman
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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 PROTESTANT'S MOTION TO SUSPEND AIR PERMIT CT-4631 PENDING RESOLUTION OF PROTESTANTS' APPEAL by electronic email to the following persons:

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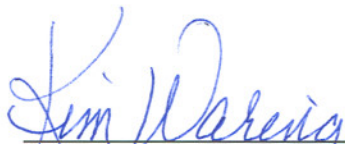
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