James S. Angell (WY Bar No. 6-4086)
Robin Cooley (admitted *pro hac vice*)
Andrea L. Zaccardi (admitted *pro hac vice*)
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Tel: (303) 623-9466
Fax: (303) 623-8083

Attorneys for Protestants

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' RESPONSE TO BASIN ELECTRIC'S MEMORANDUM IN SUPPORT OF THE DEPARTMENT'S MOTION TO DISMISS

Basin Electric Power Cooperative Inc. ("Basin") seeks to belatedly join the Department of Environmental Quality ("DEQ") in moving to dismiss Protestants' claims related to global warming. Memorandum in Support of DEQ's Motion to Dismiss (hereinafter "Basin Mem.") at 2.[1] Like DEQ, however, Basin ignores the plain language of the Clean Air Act and Wyoming regulations, which require the agency to implement the Best Available Control Technology ("BACT") for all air pollutants "subject to regulation" under the Act. Because greenhouse gases are "air pollutants" and carbon dioxide and other greenhouse gases are "subject to regulation" under the Act, DEQ must implement BACT for these pollutants at the Dry Fork Station.

[1] If Basin wanted to dismiss Protestants' claims, it should have filed a Motion to Dismiss addressing those claims by February 8, 2008, as established by the Council's scheduling order. Although Basin crafts its filing as a Memorandum in Support of DEQ's Motion, as discussed below, the company raises some new issues and is therefore doing more than simply supporting DEQ's Motion.

Basin argues that the Council is not the appropriate venue for addressing global warming. Id. at 11. However, not only is the Council mandated to address greenhouse gas emissions by the Clean Air Act and Wyoming regulations, but it is also entirely consistent with the Environmental Quality Act's goal of protecting the public health and welfare of the citizens of Wyoming as well as the State's fish and wildlife and agricultural, industrial, and recreational interests. W.S. § 35-11-102. All of these interests suffer as a result of global warming, which is already affecting Wyoming. A recent study shows the West is being impacted by climate change more than any other region of the United States outside of Alaska.[2] According to the study, the last five years in Wyoming have averaged 2º F warmer than the State's 20th Century average.[3] This warming results in decreased snowpack and earlier melting of snow in the spring.[4] In a recent article in the Casper Star Tribune, state climatologist Steve Gray indicated that snowmelt is occurring four to eight weeks earlier in Wyoming than the historical average, and this trend is likely evidence of climate change.[5] Early snowmelt leads to inadequate supplies in the summer months, leaving farmers without water for crops, and rising temperatures and lower summer flows impact fish populations.[6] Indeed, this warming is causing economic damage to the

[2] Rocky Mountain Climate Organization ("RMCO") & Natural Resources Defense Council ("NRDC"), Hotter and Drier—The West's Changed Climate, at iv (Mar. 2008) (attached as Exhibit 1).

[3] Id. at 44.

[4] Id. at 7-12.

[5] Connie Chu, Early Snowmelt Raises Concern, Casper Star Tribute (March 25, 2008) (attached as Exhibit 2).

[6] Id.

tourism, agriculture, hunting, fishing and skiing industries.[7] Because the Council is charged with protecting these interests, it is the appropriate body to address Protestants' claims that DEQ violated the Clean Air Act and Wyoming regulations by failing to consider greenhouse gas emissions as part of the permitting process for the Dry Fork Station.

Protestants are not suggesting that the Council has the authority or even the ability to "solve global warming" as Basin suggests. Basin Mem. at 20. Nor are Protestants asking the Council to set this Nation's global warming agenda or "overall energy policy." Id. at 2, 20. Indeed, Protestants' goals are much less lofty. As Basin acknowledges, the "Council's job is to review the permit under applicable law." Id. at 20. In this case, the applicable law requires DEQ to consider greenhouse gas emissions along with the other criteria pollutants, determine the best technology currently available to control these pollutants, and establish emissions limits based on this technology. Protestants ask the Council to order DEQ to do so. That Congress, EPA, and other nations are taking other steps to address the problem of global warming does not alleviate DEQ's current obligations under the Clean Air Act.

ARGUMENT

Protestants' Response to DEQ's Motion to Dismiss ("Protestants' Response"), filed March 26, 2008, addresses many of Basin's arguments. Basin's new arguments are not persuasive and are not properly before the Council. The parties all agree that BACT analysis is required under both the Clean Air Act and Wyoming's regulations for all pollutants "subject to regulation" under the Act. Like DEQ, however, Basin argues that carbon dioxide and other greenhouse gases are not subject to regulation. This argument conflicts with the plain language of the statute.

[7] RMCO & NRDC, supra note 2, at 29-34.

I. Carbon Dioxide is Regulated Under Section 821 of the 1990 Clean Air Act Amendments.

Section 821 of the 1990 Clean Air Act Amendments ordered the Environmental Protection Agency ("EPA") to "promulgate regulations" that require all sources subject to Title IV of the Clean Air Act to monitor carbon dioxide emissions. 42 U.S.C. § 7651k note; Pub. L. 101-549, Title IV, § 821, 104 Stat. 2699 (Nov. 15, 1990). The purpose of these regulations was to gather information on greenhouse gas emissions from power plants and other sources. Id. (entitled "Information Gathering on Greenhouse Gas Emissions Contributing to Global Climate Change"). In 1993, EPA passed the required regulations, which require facilities to monitor, record, and report carbon dioxide emissions. 40 C.F.R. Part 75. Any violation of these regulations constitutes a violation of the Clean Air Act. Id. § 75.5. Because carbon dioxide is "regulated" under this section, it is an air pollutant "subject to regulation" under the Clean Air Act, and BACT analysis is required. 6 WAQSR § 4(a).

Basin concedes that EPA adopted "regulations" requiring monitoring and reporting of carbon dioxide, and that any pollutants that are "actually regulated" are subject to BACT. Basin Mem. at 5-6, 7. Despite these concessions, the company argues that carbon dioxide is not "subject to regulation" because "EPA has not adopted regulations requiring that CO_2 emissions be controlled." Id. at 7. However, Basin provides no justification for interpreting "regulation" as used in Section 821 any different from "regulation" as used in the definition of BACT, or reading "emissions control" into the statute where Congress chose not to use that language.

Indeed, reading the statute in this manner violates fundamental principles of statutory construction. Protestants' Response at 8-10. As the Supreme Court held, "identical words used in different parts of the same statute are . . . presumed to have the same meaning." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 86 (2006). Therefore, when

Congress ordered EPA to regulate carbon dioxide in Section 821, it became subject to regulation. Similarly, the Council must assume that where Congress chose not to use particular language, it did so deliberately. Stutzman v. Wyo. State Eng'r, 130 P.3d 470, 475 (Wyo. 2006); see also Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) (quotations omitted) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusions or exclusion."). Congress defined the terms "emission limitation" and "emission standard" in the Act, 42 U.S.C. § 7602(k), and used those terms when it wanted to refer to actual control of emissions. See, e.g., 42 U.S.C. §§ 7412(f)(5), 7475(a)(3), 7521(f)(2), 7617(a)(7), 7651(a)(1). Because Congress did not include these terms in the definition of BACT, the Council is not free to read them into the statute. Stutzman, 130 P.3d at 475.

Moreover, Congress knew how to exempt pollutants subject to informational requirements from further regulation under the Act. Sections 602(a), (b), and (c) of the Act direct EPA to compile lists of ozone-depleting substances, and Section 602(e) requires EPA to "publish the global warming potential of each listed substance." 42 U.S.C. § 7671a(a), (b), (c), (e). Section 602(e) then goes on to clarify that "[t]he preceding sentence [requiring publication of global warming potentials] shall not be construed to be the basis of any additional regulation under this chapter." Id. In this way, Congress prohibited this information reporting requirement from resulting in any additional regulation of identified ozone-depleting substances. Congress could have included similar language in Section 821, but did not. The Council must consider this omission deliberate.

Basin also argues that if Section 821 means that carbon dioxide is "subject to regulation," the Act would require BACT for "every time an EPA administrator asked for data on a

pollutant." Basin Mem. at 8. This argument misses the point. EPA's regulations implementing Section 821 are not simply a request for information; nor would any EPA request for information about a pollutant lead to BACT analysis. Rather, through Section 821, Congress required the EPA to regulate carbon dioxide under the Act, and the EPA passed federal regulations implementing this mandate. Because Congress mandated that EPA regulate carbon dioxide, EPA and the states must conduct a BACT analysis for this pollutant under the self-executing provisions of the PSD program.

Basin's attempt to rely on the legislative history of Section 821 is inappropriate because the plain language of the statute is clear. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (holding extrinsic materials such as legislative history "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"); U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 506-08 (1993) (declining to accept petitioners' reliance on legislative history to assert an interpretation of a statute that was "at odds with its plain language"). According to the Wyoming Supreme Court:

> Legislative intent must be ascertained initially and primarily from the words used in the statute. When the words used are clear and unambiguous, a court risks an impermissible substitution of its own views, or those of others, for the intent of the legislature if any effort is made to interpret or construe statutes on any basis other than the language invoked by the legislature. Our precedent demonstrates that this rule also is an absolute.

Allied-Signal, Inc. v. Wyo. State Bd. of Equalization, 813 P.2d 214, 219 (Wyo. 1991). Because the language of the Clean Air Act and Wyoming regulations is clear, there is no reason for the Council to turn to legislative history.

Even if this Council examines legislative history, however, the statements cited by Basin do not refute the plain language in the definition of BACT. Basin Mem. at 8. Representatives

Cooper and Moorehead indicated that Section 821 was a monitoring and reporting provision and did not force carbon dioxide emissions reductions. Protestants agree; Section 821 standing alone does not force carbon dioxide reductions. However, the legislators make no reference to the PSD program or the definition of BACT; nor is there any indication that they were articulating an interpretation of that preexisting Clean Air Act language. Basin has cited no legislative history from the time that Congress enacted the definition of BACT to suggest that it intended to distinguish between regulations requiring monitoring and reporting and regulations requiring emissions control. Therefore, the legislative history is inapposite.

Basin's reliance on two, decade-old EPA memos is also misplaced. As an initial matter, Basin argues these memos are persuasive because they set forth the agency's "longstanding" interpretation of the law. Basin Mem. at 10. However, the agency's position with respect the regulation of greenhouse gases under the Clean Air Act has been anything but consistent. In fact, the two memos Basin cites are inconsistent—the Wegman memo argues that EPA does not have the authority to regulate greenhouse gas emissions under the Clean Air Act, while the Cannon Memo argues that it does.[8] Accordingly, EPA's position taken in either memo is not entitled to deference. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446, n. 30 (1987). Moreover, "an isolated opinion of an agency official does not authorize a court to read a regulation inconsistently with its language." Envtl. Defense v. Duke Energy Corp., 127 S.Ct. 1423, 1436 (2007); see also Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487-88 (2004) (noting EPA's interpretation of the Clean Air Act as set forth in internal guidance memoranda was not dispositive).

[8] The Wegman memo and Cannon memo are attached as Exhibits A and B respectively to Basin's Memorandum.

Furthermore, the Wegman memo is not persuasive because it relies on EPA's flawed interpretation of the definition of "air pollutant," which the Supreme Court has since rejected. The memo states:

> Although section 302(g) can be read quite broadly, so as to encompass virtually any substance emitted into the atmosphere, EPA believes that it is more consistent with the intent of Congress to interpret this provision more narrowly. Were this not done, a variety of sources that have no known prospect for future regulation under the Act would nonetheless be classified as major sources and be required to apply for title V permits. Of particular concerns would be sources of carbon dioxide and methane.

Wegman Memo at 4. This language demonstrates that Wegman's conclusion was based on the mistaken belief that Congress did not intend to regulate greenhouse gas emissions through the Clean Air Act. The Supreme Court squarely rejected this interpretation in Massachusetts v. EPA. 127 S.Ct. at 1460 ("The statutory text forecloses EPA's reading [that] carbon dioxide is not an 'air pollutant'"); id. at 1462 ("[G]reenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'"). Therefore, the memo is not persuasive.[9]

Because the CAA and Wyoming regulations require a BACT analysis for all pollutants subject to regulation, and because carbon dioxide is regulated under Section 821 of the 1990 Clean Air Act Amendments, DEQ must set a BACT emission limit for the pollutant.

II. Carbon Dioxide and Other Greenhouse Gases are Subject to Regulation Under the Clean Air Act.

While BACT is required for pollutants that are "regulated" under the Clean Air Act, like carbon dioxide, it also applies to pollutants that are "subject to regulation." 6 WAQSR § 4(a). At a minimum, carbon dioxide and other greenhouse gases are subject to regulation under the Act. Protestants' Response at 13-17.

[9] Protestants addressed the lack of relevance of the pre-Massachusetts v. EPA EAB decisions on which Basin relies in their Response to DEQ's Motion to Dismiss, at 11-12.

According to Basin, however, when Congress used the language "subject to regulation," what it really meant to say was "regulated" pollutants. Basin Mem. at 5-6 ("[O]nly pollutants actually regulated under the Clean Air Act are 'subject to regulation' and require BACT."). Again, this interpretation violates fundamental principles of statutory construction. Protestants' Response at 13-14. Congress used the word "regulated" in another provision of the Act. 42 U.S.C. § 7475(e)(3)(B). Therefore, the Council must presume Congress meant to differentiate between "subject to regulation" and "regulated." Barnhart, 534 U.S. at 452 (2002); see also New York v. EPA, 413 F.3d 3, 39-40 (D.C. Cir. 2005) (giving effect to Congress's use of the word "emitted" instead of terms "potential to emit" or "emission limitation" used in other provisions of the Clean Air Act).

Contrary to Basin's assertions, Protestants do not argue that any substance that meets the Clean Air Act's definition of an air pollutant is automatically "subject to regulation." Basin Mem. at 6.[10] Pollutants subject to regulation include only those substances that Congress has authorized EPA and the states to regulate. For example, as discussed above, Congress not only authorized EPA to regulate carbon dioxide under Section 821, it mandated the agency pass regulations requiring monitoring and reporting of carbon dioxide emissions in order to better address the issue of global warming. Additionally, Congress has authorized EPA and the states to regulate greenhouse gas emissions from motor vehicles and from new stationary sources. 42

[10] Furthermore, Basin's suggestion that making all air pollutants subject to BACT would "ensure that nothing would ever get built or permitted" is hyperbole. Basin Mem. at 6. Numerous air pollutants are already subject to BACT, and major sources of these pollutants are regularly permitted by EPA and the states. BACT analysis requires only that the source of pollution implement the best available technology for controlling that pollutant.

U.S.C. §§ 7411(b)(1)(A), 7521(a)(1).[11] As Basin notes, these sections "sensibly call[] for regulating only those pollutants that endanger public health or have harmful effects on the environment." Basin Mem. at 6. Greenhouse gas emissions negatively impact public health and the environment, and Basin has made no claim to the contrary.[12] Indeed, the Supreme Court found that the harms from global warming are "serious and well recognized." 127 S. Ct. at 1455. Accordingly, BACT is not required for greenhouse gas emissions solely because they meet the definition of air pollutant. Rather, BACT is required because they are air pollutants that are subject to regulation under the Act.

Furthermore, Basin overstates the "enormity" of the decision before the Council today. Basin Mem. at 5. Protestants are not asking this Council to "solve global warming" or even "take the lead on the battle against global warming" as Basin suggests. Id. at 20. Rather, Protestants' request is limited to this permit proceeding. Protestants ask the Council to recognize the plain language of the Clean Air Act and require DEQ to include greenhouse gases on the list of pollutants that it considers when determining the best technology currently available for the Dry Fork Station and set limits for these pollutants based on that technology. This decision is squarely within the Council's purview.[13] Undoubtedly, Congress and EPA will continue to

[11] EPA's continued failure to act with respect to motor vehicle regulations despite the Supreme Court's order in Massachusetts v. EPA more than a year ago only emphasizes the need for the Council to act under current law.

[12] Even if Basin had alleged that greenhouse gas emissions do not endanger public health or the environment, this is a factual issue that the Council must resolve in Protestants' favor at the Motion to Dismiss stage. Bonnie M. Quinn Revocable Trust v. SRW, Inc., 91 P.3d 146, 149 (Wyo. 2004) (the Council must "accept the facts stated in the [Petition] as true and view them in the light most favorable to the [Protestants]").

[13] Basin also argues that a Wyoming statute regarding implementation of the Kyoto Protocol—which the company concedes is "not directly relevant here"—shows that the Wyoming legislature did not want the Council to play any role in addressing global warming. Basin Mem. at 20. In addition to the fact that the statute is not relevant to this proceeding, the Clean Air Act

grapple with the best approach for future regulation of greenhouse gas emissions. However, as the Supreme Court held, the Clean Air Act is uniquely designed to accommodate newly realized threats like global warming. 127 S.Ct. at 1462. As with the definition of air pollutant, Congress worded the definition of BACT broadly enough to spring into play whenever a pollutant is subject to regulation. Because the Court has now squarely resolved the question of whether greenhouse gas emissions are air pollutants, and these pollutants are subject to regulation under the Act, the BACT provisions apply.

III. DEQ Must Consider Greenhouse Gas Emissions in a BACT Collateral Impacts Analysis.

As part of the BACT analysis, DEQ and Basin Electric must "take into account energy, environmental, and economic impacts and other costs" of the proposed Dry Fork Station. 6 WAQSR § 4(a). Therefore, even if the Council determines that carbon dioxide and other greenhouse gases are not pollutants subject to regulation under the Clean Air Act, these gases still must be considered as part of the BACT collateral impacts analysis.

The first step of the top-down, five-step BACT analysis that DEQ employed for the Dry Fork Station is to list all the potentially applicable emission control options. EPA, New Source Review Workshop Manual (Draft October 1990) at B.6 ("NSR Manual") (excerpts attached as Exhibit 3). The list must be comprehensive and include technologies employed outside of the United States. Id. at B.5. Step 2 allows DEQ to eliminate from consideration those technologies that are technically infeasible due to physical, chemical, or engineering principles. Id. at B.6-B.7. At step 3, DEQ must rank the remaining control technologies based on "control

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requires consideration of greenhouse gases as part of the BACT analysis, and Wyoming's implementation of the Act must be at least as stringent as the Act itself. 42 U.S.C. § 7416. The Wyoming legislature cannot excuse DEQ from complying with the Clean Air Act. Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

effectiveness." Id. Then, in step 4, the agency considers the collateral energy, environmental, and economic impacts of all the control technologies. Id. at B.6, B.8. EPA has determined that greenhouse gas emissions may be considered as a collateral environmental impact at step 4. Id. at B.49 ("Significant differences in . . . greenhouse gas emissions may be considered."). Likewise, the imminent future regulation of carbon dioxide and the associated costs are also economic collateral impacts that warrant consideration. Id. at B.32 ("In all cases, economic impacts need to be considered in conjunction with energy and environmental impacts.").

Basin concedes that it is appropriate to consider collateral impacts of unregulated pollutants, including carbon dioxide, in the BACT process. Basin Mem. at 12-13. The company argues, however, that the collateral impacts analysis is only relevant for technologies (1) not rejected at steps 1 or 2 of the top-down five-step process and (2) that control a regulated pollutant and also collaterally reduce carbon dioxide emissions. Id. at 13. The company argues that IGCC should have been rejected at Steps 1 and 2, and it will not reduce greenhouse gas emissions. Id. at 13-14.

Even if the Council accepts Basin's approach, it cannot rule in the company's favor at this stage in the proceeding. Whether IGCC should have been rejected during steps 1 or 2 and whether this technology will reduce greenhouse gas emissions involves serious factual questions that the Council must grapple with on the merits. Basin's arguments with respect to IGCC include a complicated discussion comparing the physical processes of subcritical, IGCC, and natural gas power generating facilities. Basin Mem. 15-16; see also id. at 16 (arguing IGCC does not reduce carbon dioxide emissions). Protestants' experts are currently preparing reports addressing these very issues and will submit them on May 1, 2008 as required by the Council's scheduling order. Therefore, it would be premature for the Council to address these issues now.

Indeed, at the motion to dismiss stage, the Council must "accept the facts stated in the [Petition] as true and view them in the light most favorable to the [Protestants]." Bonnie M. Quinn Revocable Trust v. SRW, Inc., 91 P.3d 146, 149 (Wyo. 2004). Because dismissal is a "drastic remedy," the Council may only dismiss if "it is certain from the face of the [Petition] that [Protestants] cannot assert any facts that would entitle [them] to relief." Id. (citation omitted) (emphasis added). That is not the case here. Protestants allege that IGCC and supercritical boilers are technically feasible and therefore should not have been rejected at steps 1 or 2, and that either one would reduce emissions of criteria pollutants as well as greenhouse gases (even without carbon capture and sequestration). Protest and Petition for Hearing ¶¶ 33-36, 37-41.[14] The Council must accept these facts as true. Therefore, the only question before the Council is a legal one—whether, as part of its step 4 collateral impacts analysis, DEQ had to consider greenhouse gas emissions. The law is clear that collateral impacts analysis must include unregulated pollutants. Protestants' Response at 17-19; see also In re Hibbing Taconite Co., 2 E.A.D. 838, 1989 EPA App. Lexis 24, at *16 (EAB 1989) (finding the collateral impacts analysis requires "the permitting authority to take into account the control technology's impact on unregulated pollutants in every permit proceeding"). Therefore, if the Council finds that greenhouse gas emissions are not subject to regulation under the Clean Air Act, DEQ is still required to consider them in the collateral impacts analysis.[15]

[14] Basin ignores completely Protestants' claims that a supercritical boiler would reduce criteria pollutants and greenhouse gas emissions, and focuses only on IGCC.

[15] Like DEQ, Basin also argues that collateral environmental impacts can only be used to reject a more efficient technology in favor of a less efficient technology. Basin Mem. at 13. This approach conflicts with the NSR Manual on which Basin relies. The Manual states that "analysis of environmental impacts should be performed for the entire hierarchy of technologies (even if the applicant proposes to adopt the 'top,' or most stringent, alternative). . . . Thus, the relative environmental impacts (both positive and negative) of the various alternatives can be compared

Furthermore, neither DEQ nor Basin have moved to dismiss Protestants' claims that IGCC or, at a minimum, a supercritical boiler is BACT for the Dry Fork Station. Rather, DEQ moved to dismiss Protestants' claim under Count I that DEQ must "consider the collateral impacts of greenhouse gas emissions in setting BACT limits for other pollutants" and the "collateral costs of future, imminent carbon regulation." Protest and Petition for Hearing ¶¶ 29-30. Basin did not move to dismiss any claims and merely filed a memorandum in support of DEQ's Motion. Therefore, whether IGCC or a supercritical boiler should have been rejected at step 1 or 2 is not currently before the Council. Indeed, if Basin wanted to challenge Protestants' IGCC as BACT argument, it should have filed a Motion to Dismiss addressing these claims on or before the February 8, 2008 deadline for preliminary motions set by the Council. It is now too late to bootstrap that argument into a Motion to Dismiss with respect to collateral impacts.

Finally, there is no support for Basin's accusation that Sierra Club is taking "blatantly inconsistent positions in different permit appeals." Basin Mem. at 17. In In re Christian County Generation, LLC, 13 E.A.D. ___, PSD Appeal 07-01 (EAB January 28, 2008), Sierra Club challenged at PSD permit for some of the exact same reasons that they challenge the Dry Fork permit: because the agency failed to set a BACT limit for carbon dioxide and failed to adequately consider the collateral impacts of carbon dioxide emissions. All of the Protestants in this case are deeply concerned about the impacts of greenhouse gases on the earth's climate, and are engaged in a variety of efforts to address this problem both politically and legally. Certainly coal-fired power plants are a focus of Protestants' efforts because they are one of the largest

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with each other and the 'top' alternative." NSR Manual at B.47 (excerpts attached as Exhibit 3); see also In re North County Resource Recovery Assocs., 2 E.A.D. 229, 1986 EPA App. Lexis 14, at *4 (EAB 1986) ("EPA may ultimately choose more stringent emission limitations for a regulated pollutant than it would otherwise have chosen if setting such limitations would have the incidental benefit of restricting a hazardous but, as yet, unregulated pollutant.").

emitters of greenhouse gases in the United States. Protestants have and will continue to insist that EPA and the state's follow the plain language of the Clean Air Act by considering greenhouse gas emissions as part of BACT analysis.

CONCLUSION

For these reasons, Protestants respectfully request the Council reject Basin's Memorandum and DEQ's Motion to Dismiss Protestants' claims related to global warming.

Dated: April 3, 2008

Respectfully submitted,

/s/ Robin Cooley
Robin Cooley (admitted *pro hac vice*)
James S. Angell (WY Bar No. 6-4086)
Andrea L. Zaccardi (admitted *pro hac vice*)
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Tel: (303) 623-9466
Fax: (303) 623-8083

Attorneys for Protestants

CERTIFICATE OF SERVICE

I certify that on this day of April 3, 2008, I served a copy of the foregoing PROTESTANTS' RESPONSE TO BASIN ELECTRIC'S MEMORANDUM IN SUPPORT OF THE DEPARTMENT'S MOTION TO DISMISS via e-mail and by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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

Patrick R. Day
Mark R. Ruppert
Holland & Hart LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82003
pday@hollandhart.com
mruppert@hollandhart.com

/s/ Robin Cooley