

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 RESPONDENT DEPARTMENT OF
ENVIRONMENTAL QUALITY’S MOTION TO DISMISS**

Climate change is the single greatest threat to the environment facing the world today. The United States Supreme Court recently recognized the “enormity of the potential consequences associated with man-made climate change” and that these “harms . . . are serious and well recognized.” Massachusetts v. EPA, 127 S.Ct. 1438, 1455, 1462 (2007). Reviewing the scientific literature over time, the Court showed that the science has become more definitive and the threat more alarming. Id. at 1448-50. As the Nobel Prize winning Intergovernmental Panel on Climate Change (“IPCC”) stated in 2007, “[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.”¹

¹ IPCC Fourth Assessment Report, Climate Change 2007: Synthesis Report (unedited version), at 1 (emphasis added) (attached as Exh. 1).

Increased concentrations of greenhouse gases in the atmosphere are responsible for this warming. 127 S. Ct. at 1448-50 (citing scientific studies). Power plants emit a tremendous amount of these greenhouse gases, including an estimated 40% of total U.S. carbon dioxide pollution.²

In Massachusetts v. EPA, the Supreme Court held that carbon dioxide and other greenhouse gases are “air pollutants” subject to regulation under the Clean Air Act. 127 S. Ct. at 1460. The Court specifically rejected the Environmental Protection Agency’s (“EPA”) argument that Congress did not intend to regulate greenhouse gases through the Act. In doing so, the Court recognized the Clean Air Act as a flexible statute that is designed to accommodate newly realized threats, including global warming. Id. at 1462.

Under the plain language of the Act, carbon dioxide is a “regulated” pollutant and other greenhouse gases are “subject to regulation.” Therefore, the Wyoming Department of Environmental Quality (“DEQ”) must require the best available control technology (“BACT”) to control emissions of greenhouse gases from new coal plants, including the Dry Fork Station. The Dry Fork Station will emit up to 3.7 million tons of carbon dioxide, 25.3 tons of methane, and 58.1 tons of nitrous oxide per year for many decades, making it a major contributor of greenhouse gases within the State of Wyoming.³ Moreover, because Wyoming has major coal reserves, the State will likely continue to attract proposals to build new coal-fired power plants. Accordingly, it is crucial that DEQ take the first step of considering greenhouse gas emissions as

² U.S. Department of Energy and U.S. Environmental Protection Agency, Carbon Dioxide Emissions from the Generation of Electric Power in the United States, at 1 (July 2000) (attached as Exh. 2).

³ United States Department of Agriculture, Rural Utilities Service, Draft Environmental Impact Statement for the Basin Electric Power Cooperative Dry Fork Station and Hughes Transmission Line, at 4-22 (Aug. 2007) (excerpts attached as Exh. 3).

part of the process of approving these plants. Indeed, the agency's failure to do so violates the Clean Air Act and Wyoming regulations.

Furthermore, as the science shows, the time for DEQ to act is now. Many other states are beginning to take the threat of global warming seriously. Ten eastern states are participating in the Regional Greenhouse Gas Initiative, a regional cap-and-trade program designed to reduce carbon dioxide emissions from power plants.⁴ Seven western states have joined together in the Western Climate Initiative. This agreement aims to reduce carbon dioxide emissions by 15% below 2005 levels by 2020.⁵ Additionally, six mid-western states recently signed a regional cap-and-trade program for carbon dioxide called the Midwestern Regional Greenhouse Gas Reduction Accord.⁶ Furthermore, of particular relevance to this case, Montana, California, and Washington have enacted limitations for carbon dioxide emitted from power plants.⁷ And, finding that global warming "presents a substantial endangerment to the health of persons or the environment" in Kansas, the Kansas Department of Health and Environment recently denied an air permit for construction of a coal-fired power plant because it would have contributed to global warming.⁸

⁴ Regional Greenhouse Gas Initiative Memorandum of Understanding (Dec. 2005) (attached as Exh. 4).

⁵ Western Climate Initiative Greenhouse Gas Reduction Goal Statement (Aug. 22, 2007) (attached as Exh. 5).

⁶ Midwestern Regional Greenhouse Gas Reduction Accord (2007) (attached as Exh. 6).

⁷ Mont. Code Ann. § 69-8-421 (2007); Cal. Pub. Utilities Code § 8340 (2007); Wash. Rev. Code § 80.80.040 (2007).

⁸ Letter from Roderick L. Bremby, Secretary of the Kansas Department of Health and Environment, to Wayne Penrod, Senior Manager of Sunflower Electric Power Corporation (Oct. 18, 2007) (attached as Exh 7).

In contrast, DEQ continues to lag behind the times, arguing the Council must dismiss Protestants' appeal because DEQ does not regulate greenhouse gas emissions. Because this failure violates the Clean Air Act, however, this Council must require greenhouse gas BACT for the Dry Fork Station, and deny DEQ's Motion to Dismiss.

STANDARD OF REVIEW

In considering a Rule 12(b)(6) motion to dismiss, the Council must “focus on the allegations contained in the complaint and liberally construe them in the light most favorable to the plaintiff.” Cox v. City of Cheyenne, 79 P.3d 500, 504-05 (Wyo. 2003) (citing Duncan v. Afton, Inc., 991 P.2d 739, 742 (Wyo. 1999)). Dismissal is a “drastic remedy” and should be used “sparingly.” Bonnie M. Quinn Revocable Trust v. SRW, Inc., 91 P.3d 146, 148 (Wyo. 2004) (citation omitted). Wyoming courts will sustain a 12(b)(6) dismissal only when “it is certain from the face of the complaint that the plaintiff cannot assert any set of facts that would entitle that plaintiff to relief.” Id. (citation omitted).

ARGUMENT

On April 2, 2007, the Supreme Court issued its landmark ruling, Massachusetts v. EPA, 127 S.Ct. 1438 (2007). In this decision, the Court rejected EPA's contention that Congress did not intend the agency to regulate carbon dioxide and other greenhouse gases under the Clean Air Act. Id. at 1460. As the Court explained:

Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an “air pollutant” within the meaning of the provision.

The statutory text forecloses EPA’s reading. The Clean Air Act’s sweeping definition of “air pollutant” includes “*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air” § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt “physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.” The statute is unambiguous.

Id. In rejecting EPA’s position, the Court recognized that Congress intentionally drafted the Clean Air Act to provide the flexibility to address newly recognized threats to the public health and welfare. According to the Court:

While the Congresses that drafted [the definition of air pollutant] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.

Id. at 1462. This regulatory flexibility allows EPA and the states to address the considerable scientific advances in our understanding of the causes of global warming and the alarming threat a changing climate poses to the world.

Now that the Supreme Court has firmly established that greenhouse gas emissions are covered by the Clean Air Act, DEQ can no longer ignore the Act’s mandate to implement the best available control technology (“BACT”) for these pollutants. Furthermore, even if the Council does not require a BACT limit for greenhouse gases, DEQ must consider them as part of its collateral impact analysis.

I. UNDER THE CLEAN AIR ACT AND WYOMING’S REGULATIONS IMPLEMENTING THE ACT, DEQ MUST REQUIRE BACT FOR GREENHOUSE GAS EMISSIONS AT THE DRY FORK STATION.

Under the Clean Air Act and Wyoming’s regulations implementing the Act, BACT is required for all air pollutants “subject to regulation” under the Act. Because carbon dioxide and other greenhouse gases are subject to regulation, DEQ’s failure to require BACT limits for these air pollutants violates the law.

A. BACT is Required for Every Pollutant Subject to Regulation Under the Clean Air Act.

In 1977, Congress added the New Source Review (“NSR”) and Prevention of Significant Deterioration (“PSD”) program to the Clean Air Act to maintain air quality in areas that remained unspoiled by air pollution. 42 U.S.C. § 7470(1). The NSR/PSD program prevents polluters from driving air quality down to the level of the national ambient air quality standards (“NAAQS”), which set the minimum requirements for maintaining air quality under the Act. NSR refers generally to the permitting program applicable to all new air pollution sources. PSD is a component of this program that applies to all “major sources” of air pollution. See Respondent Department of Environmental Quality’s Memorandum in Support of Motion to Dismiss (“Motion to Dismiss”) at 7.

Wyoming has delegated authority to implement the PSD program within the State. Wyoming’s program, however, must be at least as stringent as the federal requirements. 42 U.S.C. § 7416. Under Wyoming’s Air Quality Standards and Regulations (“WAQSR”), any new major stationary source of air pollution in Wyoming must obtain a PSD construction permit. 6 WAQSR § 2(a)(i). Among other requirements, the applicant must demonstrate that it will meet all applicable NAAQS, will prevent significant deterioration of existing air quality, and will

utilize the “best available control technology”—or BACT. Id. § 2(c). Considered “one of the most critical elements of the PSD permitting process,” the BACT analysis results in the selection of emissions limitations and control technology for a particular facility. In re Knauf Fiber Glass, 8 E.A.D. 121, 131 (EAB 1999).

A PSD permit must include a BACT limit for “each pollutant subject to regulation under [Wyoming] Standards and Regulations or regulation under the Federal Clean Air Act.” 6

WAQSR § 4(b)(ii). The regulatory definition of BACT is:

Best available control technology means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under the [Wyoming] Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any 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). The 2002 Clean Air Act NSR Reform Rules also provide that BACT is required for “regulated NSR pollutants,” which are similarly defined under the Clean Air Act and Wyoming regulations to include “any pollutant that otherwise is subject to regulation under the Federal Clean Air Act.” 40 C.F.R. §§ 51.166(b)(49), 52.21(j)(2); 6 WAQSR § 4(a). In sum, DEQ must impose a BACT limit for all air pollutants “subject to regulation” under the Clean Air Act.

B. Carbon Dioxide and Other Greenhouse Gas Emissions are Subject to Regulation Under the Clean Air Act.

As it must under Massachusetts v. EPA, DEQ concedes that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act. Motion to Dismiss at 8.

Accordingly, the only debate between the parties is whether greenhouse gases are “subject to

regulation” under the Act. Carbon dioxide is currently regulated under Section 821 of the Act, and other greenhouse gases are subject to regulation.

1. Carbon dioxide is currently regulated under the Clean Air Act.

As part of the 1990 Clean Air Act Amendments, Congress enacted Section 821, titled “Information Gathering on Greenhouse Gas Emissions Contributing to Global Climate Change.”

This section provides:

The Administrator of the Environmental Protection Agency shall promulgate regulations within 18 months after the enactment of the Clean Air Act Amendments of 1990 to require that all affected sources subject to Title [IV]⁹ of the Clean Air Act shall also monitor carbon dioxide emissions.

42 U.S.C. § 7651k note; Pub. L. 101-549, Title IV, § 821, 104 Stat. 2699 (Nov. 15, 1990). On January 11, 1993, EPA passed the required regulations and codified them in the Code of Federal Regulations (“C.F.R.”). 40 C.F.R. Part 75. The regulations require facilities to conduct carbon dioxide emissions monitoring, prepare and maintain monitoring plans, maintain records, and report monitoring data to EPA. 40 C.F.R. §§ 75.1(b), 75.10(a)(3), 75.33, 75.57, 75.60 to .64. They also prohibit operation in violation of these requirements and provide that any violation of Part 75 is a violation of the Act. Id. § 75.5. Accordingly, carbon dioxide is “regulated” under Section 821. See, e.g., Buckley v. Valeo, 424 U.S. 1, 66-68 (1976) (holding record keeping and reporting requirements are regulation of political speech).

Because carbon dioxide is “regulated,” and the Clean Air Act and Wyoming’s regulations require BACT for any pollutant “subject to regulation,” BACT is required for carbon dioxide emissions at major new sources. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 86 (2006) (“[I]dentical words used in different parts of the same statute are . . .

⁹ According to the Reporter’s notes, this reference to Title V was meant to refer to Title IV.

presumed to have the same meaning”); Pasquantino v. U.S., 544 U.S. 349, 358-59 (2005) (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

DEQ’s only response to the plain language of the Clean Air Act is that “regulation” actually means “emission control regulation or standard.” Motion to Dismiss at 14, 15, 17. This additional “emissions control” language, however, is found nowhere in the Clean Air Act’s BACT provisions or Wyoming’s regulations. To read this language into the Act violates the “basic tenet of statutory construction” that “omission of words from a statute is considered to be an intentional act of the legislature.” Stutzman v. Wyo. State Eng’r, 130 P.3d 470, 475 (Wyo. 2006). Therefore, the Council cannot read the language “emissions control” into the statute where Congress has chosen not to include it. Id.

In fact, the Clean Air Act defines the terms “emission limitation” and “emission standard”:

The terms “emission limitation” and “emission standard” mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emission of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. § 7602(k). Congress used these terms throughout the Act when it wanted to refer to actual control of emissions.¹⁰ If Congress wanted to limit the BACT requirement to only those

¹⁰ See, e.g., 42 U.S.C. § 7412(f)(5) (“The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection.”); id. § 7475(a)(3) (“[E]missions from . . . such facility will not cause or contribute to air pollution in excess of . . . any other applicable emission standard or standard of performance under this chapter.”); id. § 7521(f)(2) (“This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions.”); id. § 7617(a)(7) (referring to “any aircraft emission standard under Section 7571 of this title”); id. § 7651d(a)(1)

pollutants that were subject to actual controls of emissions, it could have utilized these specifically defined terms. However, it did not.

DEQ's argument that the definition of "regulated NSR pollutant" limits the pollutants subject to BACT to "those for which emission controls are required" fails for the same reason. Motion to Dismiss at 12. Regulated NSR pollutant is defined to include four discrete categories of air pollutants: (1) those for which EPA has established NAAQS, (2) those subject to CAA Section 111 [New Source Performance Standards], (3) Class I or II substances subject to Title VI, and (4) any pollutant that otherwise is "subject to regulation" under the Clean Air Act, except for listed hazardous air pollutants. 40 C.F.R. § 51.166(b)(49); 6 WASQR § 4(a).¹¹ It is this last catch-all category—which reinforces that BACT is required for pollutants that are "subject to regulation"—that is relevant here. Because the plain language does not require actual control of emissions, the Council should not interpret the regulations to include that requirement. Stutzman, 130 P.3d at 475.

As a practical matter, DEQ argues that if BACT is required for greenhouse gases, the agency "would be left with the bizarre result of having to impose emission control limits while still collecting data." Motion to Dismiss at 18. As the Supreme Court found when faced with EPA's similar argument in Massachusetts v. EPA, there is nothing bizarre about this result. In that case, EPA argued that Congressional efforts to promote collaboration and research on climate change meant that Congress did not yet intend to regulate greenhouse gas emissions. 127 Ct. at 1460-61. The Court, however, had "no difficulty reconciling" the two duties, finding

(referring to "[e]ach utility unit subject to an annual sulfur dioxide tonnage emission limitation under this Section").

¹¹ The complete language of this provision is cited on pages 10-11 of DEQ's Motion to Dismiss.

that “collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.” Id.

The D.C. Circuit confirmed that the need for further study does not preclude regulation under the PSD program in Alabama Power Co. v. Costle, 636 F.2d 323, 405-06 (D.C. Cir. 1979). In Alabama, industry groups argued that PSD requirements should not apply immediately to pollutants included in Section 166 of the Act (hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides) because that provision required EPA to study these pollutants prior to regulating them. Id. Rejecting this argument, the court found that although “Congress could have decided to delay the applicability of PSD for such pollutants until all studies and regulations required by Section 166 have been completed, Congress apparently chose not to do so.” Id. at 406. Accordingly, the court upheld EPA’s regulation that, as characterized by the court, “applies PSD and BACT immediately to each type of pollutant regulated for any purpose under any provision of the Act.” Id. (emphasis added). Even though some of the pollutants did not yet have established emissions limitations, the court held that they were nonetheless subject to regulation. The decision, therefore, supports a broad rather than narrow interpretation of BACT.

Finally, DEQ’s reliance on several administrative appeals is not persuasive. DEQ relies on three decisions of the Environmental Appeals Board (“EAB”), the federal appeals board for EPA-issued permits. Motion to Dismiss at 14, 17. The EAB decided In re North County Resource Recovery Associates, 2 E.A.D. 229 (EAB 1986) prior to the passage of Section 821, however, and the case did not involve greenhouse gas emissions. Similarly, in In re Inter-Power of New York, Inc., 5 E.A.D. 130 (EAB 1994) and In re Kawaihae Cogeneration Project, 7 E.A.D. 107 (EAB 1997), the Board did not consider an argument that carbon dioxide is regulated

under Section 821 or interpret the meaning of the language “subject to regulation.” Accordingly, the Council should not consider these decisions authoritative. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”) (citation and quotations omitted); Supreme Lodge Knights of Pythias v. Withers, 177 U.S. 260, 276 (1900) (refusing to follow case where an issue “was not considered, and the trend of the argument is so different that the case cannot be considered an authority upon the propositions here discussed”). Additionally, the EAB decided all of these cases before the Supreme Court held in Massachusetts v. EPA that Congress intended to regulate greenhouse gas emissions under the Clean Air Act. 127 S.Ct. at 1460. In any event, even if the Council finds these cases are applicable, they conflict with the plain language of the Act.

The Utah Air Quality Board’s decision in In re Sevier Power Company Power Plant, Utah Air Quality Board Docket No. DAQE-AN2529001-04 (Jan. 9, 2008), also conflicts with the Clean Air Act’s plain language. In that appeal, the Board determined it could not regulate greenhouse gas emissions because Utah regulations limited the Board’s authority. The Board was wrong, however, to suggest that Utah’s regulations preempt federal requirements. A state’s implementation of the Clean Air Act cannot be any less stringent than federal requirements. 42 U.S.C. § 7416. Furthermore, the Board’s analysis beyond interpretation of state regulations is cursory and therefore not persuasive. Fed. Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 499-500 (1958) (recognizing that the weight of an agency opinion will be judged based on the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).

In conclusion, this Council cannot ignore the plain language of the Clean Air Act, which establishes that carbon dioxide is a regulated pollutant. DEQ's excuses for not regulating greenhouse gases violate this plain language and are not otherwise persuasive. Accordingly, DEQ is required to set a BACT limit for carbon dioxide.

2. Carbon dioxide and other greenhouse gases are subject to regulation under the Clean Air Act.

Even if it were not currently regulated under the Act, carbon dioxide (along with other greenhouse gases) is "subject to regulation." 6 WASQR § 4(a); see also 40 C.F.R. § 52.21(b)(50)(iv) (stating BACT is required for "any pollutant that is otherwise subject to regulation under the Act.")

a. Subject to regulation means EPA has the authority to regulate.

As discussed above, DEQ argues that BACT applies only to air pollutants that EPA currently regulates under the Act. However, principles of statutory construction and the plain meaning of the phrase "subject to regulation" show that Congress intended for EPA and the state to implement BACT for pollutants which EPA possesses, but has yet to exercise, authority to regulate.

As EPA stated previously when discussing new source review, "[t]echnically, a pollutant is considered regulated once it is subject to regulation under the Act. A pollutant need not be specifically regulated by a section 111 or 112 standard to be considered regulated." 40 C.F.R. Part 70, Change to Definition of Major Source, 66 Fed. Reg. 59,161, 59,163 (Nov. 27, 2001) (emphasis added). Indeed, had Congress intended BACT analyses to be limited to pollutants currently regulated under the Act, it would have used the language "regulated," as opposed to "subject to regulation." Notably, Congress used the word regulated in other provisions of the Clean Air Act. See, e.g., 42 U.S.C. § 7475(e)(3)(B) (directing Administrator to promulgate

regulations that will “require an analysis of the ambient air quality [and other factors] at the site of the proposed major emitting facility in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter” (emphasis added). The Council must presume Congress meant to differentiate between the two terms. 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 inclusion or exclusion.”); 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 when construing NSR modification definition). Because “subject to regulation” is broader than “regulated,” it includes situations where EPA has the authority to regulate, but has yet to do so.

The plain meaning of the phrase “subject to” also supports this interpretation. Smith v. United States, 508 U.S. 223, 228 (1993) (holding that when a particular word in a statute is not defined, courts should “construe it in accord with its ordinary or natural meaning”); Hayes v. City of Sheridan, 105 P.3d 459, 460 (Wyo. 2005) (“A statute is construed as a whole with the ordinary and obvious meaning applied to the words.”) (citation omitted). For example, parked cars may be “subject to tow,” and contracts or warranties often note that their terms are “subject to change.” In both cases, “subject to” indicates that the action could happen—the car could be towed or the contract changed—not that this action has already occurred. Under the plain meaning, therefore, subject to regulation means that regulation is possible, not that it has already occurred. Accordingly, where EPA has the authority to regulate a pollutant, it is subject to regulation.

b. EPA has the authority to regulate greenhouse gases under the Clean Air Act.

DEQ concedes that EPA has the authority to regulate greenhouse gases. Motion to Dismiss 13 (“[T]he United States Supreme Court held that . . . EPA has the authority to regulate emissions of [greenhouse] gases.”). EPA has the authority to regulate greenhouse gases under both Sections 111 and 202 of the CAA. Section 202—the section addressed by the Supreme Court in Massachusetts v. EPA—requires EPA to set standards for emissions from motor vehicles. 42 U.S.C. § 7521(a)(1). Section 111 requires EPA to establish standards of performance for emissions from new stationary sources. Id. § 7411(b)(1)(A). Both require controls only if air pollution “may reasonably be anticipated to endanger public health or welfare.” Id. §§ 7411(b)(1)(A), 7521(a)(1).

This standard is met easily by pollutants that contribute to climate change. The Clean Air Act defines “welfare” broadly to include “effects on . . . weather . . . and climate.” Id. § 7602(h). In Massachusetts v. EPA, the Supreme Court acknowledged that “[t]he harms associated with climate change are serious and well-recognized.” 127 S. Ct. at 1455. Likewise, recognizing that “emission of air pollution from [a] proposed coal fired plant, specifically carbon dioxide emissions, presents a substantial endangerment to the health of persons or the environment,” the Kansas Department of Health and Environment recently denied a construction permit for a coal-fired power plant.¹²

Indeed, the scientific evidence regarding global warming is unequivocal. As discussed in the IPCC’s Fourth Assessment, released in 2007,¹³ human activities have greatly increased

¹² Letter from Roderick L. Bremby, Secretary of the Kansas Department of Health and Environment, to Wayne Penrod, Senior Manager of Sunflower Electric Power Corporation (Oct. 18, 2007) (attached as Exh. 7).

¹³ See, e.g., IPCC, *supra* n.1 (attached as Exh. 1)

global atmospheric concentrations of greenhouse gases, and this increase is a major cause of global warming. The impacts from global warming are not a future anticipated event; they are already occurring. In fact, they are accelerating. Eleven of the last twelve years rank as the warmest years since 1850. Scientists have observed rising sea levels, decreases in snow and ice (including Arctic ice, mountain glaciers and snow cover), changes in precipitation, and more weather extremes. The IPCC predicts the public will be forced to endure serious harms to health and welfare if global warming is not controlled, including food and water shortages, damage to crops, increased risk of wildfire, increased risk of water- and food-borne diseases and other causes of death. Therefore, based on the best science currently available, there is no question that greenhouse gas emissions “may reasonably be anticipated to endanger public health and welfare.”

Moreover, since the Supreme Court in Massachusetts v. EPA ordered EPA to reconsider the issue of greenhouse gas regulation, EPA has expressed its intent to promulgate regulations to control greenhouse gas emissions.¹⁴ That it intends to move forward with regulation presupposes a finding that these pollutants harm the public health and welfare. Accordingly, EPA has implicitly acknowledged that carbon dioxide and other greenhouse gases are subject to regulation under the Clean Air Act.

¹⁴ 72 Fed. Reg. 66,934 (indicating final regulations under Section 202 are to be published by October 2008) (attached as Exh. 8); see also Letter from Martha Coakley, Massachusetts Attorney General, et al. to EPA Administrator Stephen Johnson (Jan. 23, 2008) (stating that by indicating the agency was moving forward with regulation under section 202, EPA “acknowledged that the agency has concluded that the endangerment threshold has in fact been crossed”) (attached as Exh. 9). Furthermore, in an Executive Order President Bush took the position that EPA and other federal agencies should regulate carbon dioxide emissions under the Clean Air Act. Executive Order, “Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions from Motor Vehicles, Nonroad Vehicles, and Nonroad Engines” (May 14, 2007) (attached as Exh. 10).

DEQ warns that interpreting the phrase “subject to regulation” to include situations where EPA has only the authority to regulate “would require BACT for all air pollutants – regulated or not.” Motion to Dismiss at 13. While this is true for all pollutants that EPA has authority to regulate, the Clean Air Act limits the circumstances under which EPA may actually regulate an air pollutant. As discussed above, both Sections 111 and 202 require that the pollutant endanger public health and welfare. This limitation prevents regulation of each and every substance that might be emitted into the air. Yet, by also providing for regulation of every pollutant “subject to regulation,” the Clean Air Act still provides the regulatory flexibility necessary to evolve along with “changing circumstances and scientific developments.” Mass. v. EPA, 127 S.Ct. at 1462. Because there is no serious dispute that greenhouse gas emissions endanger public health and welfare and therefore are subject to regulation under the Act, DEQ must require BACT for these pollutants.

II. DEQ MUST CONSIDER GREENHOUSE GAS EMISSIONS IN A BACT COLLATERAL IMPACTS ANALYSIS.

As part of the BACT analysis, WYDEQ 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). This requirement calls on applicants and permitting agencies to evaluate collateral impacts, including environmental impacts, for proposed facilities such as power plants. DEQ has failed to do so in this case.

If the Council finds that carbon dioxide is not regulated or other greenhouse gases are not subject to regulation under the Clean Air Act, then the Council must require consideration of these pollutants in the collateral impacts analysis. Indeed, one of the main goals of this analysis is to consider emissions limitations for pollutants not regulated under the Clean Air Act. As the Environmental Appeals Board has explained:

[I]f application of a control system results directly in the release (or removal) of pollutants that are not currently regulated under the Act, the net environmental impact of such emissions is eligible for consideration in making the BACT determination. The analysis may take the form of comparing the incremental environmental impact of alternative emission control systems with the control system proposed as BACT; however, as is any BACT determination, the exact form of the analysis and the level of detail required will depend upon the facts of the individual case. Depending upon what weight is assigned to the environmental impact of a particular control system, the control system proposed as BACT may have to be modified or rejected in favor of another system. In other words, 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.

In re North County Resource Recovery Assocs., 2 E.A.D. 229 (EAB 1986), 1986 EPA App.

Lexis 14, at *4; see also In re South Shore Power, LLC, (EAB 2003), 2003 EPA App. Lexis 13,

at *29 (finding non-regulated pollutants reviewable under BACT collateral impacts analysis

“exception to the general rule against reviewing non-regulated pollutants in PSD proceedings”);

In re Genesee Power Station Ltd. P’ship, 4 E.A.D. 832, 848 (EAB 1993) (noting BACT analysis

must include unregulated pollutants “whenever choosing one control technology over another for a regulated pollutant has the incidental effect of increasing or decreasing emissions of

unregulated pollutants”); In re Hibbing Taconite Co., 2 E.A.D. 838 (EAB 1989), 1989 EPA App.

Lexis 24, at *16 (requiring “the permitting authority to take into account the control technology’s impact on unregulated pollutants in every permit proceeding”).

EPA has specifically stated that emissions from greenhouse gases should be considered in a collateral impacts analysis. NSR Manual at B. 49 (“Significant differences in . . . greenhouse gas emissions may be considered.”) (excerpts attached as Exh. 11).¹⁵ Thus, even if the Council

¹⁵ See also Illinois Environmental Protection Agency Bureau of Air Permit Section: Responsiveness Summary for Public Questions and Comments on the Christian County Generation’s Taylorville Energy Center Power Plant Project Near Taylorville, at 8-9 (June 2007) (attached as Exh. 12) (IEPA discusses its consideration of CO₂ emissions in its collateral impacts analysis in response to comments requesting the agency to do so).

finds that DEQ was not required to set BACT limits for carbon dioxide and other greenhouse gases in the permit for the Dry Fork Station, the agency still must consider the collateral impacts of greenhouse gas emissions from the proposed plant in setting BACT limits for other pollutants.¹⁶

Furthermore, DEQ and Basin must consider the collateral costs of future, imminent carbon regulation as part of the analysis. Congress is currently planning regulation of carbon dioxide controls for sources such as coal plants. Any regulation will greatly increase the cost of operating these facilities. For this reason, many utility companies have abandoned plans to go forward with coal plants.¹⁷ These collateral impacts are a significant part of the BACT analysis, and their analysis is required by the plain language of the Act.

¹⁶ In further support of this obligation, Sections 160(1) and (5) of the Clean Air Act note that the permitting authority is required to consider the general environmental impacts of its permitting decisions, notwithstanding attainment and maintenance of all national ambient air quality standards. See 42 U.S.C. § 7470(1), (5). Recognizing that attainment and maintenance of NAAQS does not sufficiently evaluate “all the consequences” of a permitting decision’s environmental impacts, Congress called on EPA and administering state agencies to do more. Id. § 7470(5). Notably, this statement of purpose encompasses all “air pollutants,” not just those “subject to regulation.” Id. § 7470(1). Thus, Congress intended agencies to carefully evaluate the adverse environmental impacts of any increase in greenhouse gas emissions resulting from permitting decisions.

¹⁷ See, e.g., Construction of Coal-Fired Power Plant East of Excelsior Spring Delayed Indefinitely, The Kansas City Star (Mar. 3, 2008) (stating Associated Electric Cooperative Inc. announced March 3, 2008 that it would delay indefinitely construction of a coal-fired power plant, in part because “regulations for costly carbon dioxide controls are being considered by Congress”) (attached as Exh.13); Utility Snuffs Coal Projects, Star-Tribune at trib.com (December 11, 2007) (spokesman for PacifiCorp explaining why the company abandoned plans for two coal-fired power plants in Wyoming and stating, “[t]he situation the company finds itself in now is a significant amount of uncertainty about what climate change regulation might do to the cost of coal plants Coal projects are no longer viable.”) (attached as Exh.14); Will Wyo’s Electrical Export Ambitions Go Up In Smoke?, Star-Tribune at trib.com (December 16, 2007) (energy program manager at Western Resource Advocates talking about the potential effect of future carbon regulation on the Dry Fork Station and noting that “[a]s we see carbon policy put in place, the people who are going to be paying for that are Basin’s customers.”) (attached as Exh. 15).

In defense of its failure to analyze the collateral impacts of greenhouse gas emissions, DEQ claims the required collateral impacts analysis is limited to “local impacts directly attributable to the proposed facility,” and therefore does not include impacts such as climate change. Motion to Dismiss at 19. While local impacts and site-specific concerns are certainly factors DEQ must consider in a collateral impacts analysis, they are not the only factors. The regulatory language suggests no such limitation. 6 WAQSR § 4(a). And, as the EAB noted in North County, “the exact form of the analysis and level of detail required will depend upon the facts of the individual case.” 2 E.A.D. 229 (EAB 1986), 1986 EPA App. Lexis 14, at *4.

In any event, climate change will be felt on a local as well as a global scale. For example, Wyoming is likely to experience drought and earlier snowmelt, which will impact water supplies.¹⁸ The Western Governors’ Association—of which Wyoming Governor Dave Freudenthal is a member—adopted a policy resolution regarding the impact of climate change on the western United States. The policy stated, in part:

In recent years, the West has experienced very significant droughts across much of the region, reduced snow pack, altered precipitation patterns, severe forest and rangeland fires, warmer temperatures and forest diseases. Climate change and variability have contributed to these impacts. Although specific impacts are not fully predictable, climate change could have severe economic and environmental impacts on the West in coming decades, including effects on agriculture and tourism, infrastructure (including dams, roads, water and sewer), loss of coastal areas, changed fisheries and wildlife, water shortages, storm impacts, and soil erosion.¹⁹

¹⁸ See, e.g., Final Report: Water, Drought and Wyoming’s Climate (November 30, 2006) (summarizing the sensitivity of Wyoming’s water resources to climate change) (attached as Exh. 16); Wyoming Department of Environmental Quality, Proposed Classification of Robinson Creek in the Belle Fourche River Basin near Moorcroft, Wyoming, at 5 (proposal to reclassify the lower part of Robinson Creek, noting persistent drought of Robinson Creek “potentially stemming from climate change”) (internal citation omitted) (attached as Exh. 17).

¹⁹ Western Governors’ Association Policy Resolution 06-3: Regional and National Policies Regarding Global Climate Change (June 13, 2006) (attached as Exh. 18).

As this policy recognizes, while global warming impacts are felt on a global scale, they will also indisputably cause harm locally.

DEQ also argues it does not have to consider global warming as part of its collateral impacts analysis because this analysis only allows DEQ to impose a less stringent alternative technology. Motion to Dismiss at 20. DEQ explains that it engages in the following five-step, top-down process: 1) identify control options, 2) eliminate technically infeasible control technologies, 3) rank remaining technologies in descending order of control effectiveness, 4) evaluate the most effective controls, and 5) select the most effective remaining option. Id. (citing NSR Manual at B.5). DEQ argues that through this method, once an alternative is eliminated or discounted for one reason, it can never be reconsidered. Id. at 20-21. The purpose of the collateral environmental impacts analysis, however, is to allow WYDEQ to consider more or less stringent control technology to effectively control these collateral impacts—not one or the other. Indeed, the top-down approach requires DEQ to consider all alternatives that could be effective in curbing the release of unregulated pollutants. North County, 2 E.A.D. 229 (EAB 1986), 1986 EPA App. Lexis 14, at *14 (noting that “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.”).

In one recent case, the Illinois Environmental Protection Agency (“IEPA”) analyzed the collateral impacts of carbon dioxide emissions in response to comments by the Sierra Club. In re Christian County Generation, LLC, PSD Permit No. 021060ABC, (EAB 2008), 2008 EPA App. Lexis 4. IEPA concluded that the collateral consideration of carbon dioxide led to no changes in the BACT determination for the proposed plant, because “the selected technology, IGCC,

‘appears more advantageous than conventional boiler power plants in its potential for collection of CO₂ for sequestration [and] . . . to provide significant improvements in energy efficiency.’” Id. at *18-19 (quoting IEPA’s Response to Comments). IEPA went on to explain that IGCC “is an important component of the technology that will be needed” to control CO₂ emissions. Id. at *34. Furthermore, “this proposed plant will be far better prepared for a CO₂ regulated future, in that it would be carbon capture ready. . . .[W]hen CO₂ regulations are adopted, [this plant] will be able to add the necessary system to capture and direct the CO₂ to sites for sequestration.” Id.

Not only does Christian County Generation highlight a state agency’s recognition of its duty to analyze the collateral impacts of greenhouse gas emissions, but it supports Protestants’ argument that the subcritical boiler is not BACT for these emissions. Indeed, for the purposes of a motion to dismiss, the Council must assume Protestants’ allegations that a supercritical boiler or IGCC represent BACT for the proposed plant are correct. Cox v. City of Cheyenne, 79 P.3d 500, 504-05 (Wyo. 2003). Regardless of the outcome, however, DEQ’s failure to even engage in a collateral impacts analysis violates the law. Accordingly, the Council should not dismiss this claim.

CONCLUSION

For these reasons, Protestants respectfully request the Council deny DEQ’s Motion to Dismiss Protestants’ claims related to global warming.

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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 March 12, 2008, I served a copy of the foregoing PROTESTANTS' RESPONSE TO RESPONDENT DEPARTMENT OF ENVIORNMENTAL QUALITY'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