

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' OPPOSITION TO PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW (Claim VIII — SO<sub>2</sub> Increment)**

Protestants object to DEQ and Basin's proposed Findings and Fact and Conclusions of Law (Claim VIII—SO<sub>2</sub> Increment) and suggest the following corrections and revisions. The corrections and revisions are shown in bold and strikeout.

**II. FINDINGS OF FACT**

-- To clarify in paragraph 3 that the absence of dispute is limited to the motions before the Council.

3. **In the context of the motions before the Council**, no dispute exists as to the model and methodology used for the air quality dispersion modeling performed by Basin Electric and DEQ, or the correctness of the application of that modeling. The parties agree that the modeling was done properly.

-- This suggestion for paragraph 4 does not add new language, but only moves the last sentence up (shown in bold) to make the paragraph more readable.

4. There are two distinct phases of air dispersion modeling: (1) the preliminary analysis (also known as a screening analysis); and (2) if necessary, a full impact analysis (cumulative modeling). **EPA guidance provides that no further modeling using a full impact (cumulative) analysis is necessary if the screening phase of preliminary analysis shows no impacts from the proposed source above a SIL, because in that case the proposed source's impact is considered insignificant. MSR Manual at (C.24 (Ex. 2 to Basin Electric's Memo in Support of Motion for Summary Judgment (Basin Electric Brief))).** The screening phase of the preliminary analysis showed that Dry Fork Station's emissions, by themselves, had no impact in any area above the significant impact level (SIL) for any Class I areas, except for SO<sub>2</sub> in the NCIR.

-- Clarifies in paragraph 6, consistent with paragraph 7, that DEQ “required” the subject modeling.

6. On March 28, 2006, after completing its second review of the permit application (Completeness Review No. 2), the DEQ/AQD **required** ~~requested that~~ Basin Electric to model Colstrip Units 3 and 4 using the short-term permitted SO<sub>2</sub> emission rates (also referred to as “maximum allowable” or “potential to emit”) for those sources. DEQ also provided Basin Electric with a 1 km receptor grid to be used in further modeling analyses for the NCIR. *See* Schlichtemeier Aff., ¶ 18, Ex. G; Rairigh Aff., ¶¶ 33-36.

-- Removes editorial presentation of facts in paragraph 7. Also removes irrelevant comparison to Colstrip impacts.

7. After DEQ required Basin Electric to conduct cumulative modeling using maximum allowable emissions from all increment consuming sources, including from Colstrip, the modeling ~~using this conservative assumption rather than actual emissions predicted that there might be 47 possible SO<sub>2</sub> increment exceedances of the 5.0 microgram per cubic meter limit in the NCIR over the three year period modeled. As illustrated by the amount of increment consumed by Colstrip's actual emissions, compared to actual emissions from all sources combined, practically all of modeled increment consumed was consumed by Colstrip.~~ Expert Report of Robert L. Pearson at 10-12, Table 4, and Ex. 2 (Basin Electric Brief Ex. 14).

-- Removes editorial and irrelevant presentation of facts in paragraph 8. DEQ requires maximum allowable emissions in air quality forecasting because such levels could be emitted in the future.

~~8. — Because this modeling was done using maximum allowable emissions from Colstrip, and not actual emissions from Colstrip, the results of the modeling do not match actual air quality impacts on the NCIR, but rather hypothetical conservative scenarios. *Id.*~~

-- Clarifies the meaning of “occasions” in paragraph 9.

9. On 18 of the 47 **modeled increment violations** ~~occasions~~, Dry Fork Station's modeled impact was zero. *Id.*

-- Makes same clarification in paragraph 10 as in paragraph 9. Also sets forth a more balanced, non-editorial presentation of the facts. Also removes legal statements.

10. Of the remaining 29 **modeled increment violations** ~~occasions~~, when Dry Fork Station's modeled ~~theoretical~~ contribution was

greater than zero, the modeled impact of Dry Fork Station on 25 of these occasions was vanishingly small, typically between **0.1340 and 0.0002** and 0.0009 micrograms per cubic meter (that is, between 200 and 900 trillionths of a gram per cubic meter). The other 4 occasions **All of the increment violations** were all well below the SIL, which is used by EPA and DEQ to determine when a modeled impact is so tiny as to be legally *de minimis* because of its insignificance. The SIL level employed **by DEQ for the first time in this case to excuse increment violations** by EPA and DEQ for SO<sub>2</sub> is 0.2 micrograms per cubic meter. *Id.*

-- Sets forth a more balanced, non-editorial presentation of the facts in paragraph 11. Also removes legal statements.

11. As a consequence, it is undisputed that the Dry Fork Station never had a modeled impact above SIL levels on those few days where theoretical exceedances were modeled using maximum allowable, rather than actual, emissions from Colstrip. All of Dry Fork's modeled emissions impacts were **deemed de minimis** by DEQ. under the test for determining *de minimis* impacts employed by EPA under the Clean Air Act (CAA) and by DEQ in its implementation of the CAA in Wyoming, and even these de minimis impacts occurred only under DEQ's requested conservative modeling assumptions.

-- Removes irrelevant facts in paragraph 12.

12. — Modeling results demonstrate that by far the predominant cause of predicted exceedances of the Class I SO<sub>2</sub> increments in the NCIR was emissions from Colstrip. The modeling using maximum allowable emissions from Colstrip demonstrated that Colstrip was the primary reason for any predicted increment exceedances for SO<sub>2</sub> in the NCIR. *Id.*

-- Removes legal statements in paragraph 13.

13. — The DEQ Director and DEQ Air Quality Division Administrator determined that the cumulative modeling results for SO<sub>2</sub> in the NCIR showed that the impact of emissions of SO<sub>2</sub> from Dry Fork Station were legally insignificant and thus not causing, contributing to, or impacting any allowable SO<sub>2</sub> increment in the NCIR. *See Rairigh Aff.*, ¶ 40; *Schlichtemeier Aff.*, Ex. J at DEQ/AQD Bates No. 000632.

-- Removes legal statements in paragraph 14, and clarifies that the screening analysis is performed on the source alone.

14. In deciding to issue the permit to construct Dry Fork Station, the DEQ Director and Air Quality Division Administrator applied the Class I SIL of 0.2 micrograms per cubic meter to determine that Dry

Fork Station's SO<sub>2</sub> impacts in the NCIR were never significant and were always *de minimis*. For the last 6 years, the DEQ has employed Class I SILs, in approximately 10 permit applications, as a screening tool to determine whether a proposed source **alone** would have a significant impact on a Class I area and whether cumulative modeling would then be required. These facilities include WYGEN 2, ExxonMobil, Solvay, Opal, OCI, Basin Electric Dry Fork, WYGEN 3, and Two Elk Unit 2. *See* Rairigh Aff., ¶ 23.

-- Revises paragraph 15 to be consistent with the statement of DEQ attorney Luke Esch at the September 30, 2008 hearing that “[w]e have not used this -- we have not used this SILs in this way in Wyoming before.”

15. DEQ has done so based on the reasoning that a *de minimis* threshold is needed to screen out potentially insignificant sources of emissions. DEQ has **not** also previously employed SILs after cumulative modeling to determine **that** a source's modeled impact was *de minimis*; consistent with EPA practice. ***See Dispositive Motion Hearing Transcript, p. 180 (statement of DEQ attorney Luke Esch) (excerpt attached as Exh. 1); Rairigh Aff., ¶¶ 22 and 23; Schlichtemeier Aff., Ex. V, WyGen 2 Decision pp. 17-20.***

-- Removes legal statements in paragraph 18.

18. — EPA proposed SILs for use in Class I areas in 1996 (61 Fed. Reg. 38,250, 38,338 (July 23, 1996)), and the level proposed for SO<sub>2</sub>, for a 24 hour reading was 0.2 micrograms per cubic meter, which is only 4% of the small Class I increment. Most permitting agencies use these proposed Class I SILs in the permitting process. ***See* Deposition of Protestants' Expert Khanh Tran at p. 51:15-18 (August 12, 2008) (Ex. 5 to DEQ Motion).**

-- There does not appear to be any support in the record for the proposition stated in paragraph 19.

19. — Requiring a proposed source to demonstrate zero impact on a modeled increment exceedance before DEQ could issue a PSD permit, instead of DEQ applying *de minimis* SIL levels to determine the significance of the predicted impact, would unnecessarily jeopardize development of other sources and economic development in Wyoming.

Dated: October 23, 2008

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on October 23, 2008, I served a copy of the foregoing Opposition to Proposed Findings of Fact and Conclusions of Law (Claim VIII — SO<sub>2</sub> Increment), and accompanying exhibit via e-mail, addressed to:

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/s/ Robin Cooley

# **EXHIBIT 1**

BEFORE THE STATE OF WYOMING  
ENVIRONMENTAL QUALITY COUNCIL

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DISPOSITIVE MOTION HEARING IN THE MATTER OF THE BASIN  
ELECTRIC POWER COOPERATIVE, DRY FORK STATION  
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VOLUME II  
TRANSCRIPT OF HEARING PROCEEDINGS

Transcript of Hearing Proceedings in the above-entitled matter before the Environmental Quality Council, commencing on the 30th day of September, 2008, at 9:00 a.m., at the Wyoming Game and Fish Office, 3030 Energy Lane, Casper, Wyoming, Ms. Deborah A. Baumer presiding, with Councilmembers Mr. Dennis Boal, Mr. F. David Searle, Mr. John Morris, Mr. Thomas Coverdale, Mr. Tim Flitner and Dr. Fred Ogden in attendance. Also present were Mr. Jim Ruby, Executive Secretary, Ms. Terri Lorenzon, Director/Attorney, Ms. Marion Yoder, Counsel from Attorney General's Office, Mr. Joe Girardin, Paralegal to the Council, and Ms. Kim Waring, Executive Assistant.

A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (Hearing proceedings commenced 9:00  
3 a.m., September 30, 2008.)

4 CHAIRMAN SEARLE: It being 9:00, we will  
5 reconvene our hearing that was started yesterday on the  
6 issue of the Basin Electric Power Cooperative Dry Fork  
7 Station, Air Permit CT-4631. This is Docket Number  
8 07-2801.

9 Yesterday we started the process of hearing  
10 motions on summary judgment. And I believe as we left  
11 yesterday evening, we were on the issue of the sulfur  
12 dioxide increment analysis. And we left with a motion  
13 that had been presented and seconded that was that we  
14 accept, by summary, the petition for summary judgment  
15 offered by the DEQ and by Basin, which was to approve  
16 theirs.

17 Is that correct to everybody's recollection?

18 I think what we would do at this point in time  
19 is, we do have a motion and a second. This is probably a  
20 good time to start a discussion. I'm sure everybody had  
21 a chance to think a little bit more about it last night  
22 and may have some clarity of thought. So if anybody  
23 would like to start, I can turn it over to them.

24 MR. ESCH: If I may, Council, I need to  
25 make a correction from my presentation yesterday. I

1 spoke with Chad Schlichtemeier from DEQ. And one of the  
2 statements I made yesterday was incorrect. In my  
3 statement that it was consistent with DEQ practice to use  
4 this de minimus exception, or we have used this before on  
5 WYGEN 2, I was apparently mistaken. We have not used  
6 this -- we have not used this SILs in this way in Wyoming  
7 before. However, I don't believe that takes away from  
8 the other arguments we have presented, the interpretation  
9 of the statute, the de minimis doctrine, the use of the  
10 Gross case and the EPA guidance on the issue. I just  
11 want to make sure there's clarification on that.

12 CHAIRMAN SEARLE: Thank you.

13 Kind of a quiet group this morning.

14 MR. BOAL: So Mr. -- Luke?

15 MR. ESCH: Yes, sir. Esch.

16 MR. BOAL: So we've never had another case  
17 where we went ahead and issued a permit when the modeling  
18 showed that emissions from the proposed source would  
19 exceed the PSD increment?

20 MR. ESCH: That is not correct. The  
21 modeling procedures were used differently. In this WYGEN  
22 2 -- this is how I was mistaken about it. In this case,  
23 whenever they were permitting, they used -- during the  
24 initial modeling phase, they found exceedences in the  
25 NCIR above the significant impact levels. Therefore,

1 during the accumulative modeling, they -- I think it was  
2 roughly between 2000 and 2002. I wasn't positive when  
3 the modeling was conducted. But the modeling procedure  
4 back then was different. Back then, they -- if a source  
5 was found to have exceeded this modeling, or the SIL,  
6 they drew a circle around the source, in this case WYGEN  
7 2, and that concentric circle around the source, that was  
8 the number of sources that were included in the modeling.  
9 And in that case, the circle did not include the NCIR for  
10 Coalstrip's.

11 So based on the sources that were modeled in  
12 that instance, they did not find -- there was no  
13 exceedence. There was no exceedence based on those  
14 sources.

15 MR. BOAL: What did DEQ do this time?

16 MR. ESCH: This time the modeling  
17 procedure has changed so as to change the concentric  
18 circles going around from the source itself to the -- as  
19 you saw on the presentation yesterday, the circles were  
20 going around the NCIR, the Northern Cheyenne Indian  
21 Reservation. That is how the modeling is advanced. It  
22 follows Region 2.

23 If you want to -- if you're checking to find  
24 out where the impact is to that source or to those  
25 receptors, in this case the NCIR, you draw a circle

1 around the impacted area, rather than the source itself.  
2 That's the difference -- that's where I became mistaken  
3 through the procedures. And I wanted to clarify that  
4 with Council.

5 MR. BOAL: Thank you.

6 CHAIRMAN SEARLE: Mr. Boal, do you want to  
7 start the conversation? Everybody's being kind of quiet.  
8 You're usually good as a starting point. Or if somebody  
9 else would. Tim just smiled at me.

10 MR. FLITNER: Are we still in discussion?

11 CHAIRMAN SEARLE: Yeah. We're in  
12 deliberation amongst us, is where we're at.

13 MR. FLITNER: Well, I guess with the  
14 motion that's on the table, I have a few things that lead  
15 me to vote for the motion. One is it's just -- it's  
16 still just a model. We don't really know. It's not an  
17 exact science yet. So there's quite a bit of guesswork  
18 involved. And you add that to the possibility of the  
19 NCIR and Coalstrip to some degree holding Wyoming hostage  
20 to any development that may or may not occur, I'm really  
21 uncomfortable with that. Those of us on this Council  
22 were put here as custodians of Wyoming, if you will, and  
23 we're kind of duty-bound to look out after Wyoming.

24 And the numbers with Coalstrip, versus this  
25 one, and yet we're going to be -- we're going to be held

C E R T I F I C A T E

I, RANDY A. HATLESTAD, a Registered Merit Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein constituting a full, true and correct transcript.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2008.

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RANDY A. HATLESTAD  
Registered Merit Reporter