

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 DEQ'S AND BASIN'S MOTIONS FOR SUMMARY
JUDGMENT**

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DEQ and Basin moved for summary judgment on three of the same claims on which Protestants moved for summary judgment. Because DEQ is required as a legal matter to consider IGCC and supercritical technology in a BACT analysis, regulate PM_{2.5} as a separate pollutant, and prohibit SO₂ increment violations in the Northern Cheyenne Indian Reservation, Protestants' Motion should be granted, and DEQ's and Basin's Motions denied.

I. DEQ FAILED TO CONSIDER ALTERNATIVE TECHNOLOGIES REQUIRED FOR THE BACT DETERMINATION.

Basin and DEQ expend a great deal of effort arguing that a BACT analysis need not consider alternatives whose adoption would “redefine the source.” See DEQ Mot. at 20-29; Basin Mot. at 2-21.¹ No one suggests otherwise. The issue for the Council is not whether the BACT analysis must include approaches that “redefine the source.” Rather, the question is whether IGCC and supercritical boiler technologies would “redefine the source” in this case, as DEQ and Basin insist, or whether, as Protestants contend, they are alternative “production processes” that should have been considered.

A careful parsing of the Clean Air Act, Wyoming regulations, and the NSR Manual demonstrate that Protestants' more expansive view of the BACT process is correct. These authorities make plain that the BACT process is meant to be a robust process in which a proponent for a subcritical pulverized coal plant must consider all available control technologies, including lower emitting production processes such as IGCC and supercritical boilers. Only then can the BACT provision fulfill its role of encouraging “state-of-the-art technology at newly constructed sources.” In re Tenn Valley Auth., 9 E.A.D. 357, 391 (EAB 2000); see also Protestants' Exh. 32 at 44 (“Because the duration of a permit can be for decades, the most

¹ Hereinafter, Respondent Department of Environmental Quality's Motion for Partial Summary Judgment will be cited as “DEQ Mot.” and Basin Electric's Memorandum in Support of motion for Summary Judgment on Protestants' Claims Regarding Redefinition of the Source, PM_{2.5}, and Alleged Class I Increment Violations will be cited as “Basin Mot.”

modern technologies must be considered and analyzed in the BACT process.”).² Because IGCC and supercritical boiler technology are alternative “production processes” for BACT purposes, DEQ erred by allowing Basin to exclude them from its analysis. Therefore, the motions for partial summary judgment by DEQ and Basin must be denied.

A. Basin’s and DEQ’s Crabbed Interpretation of the BACT Process Conflicts With the BACT Definition and the NSR Manual.

Dry Fork Station is a major emitting facility or major stationary source of air emissions as defined by Wyoming regulations and the Clean Air Act. Consequently, Basin Electric must obtain a PSD permit before it may build the Dry Fork facility. 6 WAQSR §§ 2(c), 4(b).

The permit must ensure that the project employs BACT, which is:

an emissions limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulations under the [Wyoming] Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any proposed 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.

Id. § 4(a) (emphasis added). Through the BACT process, then, the permitting agency must consider the full range of available alternative “production processes” and other methods—including “innovative fuel combustion techniques”—of lowering a proposed facility’s emissions. After doing so, the agency selects emission limitations and control technologies that are specific to the particular facility. See Protestants’ Motion for Summary Judgment at 12-15 (“Protestants’ Mot.”).

Basin and DEQ insist that the BACT analysis is limited in scope and that it need not—Basin insists, can not—encompass IGCC or even supercritical boiler technologies. See DEQ

² Protestants’ exhibits to their Motion for Summary Judgment and this Response will be referred to as “Protestants’ Exh.”

Mot. at 20-29; Basin Mot. at 2-25. This cramped reading of the BACT process relegates DEQ and other state permitting agencies to near impotence by giving them no influence whatsoever over the basic production processes to be employed. According to Basin, a project proponent has the “right” to select what it calls the “fundamental generating technology” and that choice cannot be disturbed or apparently even questioned by the state in which the facility will operate for decades. Basin Mot. at 6. Basin’s view is that the exercise of this alleged “right” to choose a “generating technology” is not regulated by the Clean Air Act in any way. Id. Basin suggests this is so because, “[u]tilities are ultimately accountable to their customers for the technologies they chose” while “environmental regulators” are concerned solely with “looking after environmental concerns rather than the customer’s interests in paying the bills.” Id. Because of the myriad factors that go into energy planning and power generation and transmission, Basin believes the selection of the “power generating technology” “rightly” lies solely “with the utilities who must answer to their customers.” Id. See also id. at 9 (arguing that it is “common sense” that the “multi-billion dollar” choice of generating technology is “outside the scope of concern for air regulators”).³

Basin offers this view of the policy underpinnings of the Clean Air Act without benefit of a single citation to any statute, regulation, case, or treatise. Indeed, its depiction of the limited role of the regulator and its concerns is impossible to square with the fact that the BACT analysis process specifically includes power need and economic considerations. See Protestants’ Exh. 12

³ DEQ claims Basin analyzed other potential generating technologies and rejected IGCC because it could not provide 90% availability. DEQ Mot. at 28-29; see also Basin Mot. at 3 (similar claim). Whether an IGCC facility could provide the availability desired by Basin is an economic issue that is not germane at the initial Step 1 of the BACT analysis. See Protestants’ Exh. 12 at B.5-B.9; Protestants’ Exh. 32 at 41-42 (holding that state agency cannot “prejudge” the outcome of a BACT analysis by determining what is uneconomical or not technically feasible without first doing the analysis); see also DEQ Mot. at 24 (acknowledging that only BACT Step 1 is at issue in this case). In any case, the degree to which Basin actually considered other technologies and the degree to which it appropriately discounted IGCC’s potential at the Dry Fork site involve questions of disputed fact that will be addressed at a later stage of these proceedings if necessary.

at B.1-2, B.25-33 (NSR Manual’s description of the final steps of the BACT process). Basin’s rigid view of the inalienable “right” of utilities to choose their power generation technology also denies state agencies the discretion, which they unquestionably have under the NSR Manual, to require a BACT analysis to consider a different source. See id. at B.13 (NSR Manual declaring that while an applicant need not normally consider the redefinition of its source, that “this is an aspect of the PSD permitting process in which states have the discretion to engage in a broader analysis if they so desire.”). In any case, when one descends from the policy stratosphere and turns to the actual language that governs BACT analyses, it is apparent that state regulators have more authority than Basin suggests and that the BACT process is more far-reaching than Basin would have the Council believe.

Basin argues that the BACT process can only consider options for controlling emissions from the facility whose basic “generating technology” is chosen solely by the project proponent. Basin offers the example of dry and wet scrubbers that can be installed to lower sulfur dioxide emissions. Id. at 7. There is no doubt that a BACT analysis must consider such controls because the NSR Manual states explicitly that a BACT analysis must consider “**Add-on Controls**, such as scrubbers, fabric filters, thermal oxidizers and other devices that **control and reduce** emissions after they are produced.” Protestants’ Exh. 12 at B.10 (emphasis in original).

If the Clean Air Act and NSR Manual had stopped there, Basin’s argument would have more force, but it does not. Instead, the Clean Air Act and Wyoming regulations require that a BACT analysis consider “production processes” (see 6 WAQSR § 4(a)), which the NSR Manual defines to include “**Inherently Lower-Emitting Processes/Practices**, including the use of materials and production processes and work practices that **prevent** emissions and result in lower ‘production-specific’ emissions.” Protestants’ Exh. 12 at B.10 (emphasis in original). See

also id. (BACT analysis must consider combination of “inherently lower emitting processes and add-on controls”). Plainly, therefore, a BACT analysis is not limited to add-on technologies as Basin appears to suggest, but rather encompasses changes to a project’s basic “production process” so that the emissions are lowered or not produced at all. Basin’s more narrow view must, therefore, be rejected. See, e.g., Sponsel v. Park County, 126 P.3d 105, 108 (Wyo. 2006) (“We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in pari materia.”); Stutzman v. Office of Wyo. State Engineer, 130 P.3d 470, 475 (Wyo. 2006) (citation omitted) (“We will not interpret a statute in a way that renders any portion meaningless or in a manner producing absurd results.”).

Basin acknowledges that “production processes” must be considered in a BACT analysis. Basin Mot. at 10. Basin argues, though, that these “production processes” cannot involve the “generating technology” chosen by the project proponent. Id. at 10-11. In other words, Basin argues that a “production process” for BACT purposes is something different and more limited than a “generating technology.” Basin cites nothing for this proposition and, indeed, the term upon which Basin relies, “generating technology,” is never mentioned in the NSR Manual. “Production process,” is defined in the NSR Manual, however, and the breadth of that definition decisively undercuts Basin’s argument. For BACT analysis purposes, “production process” is defined broadly as the “physical and chemical unit operations used to produce the desired product from a specified set of raw materials.” Protestants’ Exh. 12 at B.13-14. A “production process,” in other words, is something that transforms specified raw materials into “the desired product.”

As Protestants explain in their Motion for Summary Judgment, under this BACT definition, IGCC and supercritical boiler technology both qualify as alternative “production

processes” because they would each use the very same “raw material,” Powder River Basin coal, to produce the very same end product, electricity. See Protestants’ Mot. at 19-22.⁴ As Protestants demonstrated in that brief, the EAB case law is consistent with this view. See id. at 20-22.⁵

In addition to being consistent with EAB decisions, Protestants’ interpretation of the NSR Manual is the only one that gives full force to every provision in the NSR Manual, including the definition of “production process.” Because the more narrow interpretations offered by Basin and DEQ fail to do so by, for example, ignoring the broad definition of “production process,” they should be rejected.

B. Basin’s and DEQ’s Interpretation of the BACT Process Ignores the Fact that IGCC and Pulverized Coal Plants are the Same Type of Stationary Source for Air Permitting Purposes.

Basin tries to ground its narrow interpretation of the BACT process in the BACT definition’s use of “such facility.” Basin Mot. at 19 (citing EPA statements in Basin Exh. 1 at 15).⁶ Basin and EPA apparently believe that this reference to “such facility” or, as in the Wyoming regulation, “such source,” limits the BACT analysis to the exact facility proposed by the project proponent. They are mistaken.

The reference in Wyoming’s BACT definition to “such source” does not refer to the exact design favored by a project proponent, but rather to the definition’s earlier reference to

⁴ Rather than repeat their arguments, Protestants incorporate their Motion for Summary Judgment by reference.

⁵ Basin cites a 15-year-old decision from the Council in which it concluded a BACT analysis for a pulverized coal plant need not consider using a circulating fluidized bed boiler. Basin Mot., Exh. 3. That opinion did not consider IGCC technology. Nor did it consider any of the detailed arguments raised by Protestants here. Indeed, the opinion does not even mention the NSR Manual. In any case, contrary to Basin’s protestations, this 15-year-old opinion is not binding on the Council today. See Basin Mot. at 13 (suggesting Council’s prior practice is controlling and so may not be altered here); N.L.R.B. v. Bell Aerospace Co., 410 U.S. 267, 293-95 (1974) (agency may reconsider past decisions in adjudications despite reliance of industry on past decisions).

⁶ The EPA letter quoted by Basin refers to “such facility,” which is the language in the Clean Air Act, rather than “such source,” which is used in Wyoming’s otherwise identical definition. See 6 WAQSR § 4(a). The terms are effectively synonymous.

“major stationary source,” which is a term of art under the Clean Air Act. Consequently, when the BACT definition refers to the emissions achievable at “such source,” it is not referring to the proponent’s proposal, but rather to “such”—i.e., that type—major stationary source. As Protestants explained in their Motion for Summary Judgment, IGCC and pulverized coal plants (whether supercritical or subcritical) are the same type of “major stationary source” for the purpose of the State’s PSD program: all are “fossil fuel-fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input.” 6 WAQSR § 4(a) (definition of “major stationary source”). Protestants’ Mot. at 22. IGCC and pulverized coal plants are likewise within the same category of “Major Facility” under federal law. See 40 C.F.R. § 60.41Da (“Coal-fired electric utility steam generating unit means an electric utility steam generating unit that burns coal, coal refuse, or a synthetic gas derived from coal.”); id. (“Integrated gasification combined cycle electric utility steam generating unit or IGCC electric utility steam generating unit means a coal-fired electric utility steam generating unit that burns a synthetic gas derived from coal in a combined-cycle as turbine.”); id. (“Steam generating unit means any furnace, boiler, or other device used for combusting fuel for the purpose of producing steam (including fossil-fuel-fired steam generators associated with combined cycle gas turbines).”); id. (“[C]oal-fired electric utility steam generating unit [includes a unit that] burns coal, coal refuse, or a synthetic gas derived from coal.”); Protestants’ Mot. at 22-23.

Because supercritical and subcritical pulverized coal plants and IGCC facilities fall within the same major stationary source category, the consideration of an IGCC or supercritical boiler plant in a BACT analysis would not “redefine the source” for PSD permitting purposes. This fact was at the heart of the Georgia court’s recent decision in Friends of the Chattahoochee v. Couch (Protestants’ Exh. 1), holding that a BACT analysis for a pulverized coal plant must

consider IGCC. This decision – by the only court to address the IGCC and BACT issue – is directly on point here and should be followed by this Council.⁷ See also Protestants’ Mot. at 17-19 (describing three other states that have concluded that BACT analysis for pulverized coal plant must consider IGCC).

C. Supercritical Technology Does Not Redesign the Dry Fork Station.

Basin’s claims about the differences between supercritical and subcritical technology are overstated. Both are types of pulverized coal plants. They both combust pulverized coal in a boiler to generate steam, which drives the turbines to produce electricity. See Protestants’ Mot. at 26. The “substantial” differences that Basin draws out into a full page list boil down to the following: unlike supercritical boilers, subcritical boilers have stream drums and the construction materials—or “metallurgy”—for the various parts of the plant are different. Basin Mot. at 21-22; see also Protestants’ Mot. at 27 n.12. These components are different because the supercritical plant operates at higher pressures and temperatures. However, these higher pressures and temperatures are precisely what makes a supercritical plant more efficient. If these differences necessary to accommodate increased efficiency constitute a “redesign of the source,” as Basin claims, there will never be an “inherently lower-emitting production process” that does not redefine the source. If the production processes were exactly the same, there would be no increased efficiency. As discussed above, DEQ and Basin cannot read the “production process” language out of the Clean Air Act and Wyoming’s regulations.

⁷ Basin stresses that EPA has taken the position in non-regulatory settings that a BACT analysis for a pulverized coal plant need not consider IGCC as an alternative production process. Basin Mot. at 19-20. Because this view has never been set out in a formal rulemaking or similarly official statement, EPA’s position is not due any deference. See Christensen v. Harris County, 529 U.S. 576, 587 (2000) (holding that views set out in agency opinion letters are not accorded deference). In any event, like so many of EPA’s efforts to weaken the Clean Air Act over the last several years, EPA’s interpretation of the BACT analysis provision is contrary to the plain terms of the statute and regulations. See Protestants’ Mot. at 44 n. 31 (listing lengthy series of recent EPA Clean Air Act rulemakings that have been rejected by the D.C. Circuit). See also Protestants’ Exh. 1 (Georgia court rejecting EPA’s position and concluding IGCC must be considered in BACT analysis for pulverized coal plant).

Basin touts EPA's recent permits for the Desert Rock plant in New Mexico and the Deseret Power Electric Cooperative's Bonanza Power Plant in Utah as a reason it should not have to consider IGCC in a BACT analysis. Basin Mot. at 19-20; see also DEQ Mot. at 26 (relying on EPA guidance and policy). Yet, Basin ignores the fact that EPA compared supercritical and subcritical technology for a CFB plant in its BACT analysis for the Bonanza facility. Protestants' Exh. 31. EPA did not find that supercritical would redefine the source. Accordingly, EPA does not share Basin's and DEQ's position that a change in production process or generating technology is always a redefinition of the source.

Basin's and DEQ's remaining arguments raise factual issues that simply demonstrate the need to conduct a proper BACT analysis. Basin claims that supercritical technologies only result in increased efficiencies above a certain size, and that Dry Fork is too small to make the small efficiency gains worth it from an economic perspective. Basin Mot. at 24. DEQ relies solely on Basin's conclusion. DEQ Mot. at 29. However, Basin changed its tune with respect to the size at which a supercritical becomes economical during the permitting process. When Basin was planning a 250 MW plant, CH2MHill concluded that supercritical was generally justified over 350 MW. Protestants' Exh. 17 at 18. Once Basin changed its plans and decided to build a 422 MW plant and Protestants and the Nation Park Service commented that supercritical should have been considered, Sargent and Lundy revisited this conclusion and decided that supercritical was not justified at this size either. Protestants' Exh. 28 at 7. Regardless of the inconsistencies, neither analysis meets the substantive or procedural requirements of a BACT analysis. DEQ cannot predetermine, without applying BACT, "what is economically unfeasible and exclude possible control technologies on this basis." Protestants' Exh. 32 at 42. Additionally, a complete BACT analysis is the only way to ensure that Basin and DEQ comply with the public

participation requirements of the Clean Air Act and Wyoming's regulations. 42 U.S.C. § 7475(a)(2); 6 WAQSR § 2(m); see also Protestants' Mot. at 31.

II. DEQ AND BASIN MUST ADDRESS PM_{2.5} EMISSIONS FROM THE DRY FORK STATION.

PM_{2.5} has been regulated under the Clean Air Act for more than 11 years because it poses a serious health threat, particularly to children, the elderly, and asthmatics. The particles get deep into the lungs, causing premature death and increasing the risk of heart attacks and lung cancer. Because PM_{2.5} poses a more serious health threat than PM₁₀, EPA chose to regulate it as a separate pollutant over ten years ago. See Protestants' Mot. at 32-34. As Basin and DEQ concede, PM_{2.5} is a pollutant "subject to regulation" under the Clean Air Act, and the PSD program's NAAQS and BACT requirements therefore apply to PM_{2.5}. Nevertheless, Basin and DEQ claim that they are justified in doing nothing to control the tons of PM_{2.5} pollution that will be emitted from Dry Fork's stack over many decades. This do-nothing approach violates Wyoming law and the Clean Air act as well as this Council's obligation to protect the public health and welfare of Wyoming's citizens. W.S. § 35-11-102. DEQ has the tools to require state-of-the-art pollution controls to reduce PM_{2.5} emissions, and there is no justification for DEQ's failure to use them.

A. This Council Cannot Ignore Wyoming Law or the Clean Air Act.

In their motions for summary judgment, neither DEQ nor Basin address the plain language of Wyoming law or the Clean Air Act. However, they cannot ignore explicit legal requirements. Wyoming's Environmental Quality Act ("WEQA") and implementing air regulations require DEQ to ensure NAAQS compliance and implement BACT for each distinct pollutant regulated under Wyoming law or the Clean Air Act.

WEQA, W.S. § 35-11-201: “No person shall cause, threaten or allow the discharge or emission of any air contaminant in any form so as to cause pollution which violates rules, regulations and standards adopted by the council.” (Emphasis added).

6 WAQSR § 4(b)(i): “An analysis of the predicted impact of emission from the stationary source is required for all pollutants for which standards have been established under these regulations or under the Federal Clean Air Act A permit to construct . . . shall be issued only . . . if the ambient standard for the pollutant(s) is not exceeded.” (Emphasis added).

6 WAQSR § 4(b)(ii): “The required permit shall not be issued unless the proposed major stationary source . . . would meet an emission limit(s) or equipment standard(s) specified by the Administrator to represent the application of Best Available Control Technology for each pollutant regulated under these Standards and Regulations and under the Federal Clean Air Act.” (Emphasis added).

Indeed, compliance with NAAQS and BACT for each regulated pollutant is mandated by the Clean Air Act and federal regulations.

CAA, 42 U.S.C. § 7475(a)(3), (4): “No major emitting facility . . . may be constructed in any area to which [the PSD program] applies unless . . . the owner or operator demonstrates . . . that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any . . . national ambient air quality standard . . . [and] . . . the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter.” (Emphasis added).

CFR, 40 C.F.R. §§ 51.166(k)(1), 52.21(k)(1): “The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of . . . [any national ambient air quality standard in any air quality control region.” (Emphasis added).

CFR, 40 C.F.R. §§ 51.166(j)(2), 52.21(j)(2): “A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” (Emphasis added).

There is no exception that exempts PM_{2.5} from these fundamental NAAQS and BACT requirements, and DEQ cannot create one. See, e.g., *Olivas v. State ex rel. Wyoming Workers'*

Safety and Compensation Div., 130 P.3d 476, 484 (Wyo. 2006) (holding that state agencies are bound by the “clear and unambiguous” words of statutes and regulations); New Jersey v. EPA, 517 F.3d 574, 582-83 (D.C. Cir. 2008) (holding EPA must comply with plain language of the Clean Air Act).

Nor can DEQ rely on the so-called “surrogate policy” to avoid compliance with the law. Under the surrogate policy, DEQ claims that as long as it complies with the BACT and NAAQS requirements for PM₁₀, it can ignore PM_{2.5} altogether. DEQ Mot. at 29-32. Nothing in Wyoming’s statutes or regulations or the Clean Air Act and its implementing regulations allows for the use of surrogates that do not ensure “maximum” achievable emissions reductions. 42 U.S.C. § 7479(3); 6 WAQSR § 4(a) (definition of BACT).⁸ Furthermore, the surrogate policy is merely guidance, first articulated by an EPA employee in a memo and later reiterated in the preamble to a PM_{2.5} implementation rule. See DEQ Mot. at 29-32. It is not binding on Wyoming. See, e.g., 73 Fed. Reg. 28,321, 28,334-35 (May 16, 2008); Protestants’ Exh. 33 at 2; Protestants’ Exh. 34 at 4.

Although Basin asks this Council to blindly defer to EPA’s guidance, Basin Mot. at 33-34, no deference is warranted because the surrogate policy directly conflicts with the plain language of governing statutes. EPA has no authority to give DEQ a “free pass” to violate Wyoming law and the Clean Air Act. As stated by the U.S. Supreme Court, an agency action that is “out of harmony with the statute[] is a mere nullity.” Manhattan Gen. Equip. Co. v. Comm’r of Internal Revenue, 297 U.S. 129, 134 (1936); see also New Jersey v. EPA, 517 F.3d

⁸ Basin’s suggestion that Wyoming’s regulations permit the use of PM₁₀ as a surrogate is without merit. Basin Mot. at 34. There are no regulations authorizing PM₁₀ as a surrogate for PM_{2.5} in the NAAQS or BACT analysis. As Basin concedes, it is Wyoming’s regulation for application of the Best Available Retrofit Technology (“BART”) to existing sources that states “[e]missions of PM₁₀ include the components of PM_{2.5} as a subset.” See 6 WAQSR § 9(b); Basin Mot. at 34. That provision is wholly inapplicable in this case. In fact, it shows that where Wyoming intended to adopt a surrogate policy, it did so expressly.

574, 582 (D.C. Cir. 2008) (“This explanation deploys the logic of the Queen of Hearts, substituting EPA’s desires for the plain text of the [Clean Air Act].”); New York v. EPA, 413 F.3d 3, 41 (D.C. Cir. 2005) (“Absent clear congressional delegation . . . EPA lacks authority to create an exemption from New Source Review by administrative rule.”); Sierra Club v. EPA, 294 F.3d 155, 160-62 (D.C. Cir. 2002) (holding EPA has no authority to extend an express statutory deadline in the Clean Air Act). Because the Clean Air Act requires EPA and states implementing the Act to ensure NAAQS and BACT compliance for each pollutant regulated under the Act, EPA does not have authority—whether through a policy letter or the preamble of a rulemaking—to allow otherwise.

Federal courts have recognized that under very rare circumstances, EPA may be excused from strict compliance with the statutory mandates of the Clean Air Act. For this exception to apply, however, compliance must be impossible. See, e.g., Alabama Power Co. v. Costle, 636 F.2d 323, 359-60 (D.C. Cir. 1980). Further, as the Northern District of California held, to allow EPA to postpone compliance with the Clean Air Act without a “convincing demonstration of evident impossibility, would be to, in effect, repeal the Congressional mandate.” Sierra Club v. Gorsuch, 551 F. Supp. 785, 787 (N.D. Cal. 1982). Therefore, the agency’s burden of showing impossibility is “especially heavy.” Alabama Power, 636 F.2d at 359. The courts must “scrutinize such claims carefully” with care to “separate justification grounded in the purpose of the Act from the footdragging efforts of a delinquent agency.” Natural Res. Def. Council v. Train, 510 F.2d 692, 713 (D.C. Cir. 1975).

Here, neither DEQ nor Basin have claimed impossibility, much less offered any facts to support the “convincing demonstration” that is required.⁹ Nor could they. As EPA concedes, the technical difficulties with PM_{2.5} monitoring, emissions estimation, and modeling that were the basis for the surrogate policy in 1997 “have been resolved in most respects” in the ensuing 11 years. 70 Fed. Reg. 66,043; see also Basin Mot. at 36 (conceding “some of the technical developments for calculating the emissions of PM_{2.5} have been resolved”). Protestants’ expert, Dr. Ranajit Sahu, confirmed that fact:

[I]n the decade since EPA issued the Seitz memo, concerns about monitoring and modeling PM_{2.5} have been largely resolved. PM_{2.5} monitoring stations have been in operation for many years; measurement methods are in place; and adequate modeling techniques have been developed.

Protestants’ Exh. 29 at 12; see also id. at 12-13 (describing test methods and models). Neither Basin nor DEQ offered any expert testimony in rebuttal. In fact, not only is this analysis possible, but EPA, non SIP-approved states, and Montana are all currently regulating PM_{2.5} as a separate pollutant. EPA and non SIP-approved states began implementing PM_{2.5} requirements of the Clean Air Act as of July 15, 2008. See 73 Fed. Reg. 28,340. Earlier this year, the Montana Board of Environmental Review held that Montana DEQ was required to consider PM_{2.5} in the permitting process for a proposed coal-fired power plant. Protestants’ Exh. 32 at 32. (“The tools needed to derive BACT determined limits for PM_{2.5} [are] available . . . [and] there [is] no impediment to the Department conducting a PM_{2.5} analysis to determine how or if PM_{2.5} emissions could be reduced.”). Montana DEQ is now implementing the Board’s Order.

⁹ Although Basin claims that a BACT analysis would be “extremely difficult” and that NAAQS compliance would be a “huge challenge,” its factual allegations are entirely unsupported. Basin Mot. at 36-37. The company does not provide a single citation and has produced no expert testimony on this issue. Therefore it has not established even a prima facie case on this issue for the purposes of summary judgment, much less met its heavy burden of showing impossibility. Sunshine Custom Paints & Body, Inc. v. South Douglas Highway Water & Sewer Dist., 173 P.3d 398, 401 (Wyo. 2007) (“The summary judgment movant has the initial burden of establishing a prima facie case with admissible evidence.”); Moewes v. Farmer’s Ins. Group, 641 P.2d 740, 743 (Wyo. 1982) (“A party may not rely on conclusions nor can they be employed by a court in disposing of a motion for summary judgment.”).

Because compliance with the plain language of its own regulations and the Clean Air Act is possible, DEQ has no excuse for its failure to comply. DEQ's failure to regulate PM_{2.5} is nothing more than the "footdragging efforts of a delinquent agency." Natural Res. Def. Council v. Train, 510 F.2d at 713.

B. DEQ Must Implement the NAAQS and BACT Provisions of Wyoming's Regulations, Which Already Apply to PM_{2.5}.

Because there is no longer a technical justification for DEQ's failure to comply with the law, Basin relies primarily on the fact that Wyoming has not yet passed regulations for PM_{2.5}. Basin Mot. at 34-37. According to Basin, DEQ is powerless to take any action until EPA promulgates additional regulations and Wyoming amends its SIP. Id. at 35. If Basin's argument were correct—which it is not—regulation of PM_{2.5} would still be many years away. According to Basin, the State will need the next three years to modify its regulations; EPA will have an additional 18 months to approve those modifications; and then EPA will still have to finalize other portions of the PM_{2.5} implementation rule, which would then be incorporated into the state regulations and approved by EPA at some unspecified point in the distant future. Id. at 35-36. In the meantime, DEQ could continue to permit major polluting sources without doing anything to protect Wyoming's citizens from PM_{2.5} pollution. This argument is wrong; regulations needed to control PM_{2.5} are already in place in Wyoming.

As EPA has recognized, no new regulations are necessary for either BACT or NAAQS compliance. When EPA recently enacted the PM_{2.5} regulations for non-SIP approved states, it made no changes to the federal regulations governing BACT or NAAQS. For BACT, EPA stated:

We are not making any change to our current regulations or policy for implementing BACT requirements at a major source that is subject to the requirements of the PSD program. Accordingly, if a new major source will emit, or have the potential to emit, a significant amount of a regulated NSR pollutant in an attainment area for that pollutant, the source must apply BACT for each emissions unit that emits the pollutant.

73 Fed. Reg. 28,336 (emphasis added). When Wyoming implements this final rule, it also will make no changes because Wyoming's BACT regulation already applies to all pollutants regulated under the Clean Air Act. 6 WAQSR § 4(a) (definition of BACT). In fact, even if Wyoming wanted to change the regulation, it could not. BACT for every regulated pollutant is mandated by the Clean Air Act, and Wyoming law must be at least as stringent as the Clean Air Act's minimum requirements. 42 U.S.C. §§ 7416, 7475(a)(4).

DEQ can also ensure NAAQS compliance with no change to its regulations. In fact, in the final PM_{2.5} implementation rule, EPA stated:

All sources subject to PSD review must perform an ambient air quality impact analysis to show that the emissions from the source will not cause or contribute to a . . . NAAQS violation. See section 165(a)(3) of the CAA; 40 C.F.R. 51.166(k) and 52.21(k). We did not propose, and our final rules do not contain, any changes to the regulations on air quality impact analyses for purposes of the PM_{2.5} NSR program. Accordingly, sources will be required to perform this analysis for the PM_{2.5} NAAQS Such analyses must consider how a source, in combination with other sources in the area, will impact air quality at existing PM_{2.5} monitor locations, as well as at other locations that are appropriate for comparing predicted PM_{2.5} concentrations to the NAAQS based on PM_{2.5} monitor siting requirements and recommendations.

73 Fed. Reg. 28,336 (emphasis added). Likewise, when Wyoming implements EPA's final rule, it will make no changes to its own NAAQS regulations. Wyoming law already requires NAAQS compliance for all regulated pollutants. 6 WAQSR § 4(b)(i). As with BACT, Wyoming could not change this regulation even if it wanted to because it is required under the Clean Air Act. 42 U.S.C. § 7475(a)(3).

Basin's only response with respect to BACT is an unsupported claim that the analysis will be "difficult" for PM_{2.5}. Basin Mot. at 37. That a task may be challenging is no excuse for not complying with existing Wyoming and federal law. As discussed above, EPA and other states are engaging in BACT analysis for PM_{2.5}; there is no reason DEQ cannot do the same.

Basin's argument with respect to NAAQS is equally unavailing. Basin objects that Wyoming has yet to adopt a "significant impact level" or "SIL" for PM_{2.5}. As a result, under existing Wyoming law, cumulative modeling is required for all major sources. Basin Mot. at 36; see also 6 WAQSR § 4(a) (definition of "significant") (setting the emission level for regulated pollutants that are not on the list at "any emissions rate").¹⁰ According to Basin, this cumulative modeling will be "fraught with uncertainty." Basin Mot. at 36. However, this argument is entirely factual, and Basin has provided no support. Regardless, any technical difficulties are not tied to the lack of regulations. Wyoming has no regulations that tell the agency how to do cumulative modeling for SO₂, NO_x, PM₁₀, or any other regulated pollutant. Therefore, even after DEQ incorporates EPA's final rule, the regulations will still require cumulative NAAQS modeling, and DEQ will have to figure out how to do it. The only difference is that it will be three or more years down the road, and the Dry Fork Station and any other major sources of PM_{2.5} that can get permitted in the next few years will not be subject to the law. That is neither a legal nor a desirable result. PM_{2.5} has been regulated for more than 11 years; the time to act is now.

¹⁰ As Basin notes, under Wyoming's PSD program, cumulative modeling is required if the major stationary source will have ambient air quality impacts above the SIL. Basin Mot. at 36. Wyoming's regulations list a number of SILs for various pollutants. 6 WAQSR § 4(a) (definition of "significant"). The regulation also provides that for all pollutants that are not listed but still regulated under the Clean Air Act or Wyoming's regulations, the significant impact level is "any emissions rate." *Id.* Accordingly, not only has Wyoming specifically anticipated that there will be regulated pollutants for which Wyoming DEQ has not yet modified its SIP to address, but it has also taken a conservative approach by requiring cumulative monitoring for all of these pollutants.

Furthermore, Basin relies solely on EPA's PM_{2.5} implementation rule as its justification for continued delay. Basin Mot. at 35-36. However, EPA's decision to delay compliance for at least three more years violates the PSD sections of the Clean Air Act, which make no provision for a transition period during which compliance with the law is not required. States are given a maximum of only three years to amend their SIPs after EPA promulgates a NAAQS standard, and those SIPs must include PSD requirements. 42 U.S.C. §§ 7410(a)(1), (a)(2)(C). Because EPA promulgated the PM_{2.5} NAAQS in 1997, Wyoming's PM_{2.5} SIP revisions were due in 2000. EPA has no authority to extend that deadline to 2011.

EPA's only excuse for extending the deadline is that it would be "confusing and difficult to administer" if states were to require compliance with PM_{2.5} NAAQS and BACT at the same time they are making other PM_{2.5}-related changes to their SIP. 73 Fed. Reg. 28,341; see also id. (justifying the three-year transition period "ensure consistent administration"). However, EPA is "not free to evade the unambiguous directions of the law merely for administrative convenience." Natural Res. Def. Council v. EPA, 595 F. Supp. 1255, 1261 (D.N.Y. 1984) (quoting Brown v. Harris, 491 F. Supp. 845, 849 (N.D. Cal.1980)). Because administrative convenience is no excuse for subjecting Wyoming's citizens to dangerous PM_{2.5} pollution, DEQ must ensure compliance despite EPA's recalcitrance.

C. If the Council Determines that DEQ Must Address PM_{2.5}, the Appropriate Remedy is a Remand.

Basin's final claim is that this Council should just ignore the Clean Air Act and Wyoming's regulations because "nothing would be accomplished as a practical matter" if DEQ complied with the law. Basin Mot. at 37. Basin makes this assertion because it considered whether PM₁₀ NAAQS would be violated and conducted BACT analyses for PM₁₀ and precursors to PM_{2.5}. Basin Mot. at 27-28, 37-39. Notwithstanding the fact that Basin and DEQ

cannot side-step legally required procedures by claiming after-the-fact that they would not matter anyway, Basin has not demonstrated that these procedures would be meaningless. First, there is simply no assurance that NAAQS for PM_{2.5} will be met based on the limited PM₁₀ modeling that was conducted for Dry Fork Station. Second, Basin cannot assure the Council that it has complied with BACT for PM_{2.5} because the proper analysis was never completed. Third, there is also no assurance that Basin will control filterable particulate matter using PTFE bags as they claim. Fourth, Basin cannot ensure that it is meeting BACT for PM_{2.5} at the Dry Fork Station by comparing its precursor emissions with those in other permits. Finally, because of all these concerns, a remand requiring a complete NAAQS and BACT analysis, including the opportunity for public comment, is appropriate.

First, with respect to NAAQS, Basin relies on modeling it conducted for PM₁₀. Basin Mot. at 38. However, that modeling is completely insufficient to demonstrate compliance with PM_{2.5} NAAQS. For PM₁₀, Basin determined that Dry Fork's contribution to the ambient air was 4.2 µg/m³. Basin Mot. at 38. Assuming that all of the PM₁₀ is PM_{2.5}, Basin concludes that Dry Fork's PM_{2.5} contribution could be conservatively estimated at 4.2 µg/m³. Basin then leaps to the conclusion that because 4.2 is much less than the PM_{2.5} NAAQS of 35 µg/m³, there is no conceivable air quality problem or reason for doing PM_{2.5} modeling. Id. at 27, 38.

In doing so, Basin ignores a crucial step: cumulative modeling. Because Dry Fork's PM₁₀ contribution was below the SIL, Basin did no cumulative modeling. As a result, there is no information about the other sources of PM_{2.5} in the area. Those sources could contribute significant amounts of PM_{2.5}. Indeed, that is precisely what the modeling is designed to determine. As discussed above, cumulative modeling is legally required for PM_{2.5} because the SIL is currently zero. This analysis is far from meaningless. There are at least two monitoring

stations in Wyoming where the average ambient concentrations are already close to the NAAQS standard. DEQ reports the average monitored ambient levels in Sheridan and Lander as 32 $\mu\text{g}/\text{m}^3$ and 31 $\mu\text{g}/\text{m}^3$ respectively. See Protestants' Mot. at 34-35. A Dry Fork contribution of 4.2 $\mu\text{g}/\text{m}^3$ would put either of these areas over the NAAQS limit. As Dr. Sahu explains, this example shows the importance of at least conducting the analysis in the vicinity of the Dry Fork Station to determine whether there is a problem. See Protestants' Exh. 46 at 1-2.

Second, with respect to BACT, the process is crucial. The point of using the top-down method is to identify all potential technologies and avoid making any premature or superficial determinations that would preempt the use of the best technology available. The structured top-down approach is expressly intended to ensure a defensible emission limit that genuinely reflects the maximum achievable reduction in emissions. See Protestants' Exh. 12 at B.1-B.3 (explaining purpose of NSR Manual); see also In re Cardinal FG Co., PSD Appeal No. 04-04, slip op. at 12, 12 E.A.D. --- (EAB Mar. 22, 2005) (“[A] careful and detailed analysis of the criteria identified in the regulatory definition of BACT is required, and the methodology described in the NSR Manual provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program.”). Skipping over required steps in the top-down analysis is the same as jumping to conclusions. As explained by the NSR Manual, “[i]n the course of the BACT analysis, one or more of the options may be eliminated from consideration because they are demonstrated to be technically infeasible or have unacceptable energy, economic, or environmental impacts on a case-by-case (or site-specific) basis. However, at the outset, applicants should identify all control options with potential application to the emission unit under review.” Protestant's Exh. 12 at B.5-B.7 (emphasis added).

In this case, Protestant's expert identified several technologies that control PM_{2.5} that were either never considered in the Dry Fork permitting process or were not chosen for the Dry Fork Station, including wet electrostatic precipitator, advanced hybrid particulate collector, a more efficient baghouse, wet FGD, and the Indigo agglomerator. Protestants' Exh. 30 at 3. These technologies should have been considered in the BACT process. Protestants' expert also recommended that DEQ consider combinations of these technologies. *Id.* at 4. Neither DEQ nor Basin has rebutted this testimony. In any event, without engaging in this process, Basin cannot assert that BACT for other pollutants is the same as BACT for PM_{2.5}. In fact, Basin concedes this point by stating that existing "Dry Fork Station emission limits . . . will control PM_{2.5} emissions to virtually the same maximum achievable level that would have been required by BACT anyway." Basin Mot. at 27 (emphasis added); see also id. at 40. It is not sufficient to almost comply with the law.

Third, Basin claims that the fabric filters chosen for the Dry Fork Station "will ensure that particulate PM_{2.5} emissions from the Dry Fork Station will be effectively controlled to the maximum degree achievable as defined by the BACT rules." Basin Mot. at 38 (with no citation provided). Basin cannot make this conclusory assertion without completing a BACT analysis or providing any expert analysis on this issue.

Furthermore, the record indicates that Basin previously rejected the PTFE bags that now states it is planning to use. In its response to DEQ's completeness review dated December 21, 2005, Basin stated that "to guarantee [a PM₁₀] emission rate below approximately 0.012 lb/mmBtu, it is likely that the fabric filter vendors will specify the use of specialty filter bags such as PTFE membrane bags." Protestants' Exh. 47 (DEQ/AQD 738-743) (emphasis added). As Basin later explains, it rejected a BACT limit below 0.012 lb/mmBtu because these specialty

bags are too expensive. Protestants' Exh. 18 (DEQ/AQD 1538-1539). The final permit sets the PM₁₀ limit at 0.012 lb/mmBtu, and it does not require the use of a PTFE bag. Protestants' Exh. 41 at 2. With its Motion for Summary Judgment, however, Basin filed an affidavit of Robert T. Williams, an engineer for Basin. He states that Basin will use a PPS bag with PTFE coating. Williams Aff. at 10. Although Mr. Williams—who was not offered as an expert witness in this case—claims this will lead to “excellent particulate control,” he provides no information about the control efficiencies Basin anticipates. Therefore, it is impossible to determine whether the specific bags chosen by Basin constitute BACT. Additionally, the record indicates that these “specialty bags” are not necessary to comply with the permit, and that by using them, Basin could in fact achieve a PM₁₀ limit below its permitted level of 0.012 lb/MMBtu. Protestants' Exh. 18 (DEQ/AQD 1538-1539). This calls into question whether the PM₁₀ limit for Dry Fork is actually consistent with BACT. In any event, the appropriate place to explore these issues in the first place is not on appeal before the Council, but before the DEQ.

Fourth, Basin claims that because permit limits for PM_{2.5} precursors are low when compared with other permits in the country, they are doing “everything” they can. Basin Mot. at 28. As an initial matter, BACT is not set by simply comparing the proposed permit with existing permits around the country. 6 WAQSR § 4(a). Rather, BACT is determined on a case-by-case basis and depends on the particular coal being used, the amount of pollutants it will produce, and the control efficiencies of the production processes and control technologies. Because of site-specific factors, comparisons of various permits are often not apples to apples. While they provide information that may be used as part of a BACT analysis, other existing permits are not determinative of what is BACT. See Protestants' Exh. 12 at B.12.

Even if the Council were to look at other permit limits around that country, however, they do not prove that Basin has achieved BACT for PM_{2.5}. Basin touts its permit limits for PM₁₀ as well as precursors to PM_{2.5}, which include SO₂, NO_x, sulfuric acid mist (H₂SO₄), VOCs, and hydrogen fluoride (HF). Basin Mot. at 27-28, 38-39. There are, however, several permitted and existing facilities with lower permit limits than Dry Fork. For example, the Desert Rock power plant in New Mexico was recently permitted with a PM₁₀ permit limit of 0.010 lb/MMBtu as compared to Dry Fork's limit of 0.012 lb/MMBtu. Protestants' Exh. 48 at 11. The Desert Rock permit also imposes a lower emission limit for PM_{2.5} precursors, including SO₂, VOCs, and HF. Id. at 7, 10, 14.¹¹ Although the NO_x permit levels for Dry Fork and Desert Rock are the same (0.05 lb/MMBtu), Desert Rock's includes a lower averaging time (rolling 30-day compared to 12 month rolling average). Id. at 9. Further, Basin's own information from EPA's RACT/BACT/LAER Clearinghouse also shows that there are a number of permits with lower limits for PM_{2.5} precursors, including: (1) at least ten permits with a lower limit for VOCs, (2) at least four existing permits with lower limits for HF, and (3) at least one permit with a lower limit for H₂SO₄ (Dry Fork's limit is 0.0025). Protestants' Exh. 49 (DEQ/AQD 258-59, 262, 274). Accordingly, Basin cannot credibly claim that it has achieved BACT for PM_{2.5} without even engaging in an analysis.

Finally, all of these issues taken together underscore the need for Basin and DEQ to engage in the required analysis. The appropriate place for initial NAAQS modeling and BACT analysis is before DEQ, not the Council. Moreover, the public has never had the opportunity to comment on an analysis of PM_{2.5}. Only by remanding for an analysis specific to PM_{2.5} can the

¹¹ Desert Rock's SO₂ limit is 0.060 lb/MMBtu on a 24-hour block period compared to Dry Fork's 0.070 lb/MMBtu on a 12-month rolling average. Desert Rock's VOC limit is 0.0030 lb/MMBtu compared to Dry Fork's 0.0037 lb/MMBtu. And, Desert Rock's HF limit is 1.6 lb/hr or 0.00024 lb/MMBtu compared to Dry Fork's 2.62 lb/hr or 0.000689 lb/MMBtu. Protestants' Exh. 48 at 7, 10, 14.

Council ensure that the public participation requirements of the Clean Air Act and Wyoming regulations are satisfied. See 42 U.S.C. § 7475(a)(2) (public must be provided opportunity to comment on a complete BACT analysis prior to construction); 6 WAQSR § 2(m) (same).

III. DEQ'S AND BASIN'S MOTIONS FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE OF DRY FORK'S IMPACT TO ONGOING SO₂ INCREMENT VIOLATIONS IN THE NORTHERN CHEYENNE INDIAN RESERVATION.

A. Under Wyoming Law, the Council Must Deny the Permit.

The motions for summary judgment of DEQ and Basin Electric ask the Council to overlook Dry Fork's undisputed impact to ongoing SO₂ increment violations in the Northern Cheyenne Indian Reservation ("NCIR") and therefore should be denied outright. In fact, because of their reliance on anything but the Wyoming law on which this issue turns and indifference to the elevated levels of pollution in the NCIR, the motions of DEQ and Basin are without merit.

As explained in Protestants' motion, and at least initially acknowledged by DEQ in its motion, DEQ Mot. at 9, Wyoming's air pollution permitting program is not a "delegated" federal program in which Wyoming enforces federal regulations, or a state program that simply incorporates the federal program by reference, but rather a state program that is based on state regulations that have been federally-approved. 40 C.F.R. Part 52, Subpart ZZ; 44 Fed.Reg. 51977 (Sept. 6, 1979). As a result, the question of whether the Council should deny Basin's permit for the Dry Fork facility due to ongoing SO₂ increment violations is solely a matter of Wyoming's federally-approved state law.

Tellingly, neither DEQ or Basin quote the applicable provision of Wyoming's regulations that the Council must apply here. 6 WAQSR § 4(b)(i)(A)(I). Instead, DEQ and Basin attempt to distract the Council with references to federal regulations, EPA memos, and cases from other

states, none which answer a straightforward question of Wyoming law. When viewed fairly, it is beyond question that 6 WAQSR § 4(b)(i)(A)(I) prohibits the issuance of a permit to a new source if the impact of pollution from that source and others is equal to or greater than the maximum allowable increment.

Pursuant to § 4(b)(i)(A)(I), any person planning to construct a new, major source of air pollutants such as Dry Fork must first analyze the impact of emissions. After the completion of such analysis, the DEQ shall issue a permit to construct a major source of air pollution “only if . . . the predicted impact (over and above the baseline concentration) of emissions defined above is less than the maximum allowable increment shown in Table 1.” *Id.* (emphasis added). The Class I 24-hour SO₂ “maximum allowable” increment in Wyoming’s regulations is 5 micrograms per cubic meter (µg/m³). 6 WAQSR § 4, Table 1.

The facts are uncontested. The modeling performed by Basin, and approved by DEQ, shows that Dry Fork and other applicable sources result in SO₂ concentrations in the NCIR of greater than 7 µg/m³ – 40 percent over the allowable 5.0 µg/m³ increment. Basin Exh. 14 at 10-11; DEQ’s Schlichtemeier Affidavit, Exh. M at 40; Protestants’ Exh. 14 at 40. All told, the modeling predicted forty-seven (47) SO₂ 24-hour increment violations in the NCIR over a three year period. Basin Exh. 14 at 10; Protestants’ Exh. 43 at 10. Of those violations, there is no dispute that SO₂ emissions from Dry Fork contribute to at least 29. Basin Mot. at 49; Basin Exh. 14 at 10 & Exh. 2, Table 1.

Therefore, because no permit may be issued if the predicted impact of emissions is equal to or greater than the maximum allowable increment, and because it is undisputed that the predicted impact of emissions including those from Dry Fork is greater than the maximum

allowable increment, the motions of DEQ and Basin should be denied. Instead, for the same reasons, Protestants' motion for summary judgment on this issue should be granted.

B. DEQ's and Basin's Effort to Avoid a Clear Command of Wyoming Law Should be Rejected.

The law in Wyoming is clear and unambiguous: DEQ may not issue an air pollution permit to a source if the applicable emissions are predicted to exceed the maximum allowable increment in any Class I area. 6 WAQSR § 4(b)(i)(A)(I). Although DEQ and Basin concede that predicted emissions of SO₂ from Dry Fork and other applicable sources will exceed the maximum allowable 24-hour SO₂ increment in the NCIR, they attempt to skirt, by mentioning everything but, the plain meaning and consequence of § 4(b)(i)(A)(I).

DEQ and Basin never quote the text of § 4(b)(i)(A)(I) and thus never even attempt to show that it is ambiguous. By failing to demonstrate that the words of the regulation are ambiguous, and it being impossible to do so, DEQ and Basin have no business reaching out to EPA memos and unrelated state cases, or drafting their own self-serving affidavits, in an effort to distort the otherwise straightforward language of the law.

According to the Wyoming Supreme Court in Qwest Corp. v. Public Serv. Comm'n of Wyo., 161 P.3d 495, 497 (Wyo. 2007), statutory interpretation is a question of law.¹² First, “we look first to the plain and ordinary meaning of the words in the statute and decide, as a matter of law, whether the statute is clear or ambiguous.” Id.; Powder River Coal Co. v. State Bd. of Equalization, 38 P.3d 423, 426 (Wyo.2002). “If the statutory language is clear and unambiguous, we follow its plain meaning.” Rogers v. State, 2008 WY 90, ¶ 5 (Wyo. 2008). A statute is clear and unambiguous if reasonable persons are able to agree on its meaning with

¹² The Wyoming Supreme Court has held that “[p]roperly promulgated rules and regulations have the same force and effect of law. We construe them as we construe statutes.” Johnson v. City of Laramie, 2008-WY-R0627.001, ¶ 7 (Wyo. 2008). See also Olivas, 130 P.3d at 484; Antelope Valley Imp. v. State Bd. of Equalization for State of Wyo., 992 P.2d 563, 566 (Wyo. 1999).

consistency and predictability. Qwest Corp., 161 P.3d at 497. A statute is ambiguous if it is found to be vague or uncertain and subject to varying interpretations. RME Petroleum Co. v. Wyo. Dep't of Revenue, 150 P.3d 673, 683 (Wyo. 2007).

Because there is nothing ambiguous about the requirement in 6 WAQSR § 4(b)(i)(A)(I), its plain meaning must be followed. The DEQ may “only” issue a permit to construct a major source “if . . . the predicted impact (over and above the baseline concentration) of emissions defined above is less than the maximum allowable increment shown in Table 1.”

DEQ and Basin point to nothing vague in this language, and there is nothing vague. Only if the predicted impact of emissions is less than the applicable increment may a permit be issued. Period. The regulation does not state that the predicted impact can be equal to the applicable increment, greater than the applicable increment as long as it is not significantly greater, or greater than the applicable increment if the increment is being violated anyway. Neither DEQ or the Council or the courts have the authority to change the clear language of this regulation: “We will not enlarge, stretch, expand or extend a statute to matters not falling within its express provisions.” Lo Sasso v. Braun, 386 P.2d 630, 632 (Wyo. 1963).

DEQ's and Basin's extensive reliance on EPA memos, other non-Wyoming materials, and DEQ's interpretation itself, is therefore improper because the language of Wyoming's regulation is unambiguous. “When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction.” Jenkins v. State, Safety & Comp. Div., 153 P.3d 271, 273 (Wyo. 2007). As explained by the U.S. Supreme Court, “[i]f the regulation is unambiguous, no deference is required as the plain language of the regulation, not the agency's interpretation, controls.”

Christensen v. Harris County, 529 U.S. 576, 588 (2000) (emphasis added). The purpose of this rule is obvious:

[D]eference [to an agency's interpretation] is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous -- it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. Because the regulation is not ambiguous . . . deference is unwarranted.

Id. (emphasis added.)

Because the regulation is clear, the reliance of DEQ and Basin on In re Prairie State Generating Co., 2006 WL 2847225 (E.A.B., Aug. 24, 2006), is improper. It is also misplaced because Illinois is a “delegated” state and thus is simply enforcing EPA’s PSD regulations – not Illinois’. Wyoming does not enforce EPA’s regulations, nor do Wyoming’s regulations parrot EPA’s. Because Prairie State can not, and does not, interpret or modify Wyoming law, it has neither binding nor even persuasive value. The same result pertains to the 1988 EPA memo from George Emison (applies to EPA regulations, not Wyoming’s), Groce v. Dep’t of Env’tl. Prot., 921 A.2d 567 (Pa. Cmwlth. Ct. 2007) (applies to EPA regulations adopted *in toto* by Pennsylvania); and the 1991 EPA memo from John Calcagni (applies solely to EPA regulations).

DEQ’s additional reliance on the Rairigh Affidavit is equally off-point for similar and separate reasons. DEQ Exh. 2. First, DEQ has no authority to change the plain meaning of its regulation to allow alleged “de minimis” violations of the Class I SO₂ increment, through the use of “significant impact levels” (SILs), without going through rulemaking. As explained by the Court in Christensen, an agency may not “create de facto a new regulation” through the guise of interpretation.

Second, to the extent DEQ wants to amend its regulation to apply SILs to Class I areas (assuming without conceding it has such authority), it knows how to do it. At 6 WAQSR §

2(c)(ii)(A), DEQ regulations provide for SILs in the context of Wyoming's ambient air quality standards. That DEQ felt the need to promulgate SILs into its regulations in Section 2 is compelling evidence that the agency would first need to promulgate SILs into Section 4 for them to be effective there.

Third, Mr. Rairigh only testifies that DEQ has used Class I SILs "as a screening tool" to determine whether cumulative air pollution modeling is necessary. DEQ Exh. 2, ¶ 23. Because cumulative air pollution modeling was required for Dry Fork, that practice is not at issue here. The issue here is whether SILs may be used to overlook increment violations established by cumulative air pollution modeling – a legal question on which Mr. Rairigh does not speak, and on which he would not be qualified to speak.

For all the reasons set forth above, the DEQ's and Basin's motions for summary judgment should be denied, and Protestants' granted, because the predicted impact of Dry Fork's SO₂ emissions is more than the maximum allowable Class I increment in the Northern Cheyenne Indian Reservation in contravention of 6 WAQSR § 4(b)(i)(A)(I).

CONCLUSION

For the above reasons, Protestants' respectfully request this Council deny DEQ's and Basin's Motions for Summary Judgment, and grant Protestants' Motion for Summary Judgment.

Dated: September 12, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 12, 2008, I served a copy of the foregoing PROTESTANTS' RESPONSE TO DEQ'S AND BASIN'S MOTIONS FOR SUMMARY JUDGMENT and accompanying exhibits via e-mail and Federal Express addressed to:

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