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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN THE MATTER OF:)
BASIN ELECTRICAL POWER COOPERATIVE)
DRY FORK STATION,) Docket No. 07-2801
AIR PERMIT CT-4631)

**RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S
REPLY TO PROTESTANTS' RESPONSE TO DEQ'S AND BASIN'S MOTIONS
FOR SUMMARY JUDGMENT**

Respondent, the Wyoming Department of Environmental Quality ("DEQ"), through the Office of the Attorney General of the State of Wyoming and pursuant to WYO. R. Civ. P. Rule 56 and the DEQ Rules of Practice and Procedure, Chapter II, sections 3 and 14, provide the following reply to Protestants' Response to DEQ's and Basin's Motions for Summary Judgment ("Protestants' Response"). Protestants touched on a new issue that was not addressed in DEQ's Motion for Partial Summary Judgment ("DEQ's Motion"). Protestants acknowledge that DEQ has discretion in determining the scope of the BACT analysis and have contradicted their own arguments. Applying the law to the facts leads to one conclusion, DEQ's action was rational and in accordance

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with law. DEQ asks this Council to grant DEQ's Motion because Protestants have not raised any genuine issues of material fact and judgment may be rendered as a matter of law.

I. Protestants concede that DEQ has discretion in determining the scope of the BACT analysis.

Protestants attempt to counter DEQ and Basin's assertion that the "BACT analysis is limited in scope and that it need not . . . encompass IGCC or even supercritical boiler technologies." See Protestants' Response at 2. They go on to state that "[t]his 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." *Id.* at 3. However, Protestants contradict this argument in their response when they essentially concede DEQ discretion to limit the scope of the BACT analysis:

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 [New Source Review] 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 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.").

Id. at 4.

Protestants thus agree with the NSR Manual's statement and do not dispute the discretion afforded to state agencies in determining what should be considered in the BACT analysis. DEQ agrees with Protestants that DEQ has discretion to determine the breadth of the BACT analysis based on what technologies redefine the source. DEQ has

the discretion to engage in a broader analysis, but it is not required to do so based on Protestants' policy positions.

DEQ's discretion under the NSR Manual, rather than rendering DEQ "impotent," complements Wyoming's legislative approach to new clean coal technologies. During the 2007 legislative session, the Wyoming Legislature created and funded a "clean coal research account." WYO. STAT. ANN. § 39-14-802. The clean coal research account is used to fund specific clean coal technology proposals including those "with an emphasis on methods of combusting sub-bituminous coal at high altitudes." 2007 LAWS Ch. 186, § 2.

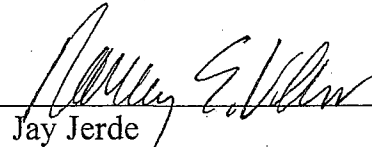
In 2008, the legislature funded four research projects recommended by the clean coal research task force, including one focused on pre-combustion/pre-gasification technologies for Powder River Basin (PRB) coals, and one focused on combustion and gasification design technology for a fixed bed gasifier for Wyoming coals. 2008 LAWS Ch. 48, § 325. In a separate budget provision, the legislature also appropriated twenty million dollars (\$20,000,000.00) for the University of Wyoming School of Energy Research, "for the development, construction and operation of a high plains gasification facility and technology center," and provided additional clean coal technology research funding. *Id.* at § 320(a)(vi), (vii). Although Protestants' preferred policy approach is for DEQ to require IGCC and Supercritical technologies in the BACT analysis, DEQ's "no redefinition of the source" approach, rather than floating about in "the policy stratosphere," is firmly rooted in Wyoming law and dovetails with the legislature's approach for developing and implementing innovative pre-combustion, pre-gasification and gasification technologies for Wyoming's coal.

Based on Protestants' own admissions and the supporting arguments contained in DEQ's Motion, DEQ requests that the Council grant DEQ's Motion because DEQ properly excluded technologies which would redefine the source from the BACT analysis.

In conclusion, based on Protestants' own admissions and the supporting arguments contained in DEQ's Motion, and in DEQ's Response to Protestants' Motion for Summary Judgment, DEQ requests that the Council grant DEQ's Motion on the use of Significant Impact Levels (Protestants' Pet. for H'rg at 17-18 (Claim VIII); excluding "redefinition of the source" technologies from the BACT analysis (*Id.* at 10-12 (Claims II and III)); and use of PM₁₀ as a surrogate for PM_{2.5} (*Id.* at 16-17 (Claim VII)).

DATED this 19th day of September, 2008.

FOR RESPONDENT DEQ/AQD



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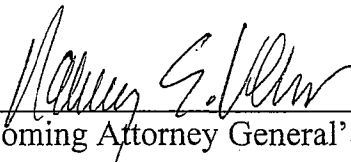
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY TO PROTESTANTS' RESPONSE TO DEQ'S AND BASIN'S MOTIONS FOR SUMMARY JUDGMENT through United States mail, postage prepaid on this the 19th day of September, 2008 to the following:

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