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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)	
_____)	

**PROTESTANTS’ REPLY IN FURTHER SUPPORT OF THEIR MOTION TO SUSPEND
AIR PERMIT CT-4631 PENDING RESOLUTION OF APPEAL**

Basin Electric Power Cooperative (“Basin Electric”) opposes Protestants’ motion to suspend Air Permit CT-4631 for the same flawed reason that it supports dismissal of this action: according to Basin Electric an air permit issued by DEQ is final and the Council plays no role in its review. Because its DEQ-issued permit represents “final agency action,” Basin Electric claims that its permit is not, and can not be, suspended when an appeal is taken to the Council. Mot. to Dismiss, p. 8; Opp. to Mot. to Suspend, p. 6.

Certainly if the Council agrees with Basin Electric that the Council has no jurisdiction to hear this case, Protestants’ motion to suspend should be denied. Conversely, if the Council rejects Basin Electric’s assertion that its DEQ-issued permit is final and not subject to further review by the Council, Protestants’ motion to suspend should be granted because the DEQ permit is not final and is subject to modification by the Council.

1. No Final Action of Agency Until the Council Rules.

Basin Electric asserts in its motion to dismiss,

In this case, when the Department issued the permit to Construct for the Dry Fork Station, the permitting process was consummated. The permit is neither tentative nor interlocutory, and it confers on Basin Electric the full legal right to proceed with construction. . . . Since the Permit to Construct is final agency action, further administrative review by the Council without express statutory authorization would violate Wyoming administrative law.

Mot. to Dismiss, pp. 7-8.

Similarly, in its opposition to Protestants' motion to suspend, Basin argues,

Under Wyoming law the permit issued by the Director is a final agency determination. . . . This authorizes Basin Electric to begin construction immediately.

Opp. to Mot. to Suspend, pp. 16-17.

Basin Electric correctly cites the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997), for the proposition that "to be 'final,' agency action must mark the 'consummation' of the agency's decisionmaking process." Mot. to Dismiss, p. 7. Thus in *Whitman v. American Trucking Ass'n.*, 531 U.S. 457, 478 (2001), the Court held that only if the "EPA has rendered its 'last word on the matter' in question, [citation omitted], is its action 'final' and thus reviewable."

DEQ's issuance of an air permit is clearly not the "last word" of the agency. The nominal "final action" of DEQ in issuing an air permit pursuant to Wyo. Stat. § 35-11-802 and WAQSR Chapter 1, Section 2(m), only starts the 60-day clock to bring an administrative appeal to the Council consistent with DEQ Rules of Practice and Procedure, Chapter 1, Section 16. Therefore Basin Electric and DEQ are mistaken that the DEQ-issued permit represents the "consummation" of the agency's decision-making process. The important point is that there are two described "final actions" that can occur during the air permit issuance and review process.

The first named "final action" constitutes the issuance of the permit by DEQ. That "action" is clearly not the "final action" of the agency because it may only be appealed to the

Council – not to District Court. DEQ Rules of Practice and Procedure, Chapter 1, Section 16; Wyo. Stat. § 16-3-114(a).

If an appeal is taken to the Council, the second “final action,” that may include the denial or modification of any DEQ-issued permit, is the decision of the Council. Wyo. Stat. § 35-11-112(c); DEQ Rules of Practice and Procedure, Chapter II, Section 12. It is only this decision or action that represents the “final action” of the agency for purposes of judicial review. Wyo. Stat. § 35-11-1001(a); Wyo. Stat. § 16-3-114(a).

Because the air permit issuance and appeal process established by the Environmental Quality Act, the WAQSR and DEQ’s Rules of Practice and Procedure is not “consummated” until after the Council speaks, Basin Electric has no final permit at this time and its opposition to Protestants’ motion to suspend therefore is fundamentally misplaced. Basin Electric’s permit could be denied or modified by the Council and therefore should be deemed by the Council to be suspended as a result of Protestants’ appeal.

2. No Property Interest in Non-Final Permit.

Basin Electric also argues that Protestants’ motion to suspend should be denied because it has a property interest in the permit issued by DEQ. This is wrong. Basin Electric may only have a property interest in an air permit if that permit is approved as a final action by the Council. If conditions in the DEQ-issued permit are subject to the further discretion of the Council, which they are, Basin Electric has no property interest in such permit and no right to proceed with construction. See generally, *Koloa Marketplace v. County of Kauai*, 2007 U.S. Dist. LEXIS, 56274 (D. Hawaii, 2007).

3. De Novo Review Does Not Negate DEQ Permitting Process.

Basin and Electric and DEQ also incorrectly claim that if *de novo* review by the Council is allowed the DEQ permit writing process is meaningless. First, the *de novo* review of the Council is required by law. The Council has no choice in the matter. Second, *de novo* review is designed not to establish the Council as the permit writer, but as the objective permit reviewer. The Council need not be in the position of writing permits: if it finds flaws with DEQ's permit it can remand the permit back to DEQ to be written correctly.

Accordingly, Protestants respectfully request that their motion to suspend be granted.

Dated: April 4, 2008

Respectfully submitted.

/s/ Reed Zars

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CERTIFICATE OF SERVICE

I, Reed Zars, certify that on this 4th day of April, 2008, I served a copy of the foregoing PROTESTANTS' REPLY IN FURTHER SUPPORT OF MOTION TO SUSPEND AIR PERMIT CT-4631 via e-mail and by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

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