

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

**AUG 21 2008**

*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 GRANTING RESPONDENT DEPARTMENT OF ENVIRONMENTAL  
QUALITY'S MOTION TO DISMISS**

THIS MATTER came before the Environmental Quality Council (EQC) on April 29, 2008, for oral argument on the Respondent Department of Environmental Quality's February 7, 2008 Motion to Dismiss with memorandum in support thereof, Basin Electric's Memorandum in Support of the Department's Motion to Dismiss filed on March 12, 2008, Protestant's Response to Respondent Department of Environmental Quality's Motion to Dismiss filed on March 12, 2008, Protestant's Response to Basin Electric's Memorandum in Support of the Department's Motion to Dismiss filed on April 3, 2008, and Respondent Department of Environmental Quality's Reply in Support of its Motion to Dismiss filed on April 3, 2008. Council also received Protestant's Notice of Additional Authority filed April 24, 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 the Environmental Quality Council (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 Wyoming Outdoor Council appeared by and through counsel, Robin Cooley. 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 Permit CT-4631 for the Dry Fork Station and requested a hearing before the EQC. Therefore, the 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 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. One of the Protestants' claims was that the permit lacked emission limits for carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O), hereinafter CO<sub>2</sub> and other greenhouse gases. On February 7, 2008, DEQ filed a Motion to Dismiss all CO<sub>2</sub>, greenhouse gas and global warming claims set forth in Protestants' Protest and Petition for Hearing.

Basin Electric argued in support of DEQ's Motion to Dismiss all claims relating to greenhouse gases and global warming in its March 12, 2008 Memorandum.

Protestants filed a response in opposition to both DEQ's Motion to Dismiss and Basin Electric's Memorandum in support of DEQ's motion.

### **III. ISSUES AND CONTENTIONS**

The issue raised by DEQ in this motion is whether Protestants' claims relating to greenhouse gases and global warming are proper for this Council to review. In its Protest and Petition for Hearing, Protestants argued that CO<sub>2</sub> is a regulated pollutant and other greenhouse gases are "subject to regulation" pursuant to the Clean Air Act and therefore DEQ must implement a Best Available Control Technology (BACT) analysis for these pollutants. Additionally, Protestants asserted the EPA passed regulations requiring facilities to monitor, record and report CO<sub>2</sub> emissions. Therefore, the DEQ must require the BACT to control emissions of greenhouse gases from the Dry Fork Station. In the alternative, Protestants request

this Council require DEQ to utilize a BACT analysis to consider collateral environmental impacts.

DEQ argued that it does not currently regulate CO<sub>2</sub> and other greenhouse gases that contribute to global warming, nor are those gases subject to regulation and therefore DEQ need not consider the emission effect of those gases in issuing the air quality construction permit in this case.

Basin Electric supported DEQ's motion and further argued there is no legal authority that those gases must be considered by DEQ in evaluating BACT for PSD permits. Basin Electric argued the Environmental Protection Agency (EPA) has yet to decide whether, and if so how, standards should be set for the regulation of CO<sub>2</sub>. Therefore, this Council should not apply controls in the absence of specific rules and regulations.

#### **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

determined the permit satisfied both New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements. DEQ did not consider a BACT analysis for CO<sub>2</sub> and other greenhouse gases. *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. *Protestants' Exhibit 5.*

6. Protestants based their appeal on assertions that, in permitting Dry Fork Station, DEQ failed to comply with Wyoming's PSD requirements and the Federal Clean Air Act. Specifically, Protestants asserted that, during the permitting process, DEQ failed to require Basin Electric to undergo a BACT analysis to control emissions of CO<sub>2</sub> and other greenhouse gases. Additionally, Protestants claimed DEQ failed to consider the collateral environmental impacts of those gases.

7. DEQ filed its Motion to Dismiss all claims in Protestants' Protest and Petition for Hearing that relate to CO<sub>2</sub>, greenhouse gas and global warming claims. Basin Electric supported DEQ's Motion to Dismiss.

8. Under Wyoming's Air Quality Standards and Regulations (WAQSR), any new major stationary source of air pollution in Wyoming must obtain a PSD construction permit. A PSD permit must include a BACT limit for "each pollutant subject to regulation under

[Wyoming] Standards and Regulations or regulation under the Federal Clean Air Act.” 6  
WAQSR § 4(b)(ii).

9. Protestants’ exhibits reflected that ten eastern states are participating in the Regional Greenhouse Gas Initiative, six mid-western states recently signed a regional cap-and-trade program for CO<sub>2</sub> called the Midwestern Regional Greenhouse Gas Reduction Accord, and Montana, California and Washington have enacted limitations for CO<sub>2</sub> emitted from power plants. *Protestants’ Exhibits 4, 5, 6, and 7.*

10. Currently, Wyoming has not enacted limitations on CO<sub>2</sub> and other greenhouse gas emissions from coal-fired power plants.

## **V. CONCLUSIONS OF LAW**

### **A. Principles of Law**

11. All hearings before the EQC, 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.

12. When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure, the material allegations of the complaint are accepted as true and the complaint should be dismissed if it clearly appears the complainant can prove no set of facts in support of his claim. *Wilson v. Bd. Of County Comm’rs of County of Teton*, 153 P.3d 917, 921 (Wyo. 2007).

13. Preconstruction review and permitting of major sources was mandated by Congress in the 1977 Clean Air Act amendments when the PSD/NSR program was adopted to

insure that “economic growth will occur in a manner consistent with the preservation of existing clean air resources[.]” 42 U.S.C. § 7470(3).

14. Under Wyoming’s Air Quality Standards and Regulations (WAQSR), any new major stationary source of air pollution in Wyoming must obtain a PSD construction permit. 6 WAQSR § 2(a)(i).

15. Among other requirements, the applicant must demonstrate that it will meet all applicable national ambient air quality standards, will prevent significant deterioration of existing air quality and will utilize the “best available control technology” for “each pollutant subject to regulation” under [Wyoming] Standards and Regulations or regulation under the Federal Clean Air Act. 6 WAQSR § 4(b)(ii).

16. The regulatory definition of BACT is:

Best available control technology means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under the [Wyoming] Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any major stationary source or major modification 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 of production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

[a]pplication of BACT shall not result in emissions in excess of those allowed....

6 WAQSR § 4(a).

17. Regulated New Source Review (NSR) pollutant is defined to mean the following:

- (1) pollutants for which a National Ambient Air Quality Standard have been adopted;
- (2) pollutants for which New Source Performance Standard have been adopted for one or more category of facilities under Section 111 of the Clean Air Act;

(3) pollutants for which a stratospheric ozone standard have been adopted under Title VI of the Clean Air Act; and

(4) any pollutant that otherwise is subject to regulation under the Clean Air Act (with the exception of hazardous air pollutants).

#### B. Application of Principles of Law

18. DEQ and Basin Electric argued that Protestants' claims asserted in Count I of its Protest and Petition for Hearing fail as a matter of law because CO<sub>2</sub> and other greenhouse gases are not currently regulated pollutants (or subject to regulation) pursuant to the Federal Clean Air Act and corresponding EPA regulations, the Wyoming Environmental Quality Act or Wyoming's Air Quality Standards and Regulations. Therefore, no legal duties are currently imposed on DEQ to regulate CO<sub>2</sub> and other greenhouse gases and make a BACT determination.

19. Protestants argued that EPA regulations implementing the Clean Air Act require a BACT analysis for each regulated NSR pollutant in accordance with the four pronged definition of NSR pollutant quoted in paragraph 17 of this Order. Protestants conceded there is no ambient standard that has been set for CO<sub>2</sub>, there is no new source performance standard established for CO<sub>2</sub>, and there is no stratospheric ozone standard for CO<sub>2</sub>. Rather, Protestants rely upon the fourth "catch all" category of a pollutant "otherwise subject to regulation" under the Clean Air Act to support its argument.

20. Protestants' argument focused on the United States Supreme Court case *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007). The Supreme Court remanded the case to EPA to make a determination as to whether vehicle greenhouse gas emissions contribute to global climate change and thereby "endanger public health or welfare." The case did not make a finding, as Protestants urged, that emissions from coal fired power plants "endanger public health or welfare," nor has the EPA adopted regulations for such emissions of CO<sub>2</sub>.



21. Protestants alternatively argued the plain language of the Clean Air Act and Wyoming regulations require DEQ to implement the BACT for all air pollutants subject to regulation under the Act. Because greenhouse gases are “air pollutants” and CO<sub>2</sub> and other greenhouse gases are “subject to regulation” under the Act, DEQ must implement BACT for these pollutants at the Dry Fork Station and establish emissions limits based on this technology. Protestants attempt to find support in the Clean Air Act’s Acid Rain Program and Section 821 of Public Law 101-549 entitled “Information Gathering on Greenhouse Gases Contributing to Global Climate Change,” which authorizes the EPA to require acid rain sources to monitor, collect and report CO<sub>2</sub> emission data.

22. The EPA has adopted regulations which require facilities to monitor, record and report CO<sub>2</sub> emissions. However, the EPA has not yet decided whether, and if so how, standards should be set for CO<sub>2</sub> and currently imposes no emission controls on CO<sub>2</sub>. Protestants seek to have this Council regulate greenhouse gases in this permit appeal without the scientific and policy resources available to the EPA and the United States Congress. Protestants cited no legal authority to support its position that because the EPA currently requires facilities to monitor, record and report CO<sub>2</sub> emissions, the requirement meets the definition of “subject to regulation,” therefore triggering a BACT analysis. This Council declines to find that the process of data collection also encompasses regulation of greenhouse gases.

23. Whether or not CO<sub>2</sub> and other greenhouse gases **may** be “subject to regulation,” the EPA has not determined how it will regulate the greenhouse gas. The matter is currently under vigorous national debate and CO<sub>2</sub> is still not regulated at the federal level. No specific emission standards have been set for CO<sub>2</sub>. This Council declines to determine how to regulate

CO<sub>2</sub> and other greenhouse gases without specific guidance from DEQ and the Federal Government.

24. In conclusion, although the issue in this case clearly presents a question of great concern to Wyoming citizens, regulating CO<sub>2</sub> is a very complex matter and this Council declines to create a regulation process without guidance from the Federal Government, currently collecting and analyzing data. The definition of BACT provides that the application of BACT shall not result in emissions in excess of those allowed. Currently, no emission levels or controls have been established by DEQ or the Federal Government. 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 regulate the gases at issue in this motion.

25. Count I of Protestants' Protest and Petition for Hearing is therefore dismissed.

### ORDER

IT IS THEREFORE ORDERED that:

1. The Department of Environmental Quality's Motion to Dismiss all carbon dioxide, greenhouse gas and global warming claims set forth in Count I of Protestants' Protest and Petition for Hearing is hereby GRANTED.

2. The hearing remains set in this matter for November 17, 2008.

DONE this 21<sup>ST</sup> 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 GRANTING RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO DISMISS by electronic email to the following persons:

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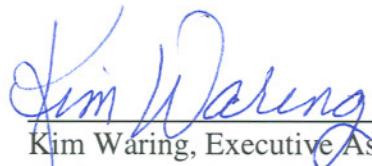
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