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ATTORNEYS FOR BASIN ELECTRIC
POWER COOPERATIVE

FILED
AUG 31 2010
Jim Ruby, Executive Secretary
Environmental Quality Council

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

In the Matter of:)
Basin Electric Power Cooperative) Docket No. 10-2802
Air Quality Permit No. MD-6047)
BART Permit: Laramie River Station)

**BASIN ELECTRIC'S REPLY TO DEQ'S RESPONSE TO
BASIN ELECTRIC'S MOTION FOR SUMMARY JUDGMENT**

I. Introduction

The question the Council must answer is whether DEQ had authority to issue Condition 16 of the Best Available Retrofit Technology (BART) permit for Basin Electric's Laramie River Station (LRS). If it did not, the Council should grant Basin Electric's Motion for Summary Judgment.

DEQ presents two arguments why Condition 16 is valid and why Basin Electric's Motion for Summary Judgment should be denied: (1) it contends Wyoming law gives it the authority to include Condition 16; and (2) it claims Condition 16 is valid and binding because Basin Electric agreed to it. DEQ's Response Opposing Basin Electric's Motion for Summary Judgment

(DEQ's Response). As a matter of law, DEQ is wrong on both points. As a matter of fact, Basin Electric denies it agreed to Condition 16, but that dispute is not material to this Motion for Summary Judgment because neither DEQ nor any other agency may impose pursuant to agreement a permit condition it is not authorized to impose under the law.

Further, in attempting to use a BART permit to adopt the Long-Term Strategy requirements of Condition 16, DEQ ignored the fundamental differences between BART, which applies to individual sources, and Long-Term Strategy, which applies to and should consider all sources that emit visibility-impairing pollutants.

II. Wyoming law does not authorize DEQ to impose conditions in a BART permit that are not related to BART

A. This is a BART permit

The permit at issue is a BART permit. (DEQ Exhibit 21). It says on its face it is a BART permit. The transmittal letter that accompanied the permit says it is a BART permit. (Exhibit A, attached hereto). The "BART Application Analysis" that accompanied the proposed permit sets forth 45 pages of documentation regarding DEQ's evaluation and determination of BART for the LRS, culminating in "BART Conclusions" at pages 42-45, which included a determination that BART for NO_x control is 0.23 lb/MMBtu. (DEQ Exhibit 13). This BART determination was carried forward in the final BART permit as Condition 7. (DEQ Exhibit 21). According to DEQ, its BART evaluation was conducted in accordance with WAQSR Chapter 6, Section 9, (the BART permitting rule), and with 40 C.F.R. Part 51, App. Y, EPA's "Guidelines for BART Determinations under the Regional Haze Rule." (DEQ Exhibit 13, at 3-4). There is no dispute that the permit at issue in this proceeding is a BART permit, issued pursuant to the BART permitting rule.

B. Condition 16 is not a BART condition

It is not disputed that Condition 16 says nothing about BART. Condition 16 does not refer to BART, does not relate to BART, and is not based on a BART analysis or on federal or state BART statutes or regulations. Instead, it requires new and different permit applications in the future “under the Long-Term Strategy of the Wyoming § 308 Regional Haze State Implementation Plan,” and mandates that *future* applications must provide for NO_x emission limits not to exceed 0.07 lb/MMBtu. (DEQ Exhibit 21). These future Long-Term Strategy permits are not BART permits, and the 0.07 lb/MMBtu limit (which DEQ believes is achievable with Selective Catalytic Reduction (SCR) technology) is not a BART limit, as DEQ found. To the contrary, as noted above, BART for NO_x for LRS Units 1-3 is 0.23 lb/MMBtu. DEQ expressly determined that “SCR was *not* determined to be BART for NO_x control.” *Id.* at 42-43 (emphasis added). Condition 16 is a non-BART condition in a BART permit, and is unauthorized by statute or regulation in this BART permit. However laudable the future Long-Term Strategy permit goals might be, they are not legally allowed in a BART permit.

C. Wyoming regulations do not authorize Condition 16

In an effort to expand the scope of the BART permit to allow any non-BART requirement it desires to impose, DEQ cites several paragraphs of WAQSR Chapter 6, Section 2 as authority for Condition 16. (DEQ’s Response at 13-16). But Chapter 6, Section 2 applies to permits for the construction or modification of facilities that increase air emissions, not to BART permits. WAQSR Chapter 6, Section 2(a).

BART permits are governed by the specific rule for BART permits at WAQSR Chapter 6, Section 9. The BART rule comprehensively regulates BART permits. It defines which sources are subject to BART. Section 9(d). It incorporates EPA’s Guidelines for BART

Determinations and requires that BART determinations be made in accordance with those Guidelines. Section 9(c) and (e). It requires BART sources to submit applications for BART permits and that such applications must include analyses of BART control options, proposals and justifications for BART, and proposed schedules for installing BART technology. Section 9(e)(1)(A)-(F). It requires DEQ to prepare proposed BART permits, to approve or amend a source's proposed BART limits, and to specify requirements for BART operation and maintenance, performance testing, reporting and recordkeeping. Section 9(e)(iii). It obliges BART permittees to install and properly operate BART. Section 9(e) (viii), (ix). The BART rule does not allow for Long-Term Strategy provisions in BART permits and DEQ does not cite anything in the rule to support its claim of authority for Condition 16. Instead, DEQ relies on a few sentences and phrases in the agency's construction permit rules, taken out of context. DEQ's argument ignores the fact that the BART rule was intended "to meet the BART requirements of the Regional Haze Rule."¹ No other rule is intended to address BART. The non-BART rules cited by DEQ do not support its claim.

The BART rule does incorporate by reference two *procedural* provisions of Chapter 6, Section 2 regarding the permitting *process*, and the fee provisions of Section 2: Section 2(g), which describes the administrative *procedures* for determining whether a permit application is complete; Section 2(m), describing the *procedures* for obtaining public comment; and Section 2(o), which sets fees for *processing* permit applications. None of these borrowed procedural provisions relates to the *substance* of the BART rule or authorizes Condition 16 in the LRS BART permit.

¹ Environmental Quality Council, Statement of Principal Reasons for Adoption, October 10, 2006, attached as Exhibit C to Basin Electric's Memorandum in Support of Motion for Summary Judgment.

DEQ offers a tortured argument that Chapter 6, Section 2(g) authorizes Condition 16.

Section 2(g) is a procedural provision that speaks to whether a permit application is complete and provides that:

The Administrator will review each application within 30 days and notify the applicant as to whether or not the application is complete. . . . A complete application shall include all materials and analyses which the Administrator determines are necessary for the Division to review the facility *as a source of air pollution*.
(Emphasis added)

DEQ argues that the last sentence in this procedural section, which simply defines a complete application as one that includes all necessary information, expands geometrically its regulatory power over any source of air pollution. Apparently, DEQ believes that the phrase “review the facility *as a source of air pollution*” empowers it to impose any condition in a permit that might lower emissions, whether or not the condition is authorized anywhere in statute or regulation.

It is not credible to suggest that when Section 2(g) was adopted as part of the construction permit rule, it was intended to confer on DEQ the astonishing breadth of authority it now claims to have: allowing it to create new regulatory requirements without a rulemaking proceeding. If Section 2(g) gave DEQ the authority claimed, there would be no need for this Council to adopt emission standards or other permitting rules such as the BART rules. Such rules would be superfluous if DEQ had carte blanche to impose any permit condition for sources of air pollution. With such authority, DEQ could, in theory at least, insist as a condition of granting an air quality permit that a permittee undertake an environmentally beneficial project—perhaps funding of a motor vehicle inspection and maintenance project for employees at its plant—having nothing to do with its permit.

DEQ also cites the language of Chapter 6, Section 2(f) that “[t]he AQD Administrator may also impose ‘any reasonable conditions upon an approval to construct [or] modify[.]’”

(DEQ Response at 14). Unlike Section 2(g), Section 2(f) is *not* incorporated in the BART rule, a fact DEQ fails to mention. Section 2(f), by its terms, is strictly applicable to permits to construct or modify, and the LRS BART permit is neither.

Moreover, a provision that DEQ may impose “reasonable conditions” in a permit is not an open-ended grant of authority to make up whatever new rules the agency might improvise on a permit-by-permit basis. The scope of appropriate “reasonable conditions” is illustrated by the examples listed in Section 2(f) itself: conditions regarding sampling and testing, reasonable access to permitted facilities, monitoring and recording emissions, and ambient air monitoring as necessary to measure a facility’s impact on air quality. All of these examples are supporting conditions that enable DEQ to monitor and enforce substantive permit terms. The BART rule likewise provides that BART permits “shall specify any notification, operation and maintenance, performance testing, monitoring, reporting and recordkeeping requirements determined by the Administrator to be *reasonable and necessary*.” WAQSR Chapter 6 Section 9(e)(iii) (emphasis added). In both rules, the “reasonable” requirements are intended to provide for compliance oversight, not to grant the agency *carte blanche* to make up new substantive rules.

DEQ’s interpretation would undermine basic principles of administrative law that limit the power of government agencies to the authority that is conferred on them by the legislature. The Wyoming Supreme Court recently made clear that where a specific rule exists (in that case the rule defining significant deterioration of air quality) DEQ may not take out of context generalized statements in regulations (in that case the provision that lack of significant deterioration be shown “to the satisfaction of the Administrator”) to change or expand its authority under the specific rule.² Likewise in this case, DEQ may not take out of context non-

² *Powder River Basin Res. Council v. Wyo. Dep’t of Env’tl. Quality*, 226 P.3d 809, 818-820 (Wyo. 2010).

substantive regulatory language to change or add to the BART rule or impose non-BART conditions in a BART permit.

D. Wyoming statutes do not authorize Condition 16

DEQ further reaches for authority to impose Condition 16 under the Wyoming Environmental Quality Act (WEQA). Specifically, it cites W.S. § 35-11-801(a), which provides that

In granting permits, the director may impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules, regulations and standards.

Because a purpose of the WEQA is to reduce pollution, DEQ argues that “permitting requirements aimed at reducing and eliminating air pollution are consistent with the WEQA” and “Condition 16’s requirement for add-on NO_x controls . . . is therefore consistent with the WEQA’s purpose.” (DEQ Response at 12-13). To the contrary, Condition 16 *is not consistent with* existing rules, regulations and standards, specifically with the BART permitting rule at WAQSR Chapter 6, Section 9. The adoption of that rule by this Council demonstrates an intent that BART permits be issued in accordance with the BART rule, and not include non-BART provisions beyond the scope of the rule.

Consistent with the WEQA, the BART rule empowers DEQ to include in BART permits “reasonable and necessary” conditions regarding monitoring, testing, and reporting of compliance with BART limits. Such conditions are consistent with the rule. However, substantive emission limits not authorized by the BART rule are not consistent with the BART rule. This inconsistency is further evidenced by the fact, discussed further in Section III below, that neither the substance nor the process for BART permits is compatible with Long-Term Strategy . Long-Term Strategy is a fundamentally different process that must look at all sources of visibility impairment, whereas BART looks at individual sources.

The breadth of authority that DEQ claims is essentially unlimited. Its interpretation would empower it to make up *impromptu* emission limits more stringent than provided in regulations because any measure to reduce emissions would, by DEQ's lights, be consistent with the purpose of the Act. Regulatory standards and permitting rules would be rendered superfluous because DEQ could regulate by means of *ad hoc* requirements as long as they might reduce pollution.

Such overreaching is inconsistent with fundamental principles of administrative law that set bounds on the authority of all government agencies. In *Lineberger v. Wyoming Board of Outfitters and Professional Guides*,³ for example, the Court rejected the argument of the licensing Board that it could include a permit condition not otherwise authorized based on the statutory power to "impose *reasonable restrictions* and limitations upon licensees as necessary to implement this act."⁴ Wyoming follows the principle of "limited agency authority," which means (a) that agencies can only do what the statutes and rules expressly authorize; and (b) that any reasonable doubt of existence of any power of the agency must be resolved against the exercise of that power.⁵ In *Lineberger*, the Supreme Court noted that it "strictly construe[s] statutory language when determining the powers granted to an administrative agency."⁶ The Court also noted that administrative agencies are creatures of statute and are "wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority."⁷ The Court held that where the statute directed that a professional guide license

³ 44 P.3d 56 (Wyo. 2002).

⁴ *Id.* at 60.

⁵ *Hupp v. Employment Sec. Comm'n of Wyo.*, 715 P.2d 223, 225 (Wyo. 1986); *French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo. 1998).

⁶ *Lineberger*, 44 P.3d at 62 (emphasis added).

⁷ *Id.* at 62, quoting *Platte Dev. Co. v. Env'tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998).

should include a requirement to report violations of federal or state laws *relating to wildlife, game and fish*, the “reasonable restrictions” provision in the statute did *not* authorize a permit condition to report violations of *any* federal or state law.⁸ Similarly, in this case, the authority to issue BART permits does not include a “necessary condition” authority to impose non-BART Long-Term Strategy conditions in a BART permit.

III. Long-Term Strategy requirements can only be imposed through the separate process for adopting Long-Term Strategies that consider all sources, not the BART process for a single source

In its Memorandum in Support of Motion for Summary Judgment (Basin Memo), Basin Electric noted that the appropriate process to adopt Long-Term Strategy requirements for LRS DEQ would be the Wyoming Regional Haze SIP (RH SIP) process. (Basin Memo at 9-10). It also pointed out that there is a big difference between BART and Long-Term Strategy, both procedural and substantive, such that a BART permit is the wrong process for doing Long-Term Strategy. (Basin Memo at 11-13). BART applies only to a limited class of sources and is addressed case-by-case for individual sources through the Wyoming BART permit process. Long-Term Strategy, on the other hand, involves a broad range of sources that affect visibility in Class I areas. In devising its Long-Term Strategy, a state must identify emissions from all visibility-impairing sources, consider all types of sources, including stationary, minor, major, mobile and area sources; consider numerous other factors not pertinent to BART; and the net effect on visibility from reducing emissions. (Basin Memo at 11-12). Nowhere in the record of the LRS BART permit process are any of these factors mentioned. Stated differently, DEQ has not done the work in this BART permit process that would be required to adopt a Long-Term Strategy for the LRS. (Basin Memo at 12-13).

⁸ *Id.* at 62-63.

Despite the fact that Condition 16 says it is imposed “under the *Long-Term Strategy* of the Wyoming § 308 *Regional Haze State Implementation Plan*,” in its response to the motion for summary judgment DEQ now says that the Regional Haze SIP “*does not provide the authority*” for Condition 16. (DEQ Response at 15; emphasis added). DEQ acknowledges that the “administrative process for [adopting a SIP] is separate and independent from the permitting process” and “[t]he RH SIP process differs from the permitting process.” (DEQ Response at 15, 16). It anticipates that “the emission controls and reductions resulting from DEQ’s permitting actions are anticipated to be rolled into the RH SIP.” (DEQ Response at 15). But rather than rely on its separate authority to adopt a Long-Term Strategy as part of the RH SIP, it seeks to include Long-Term Strategy in the BART permit, which mixes apples and oranges. Therein lies the administrative error: by placing a putative Long-Term Strategy requirement in a BART permit, DEQ complies with neither the BART rule nor the Long-Term Strategy process.

Condition 16 is internally inconsistent. On its face it states that it is required pursuant to the Long-Term Strategy and RH SIP, and yet DEQ adopted it in a BART permit instead of as part of the RH SIP. Basin Electric understands that additional requirements may emerge for the LRS during the Long-Term Strategy process, but it is necessary to keep those issues separate from the BART permit. Failure to do so undermines both separate processes, and weakens the RH SIP planning process.

IV. Basin Electric cannot by agreement confer on DEQ authority DEQ does not have

A. Basin Electric did not agree to Condition 16

Contrary to DEQ's claim that Basin Electric somehow agreed to Condition 16 of the BART Permit (DEQ Response at 17-19), Basin Electric never agreed to install SCR or meet the 0.07 lb/MMBtu NO_x emission limit sought by DEQ. However, whether Basin Electric agreed or disagreed with DEQ, DEQ cannot by agreement acquire authority it does not otherwise have. DEQ either had authority to impose Condition 16 or it did not - regardless of some alleged side agreement.

Of course, if DEQ had authority to require Condition 16, as it argues, there would be no need for it to rely on an alleged agreement. Its dependence on the asserted agreement underscores its lack of authority to impose Condition 16 in the absence of agreement.

Basin Electric has attached the affidavit of Lyle Witham, its Manager of Environmental Services, to explain the discussions between the parties. Mr. Witham indicates that he explained to DEQ that Basin Electric could not agree to DEQ's request that the company agree to install SCR technology or accept a NO_x limit of 0.07 lb/MMBtu without the approval of the Missouri Basin Power Project (MBPP), which is the group of six consumer-owned energy organizations that jointly own LRS. The need for such approval was confirmed in writing to DEQ, but no approval ever was obtained or communicated to DEQ. (Witham Affidavit, ¶¶ 8, 9, 11; DEQ Response Exhibits 10, 11).

Mr. Witham acknowledges that on several occasions DEQ asked Basin Electric to agree to install SCR on the LRS units to achieve a .07 lb/MMBtu NO_x emission limit. (Witham Affidavit, ¶¶ 7, 9-10). He also acknowledges there were discussions about Basin Electric's concerns as to whether SCR could be installed within five years and whether 0.07 lb/MMBtu could be achieved with SCR. (Witham Affidavit, ¶ 10). Apparently, DEQ misread these

discussions as assent by Basin Electric to Condition 16, but there never was an agreement. Despite DEQ's good faith misimpression, Basin Electric consistently held to the position that BART for NOx was LNB and OFA and the EPA's presumptive limit of 0.23 lb/MMBtu, and that no further reductions were justified, as evidenced by numerous submittals and letters to DEQ during the span from February 2007 to September 2009. (DEQ Exhibits. 2, 10, 11, 19).

B. Whether or not Basin Electric agreed to Condition 16 is not a "material issue" preventing summary judgment

As DEQ admits, to defeat summary judgment for Basin Electric, the dispute of fact regarding whether Basin Electric agreed to Permit Condition 16 must be material. (DEQ Response at 19). The Wyoming Supreme Court has held that only a material issue precludes summary judgment and defined a "material" issue of fact as follows:

[F]or the purposes of ruling upon a motion for summary judgment a fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. . . . In considering a motion for summary judgment it is appropriate for a court to identify the essential elements of the plaintiff's cause or of the defense asserted, and to then determine the materiality of any fact in the light of whether it will establish or refute one of those essential elements. *If it does not have that effect, it would not be a material fact in the controversy, and a genuine issue with respect to that fact, no matter how sharp, would not foreclose the granting of a motion for summary judgment.*"]

*Dawson v. Lohn.*⁹ A material fact is one which has legal significance and which would establish a defense. *Massengill v. S.M.A.R.T. Sports Medicine Clinic, P.C.*¹⁰

Therefore, if an agreement on Condition 16 would not make Condition 16 valid, the existence or absence of agreement is not material to Basin Electric's Motion for Summary

⁹ 705 P.2d 853, 858 (Wyo.1985)(emphasis added)(citations omitted).

¹⁰ 996 P.2d 1132, 1134 (Wyo. 2000).

Judgment. As a matter of law, an agreement with a regulated entity cannot create or expand an agency's authority because agencies have only the authority conferred on them by the legislature.

C. Even if Basin Electric had agreed to Condition 16, such agreement could not expand DEQ's authority

In *Lineberger*,¹¹ the Wyoming Supreme Court refused to uphold a condition in a professional guide license that was *agreed to* by the guide because it exceeded the Board's statutory authority. The agreement in *Lineberger* required the guide to report *any* state or federal conviction to the Board, although the statute authorized the Board to consider only convictions *related to fish and wildlife*. Even though the guide had signed an agreement accepting the condition and the guide did not challenge the condition until two years later after the Board refused to renew his license, the Supreme Court refused to enforce the condition.¹² The Court's decision clearly demonstrates that a regulatory agency may not impose permit conditions that exceed the agency's authority, based on the agreement of a permittee—even when the existence of the agreement is not disputed. The Court relied on the well-established principle that an administrative agency is limited in authority to powers legislatively delegated.

Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim.

*Lineberger*¹³, quoting *Amoco Prod. Co. v. State Bd. of Equalization*.¹⁴ The Court continued, “[a]n agency is wholly without power to modify, dilute or change in any way the statutory

¹¹ 44 P.3d 56 (Wyo. 2002).

¹² *Id.* at 63.

¹³ 44 P.3d at 62.

¹⁴ 12 P.3d 668, 673 (Wyo. 2000).

provisions from which it derives its authority.” *Id.*, quoting *Platte Dev. Co. v. Env'tl. Quality Council*.¹⁵

The principles applied in *Lineberger* are important safeguards that preserve the decisions of the legislature and avoid the potential that an agency might, even inadvertently, circumvent those decisions.

The *Lineberger* principle precluding expansion of agency authority by agreement is well established in administrative law and has been followed by other courts. *E.g.*, *Standard Airlines, Inc. v. Civil Aeronautics Bd.*,¹⁶ (the court refused to allow the agency to revoke an airline's registration on the basis of licensing conditions the airline had accepted but which were not legally authorized, stating that “[a]n administrative agency cannot make an otherwise invalid proviso a condition to the grant of a permit.”); *Peoples Bank v. Eccles*,¹⁷ (a restrictive condition on a bank's Federal Reserve membership could not be enforced, even though accepted by the bank, if the condition exceeded statutory authority. “No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered”). DEQ fails to cite any case, whether in Wyoming or another jurisdiction, which holds that an agency may acquire authority it otherwise does not have by means of an agreement.

If agencies were not constrained to operate within the authority granted by the legislature, they would potentially wield extraordinary coercive power. It would be a concern if DEQ or any other Wyoming agency could condition the grant of a permit on the permittee's agreement to undertake a project unrelated to the agency's mission - to build a school or community recreation

¹⁵ 966 P.2d at 975.

¹⁶ 177 F.2d 18, 20 (D.C. Cir. 1949).

¹⁷ 161 F.2d 636, 644(D.C. Cir. 1947), *rev'd on other grounds*, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784 (1947).

center, for example - which, although of benefit to citizens, would exceed the power the legislature intended to grant the agency. The issue at stake in this proceeding, while very important to the parties and important for purposes of this permit, is also important for the purpose of affirming this broadly applicable principle of law and policy. DEQ must stay within the limits established by the rules, and not seek to impose different permit limits than those specifically authorized.

D. Basin Electric cannot waive its right to challenge Condition 16 for DEQ's lack of authority to impose it

DEQ contends that Basin Electric has waived its right to challenge Condition 16 because it did not object to it “during the permitting process.” (DEQ Response at 17). That is both factually and legally wrong. Although DEQ might have misread Basin Electric’s reservations and concerns, the company repeatedly told DEQ that the presumptive level of 0.23 lb/MMBtu for NO_x was BART for the LRS, that SCR would not yield a benefit or meet the intended goal of BART, and that SCR was “above and beyond BART.” (Witham Affidavit ¶¶ 6, 8-10; DEQ Exhibits 5, 7, 10, 11 and 19). While DEQ was processing the proposed LRS BART permit, Basin Electric sent its letter on September 10, 2009 (DEQ Exhibit 19) reiterating its position that LNB/OFA satisfies the requirements of BART and that DEQ’s requirement to install SCR in 2018 and 2023 as part of the SIP was above and beyond the intent of BART.

However, even if Basin Electric had failed to object to Condition 16, that would not waive its right to appeal. As aptly stated by the D.C. Circuit Court of Appeals in *Peoples Bank v. Eccles*¹⁸:

¹⁸ 161 F.2d at 644.

The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it.

DEQ mistakenly relies on *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*¹⁹, for its waiver argument, but the issue there was whether failure to raise an issue before a hearing Board similar to this Council waived the right to argue the issue before the courts. Clearly Basin Electric has not failed to raise the issue of Condition 16 before this Council. DEQ also cites *WW Enterprises v. City of Cheyenne*²⁰ for the argument that a litigant may not try a case on one theory and appeal it on another, but that case involved a failure to raise an issue before the district court, not in an administrative hearing.

DEQ's argument also ignores the reality that the administrative process is not yet finished. The BART permit itself states that it is subject to the right to appeal, and on appeal this Council may order that it be modified, based on issues presented in the appeal. W.S. § 35-11-112(c)(ii). Thus, it would not be possible for Basin Electric to waive a challenge to a permit condition when the permit is not yet administratively final.

In the final analysis, the controlling authority is the *Lineberger* case,²¹ which makes clear that even an express and undisputed agreement to a permit condition does not prevent the permittee from challenging the condition on the grounds that it exceeds agency authority.

Therefore, the central issue for this Council is whether under applicable statutes and regulations DEQ has authority to include in the LRS BART permit the Long-Term Strategy non-BART provisions of Condition 16. For the reasons explained above, it does not.

¹⁹ 7 P.3d 900, 906 (Wyo. 2000).

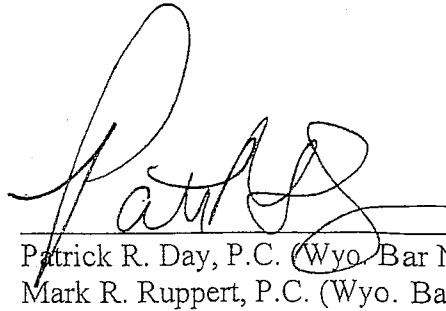
²⁰ 956 P.2d 353, 356 (Wyo. 1998).

²¹ 44 P.3d 56 (Wyo. 2002).

V. Conclusion

DEQ had no authority to impose a non-BART Long-Term Strategy Condition 16 in the LRS BART permit. DEQ's action in imposing Condition 16 in the BART permit compromises both the BART and Long-Term Strategy processes. Lacking authority in the law to impose Condition 16, DEQ cannot rely on an agreement to expand its legal authority. Basin Electric respectfully requests summary judgment in its favor, and that Condition 16 be vacated and stricken from the LRS BART permit.

Dated August 31, 2010.



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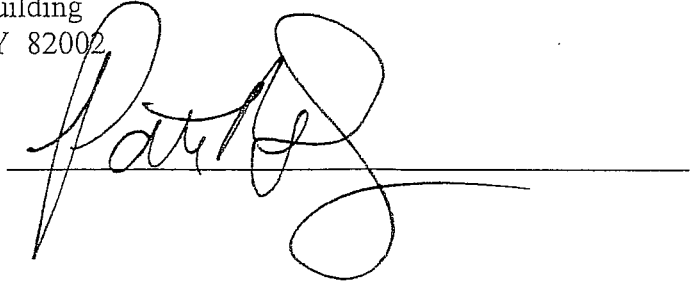
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ATTORNEYS FOR BASIN ELECTRIC POWER
COOPERATIVE

CERTIFICATE OF SERVICE

I certify that on August 31, 2010, I served a copy of the foregoing to the following by
U.S. Mail, postage prepaid, addressed as follows:

Nancy Vehr
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, WY 82002

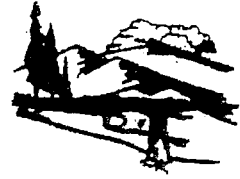
A handwritten signature in black ink, appearing to read "Nancy Vehr", is written over a solid horizontal line. The signature is cursive and stylized.

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EXHIBIT A



Department of Environmental Quality



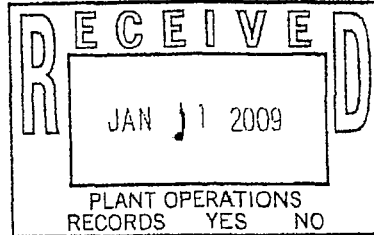
To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Dave Freudenthal, Governor

John Corra, Director

December 31, 2009

Mr. Robert Eriksen
Sr. Environmental Compliance Administrator
Basin Electric Power Cooperative
1717 East Interstate Avenue
Bismarck, ND 58503-0564



Re: Air Quality Permit MD-6047
BART Permit: Laramie River Station

Dear Mr. Eriksen:

The Division of Air Quality of the Wyoming Department of Environmental Quality has enclosed a copy of the Best Available Control Technology (BART) permit for Basin Electric's Laramie River Station, dated December 31, 2009. Comments received during the public comment period and the public hearing were considered in the final permit. A copy of the decision document for the permit is also enclosed. One of the proposed permit conditions was modified in the final permit, as described below.

- Condition 16: The time for submitting a permit application for additional add-on NO_x control was changed from six years prior to installation to two years prior to installation.

If you have any questions, please feel free to contact this office.

Sincerely,

David A. Finley
Administrator
Air Quality Division

cc: Glen Spangler/AQD Cheyenne

Herschler Building • 122 West 25th Street • Cheyenne, WY 82002 • <http://deq.state.wy.us>

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ATTORNEYS FOR BASIN ELECTRIC
POWER COOPERATIVE

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

In the Matter of:)
Basin Electric Power Cooperative) Docket No. 10-2802
Air Quality Permit No. MD-6047)
BART Permit: Laramie River Station)

AFFIDAVIT OF LYLE WITHAM

Lyle Witham, having been duly sworn, states as follows:

1. I have worked for Basin Electric Power Cooperative (**Basin Electric**) since November 30, 2007, as the Manager of Environmental Services. From the fall of 1998 until I began working for Basin Electric, I was the assistant attorney general that served as the primary counsel for the Environmental Health Section of the North Dakota Department of Health (**NDDOH**), the North Dakota agency primarily responsible for implementing and administering North Dakota's environmental protection laws. This included the federal environmental laws such as the Clean Air Act as well as, state laws, rules, and regulations relating to visibility and visibility protection for federal

Class I areas under Clean Air Act (CAA), including §§ 169A & 169B which are at issue in this matter.

2. Since I became Manager of Environmental Services for Basin Electric in November 2007 I have been directly involved in meetings and correspondence with DEQ over the BART permit. I, therefore, have direct personal knowledge of the matters since that date. Information prior to that date is based on records in Basin Electric's files.

3. In June of 2006 DEQ requested that Basin Electric do an analysis of BART control options. DEQ informed Basin Electric "[i]nitially we [DEQ] felt that if a source committed to the use of these 'presumptive' levels of control [established in EPA's BART Guidelines], that they would not have to provide any additional assessment . . ." (Exhibit A, Dave Finley letter, dated Oct. 2, 2006). DEQ later altered its position and therefore requested "some sort of 'minimal' assessment of the...five [BART] factors" because conversations with EPA and others had suggested that "it is possible that there could be some sort of economic benefit in an individual application, or other peculiarity associated with a specific site that would recommend use of control levels more stringent than the BART presumptive levels." (Exhibit A). DEQ indicated that a "1 page" evaluation of each BART factor probably would be sufficient. (Exhibit A).

4. Consistent with DEQ's request, Basin Electric performed a BART analysis and committed to meet the presumptive level of 0.23 lb/MMBtu NO_x (30-day average) for the three LRS units. (DEQ Exhibit 2, February 28, 2007 letter to DEQ). DEQ then requested additional information which Basin Electric provided on September 28, 2007 (DEQ Exhibit 5). These submittals included a more-than-minimal evaluation of the five BART factors and concluded that the presumptive BART level of 0.23 lb/MMBtu for

NOx was BART. No special economic benefit or other peculiarity was identified that would recommend a more stringent level.

5. During the spring to early summer of 2008, DEQ contacted Basin Electric to request additional NOx BART analyses relating to the possible use of selective catalytic reduction (SCR) NOx control technology. I was aware that EPA Region 8 wanted to push States to require NOx reductions lower than EPA's own presumptive "emission limitations" under CAA § 169A(b) & (g)(2), 42 U.S.C.A. § 7491(b) & (g)(2). As a result, when DEQ and Basin Electric begin discussing possible technologies to force "beyond presumptive BART" NOx emission levels and technologies I assumed DEQ was reacting to pressure from EPA. However, Basin Electric remained firm in its position that OFA (overfire air) technologies would meet the presumptive NOx BART emission limitations for all LRS units. Eventually, Basin Electric at DEQ's request agreed to also install improved low-NOx burners, an additional control beyond OFA, to reach annual and pounds per hour emissions targets that are effectively substantially below the presumptive 30-day rolling average established by EPA's promulgated NOx limitations for LRS's three boilers.

6. In July 2008, Basin Electric provided the additional visibility modeling analyses requested by DEQ for the baseline scenario and potential selective catalytic reduction (SCR) NOx control technology. (DEQ Exhibit 7, July 24, 2008 letter to DEQ). A technology cost update also was included. This additional study reiterated the overall findings of a February 2008 study that installation of SCR at LRS would provide minimal visibility improvement, that the total annual costs and cost-effectiveness would be prohibitive, that SCR would have other environmental and operating impacts, and

that SCR would not yield a benefit or meet the intended goal of BART (DEQ Exhibit 7, Black & Veatch Report, p. 13).

7. After the additional BART modeling requested by DEQ was provided by Basin Electric, I met with representatives of DEQ. At that meeting, DEQ indicated that it was considering beyond-BART requirements in part to address challenges they were facing in western Wyoming relating to ozone levels, and that PacificCorp was working with them to voluntarily put SCRs on some facilities on an accelerated schedule. DEQ informed us that their preliminary BART determination was low-NOx burners (LNB), OFA, and SCR for LRS. DEQ asked Basin Electric to volunteer to install SCR NOx controls at LRS to achieve 0.07 lb/MMBtu emission rates (30-day average), informing us that PacificCorp had made concessions on installing SCRs at its electric generating units.

8. Although DEQ asked Basin Electric to consider installing SCR technologies, we reminded DEQ that BART for NOx was the presumptive level in EPA's BART Guideline. We did not agree or commit to install SCR for a variety of reasons, not the least of which was that we had no authority to do so. We explained to DEQ that the Missouri Basin Power Project (MBPP), a group of six regional, consumer-owned energy organizations, jointly own LRS. Basin Electric is the project manager but is only one of the six organizations that jointly own LRS and that, as a result, whatever the merit or lack of merit regarding SCR technology approval would be required not just of Basin Electric's management, but also the management and other owners of the MBPP. It was my impression that DEQ understood we had no authority to commit to SCR technologies.

9. Basin Electric continued to focus on LNB and OFA as proposed BART, and sent DEQ a letter on February 25, 2009 again proposing the equivalent of presumptive limits of 0.23 lb/MMBtu for NOx (30-day average) and advised DEQ that LRS was proceeding with plans to install OFA and upgrade LNB at LRS's three units. (DEQ Exhibit 10). On March 2, 2009, we again had a meeting with DEQ representatives about potential LRS BART limits. I recall some discussion of SCR and 0.07 lb/MMBtu NOx emission rates that DEQ was proposing as part of a Long-Term Strategy. As I recall, most of the meeting was spent discussing achievable emission limits after installing OFA and new LNB, with DEQ wanting a 0.15 lb/MMBtu NOx limit (30-day average) and Basin Electric still proposing a 0.23 lb/MMBtu NOx limit (30-day average). After this March 2, 2009 meeting, Basin Electric sent DEQ another letter on March 16, 2009 again proposing the equivalent of presumptive limits of 0.23 lb/MMBtu for NOx (30-day average) and advised DEQ that LRS was proceeding with plans to install OFA and upgrade LNB at the three LRS units. (DEQ Exhibit 11). This letter again reminded DEQ that MBPP approval would be needed for any DEQ proposal going beyond LNB/OFA

10. Between September 2008 and May 2009, the DEQ did indicate more than once its desire to have SCR installed at the LRS, with a NOx emission limit of 0.07 lb/MMBtu. Without agreeing that it would install SCR or that SCR was BART, Basin Electric explained to the DEQ that there were technical and practical problems with SCR, that installing SCR on the LRS units as BART would present significant problems, including uncertainty whether 0.07 lb/MMBtu emission limit was achievable at the LRS with SCR, the cost and the timing of retrofitting three units before the BART deadline, and obtaining MBPP approval for installation in that time frame. However,

we continued to believe that the presumptive BART level for NOx was appropriate at the LRS and that no good reason had ever been identified to depart from the presumptive level, and we stated that repeatedly to the DEQ. At no time did we agree to SCR or to a 0.07 lb/MMBtu, or to Condition 16 of the eventual permit.

11. I do not recall any face-to-face meetings between DEQ and Basin Electric between our March 2, 2009 meeting and the time DEQ came out with its permit analysis and draft permit conditions that required LRS to install add-on NOx controls on one unit in 2018 and a second unit in 2023 that would achieve a NOx emission rate at or below .07 lbs/MMBtu (30-day average) as part of Wyoming's Long-Term Strategy but not as BART. From a phone call that I had with Mr. Schlichtemeier of DEQ on April 8, 2009, I learned that DEQ intended to impose these conditions in our BART permit with DEQ saying they were part of Wyoming's Long-Term Strategy but not BART. I did not agree to these terms on behalf of Basin Electric and had no authority to do so, and no such approval has ever been given by the MBPP.

12. After DEQ had published its proposed permit, including Condition 16, and received public comment, DEQ requested Basin Electric to respond to certain comments the agency had received. (DEQ Exhibit 18). In a letter dated September 10, 2009, Basin Electric responded and in that response again stated that its position continued to be that OFA/LNB and the presumptive NOx limit of 0.23 lb/MMBtu satisfies the requirements of BART. In its response to DEQ's item 4, "Please provide additional justification of why SCR cannot be installed on any of the units within 5 years of SIP approval as BART" (DEQ Exhibit 18), Basin Electric responded:

As a result of the BART analysis following EPA's BART Guidelines, it was determined that the installation of OFA would meet the presumptive limit of 0.23 lb/MMBtu, thus satisfying the BART requirements. Basin Electric holds the position that OFA/LNB adequately satisfies the requirements of

BART. While WY DEQ has incorporated SCR installation at LRS in 2018 and 2023 as part of the SIP, Basin Electric believes SCR to be 'above and beyond' the original intent of BART at this time, which is to achieve further emission reduction in an economically feasible manner. BART should not be used in place of PSD to trigger the installation of BACT as that is not the proper purpose of BART.

(DEQ Exhibit 19, September 10, 2009 letter to DEQ).

13. In summary, Basin Electric never agreed or committed to a plan to install SCR or to meet a .07 lb/MMBtu NOx limit on any LRS unit, or agreed to Condition 16, as part of BART or as part of a Long-Term Strategy.

FURTHER, AFFIANT SAYETH NAUGHT.

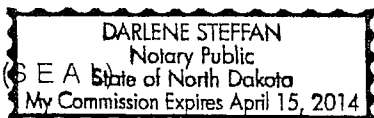
Lyle Witham

Lyle Witham

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF BURLEIGH)

The foregoing instrument was subscribed and sworn to before me this 31 day of August, 2010, by Lyle Witham.

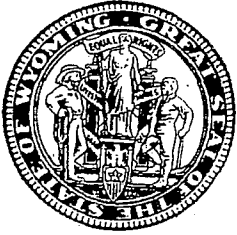
Witness my hand and official seal.



Darlene Steffan

Notary Public
My commission expires: 4-15-14

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Department of Environmental Quality



To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Dave Freudenthal, Governor

John Corra, Director

October 2, 2006

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LARAMIE RIVER STATION OPERATIONS

Dallas Wade, Plant Manager
Basin Electric Power Cooperative
P.O. Box 1346
Wheatland, Wyoming 82201

Re: Laramie River Station

Dear Mr. Wade:

As we notified you on June 14, 2006, your facility has been determined to be "Subject to BART" (Best Available Retrofit Technology) per the U.S. Environmental Protection Agency regulations contained in 40 CFR Part 51, Appendix Y: Guidelines for BART Determinations under the Regional Haze Rule. Per our commitment made to you during our July 10-11 Gillette Air Quality Advisory Board Hearing on the Division's Chapter 6, Section 9 Best Available Retrofit Technology Rule, under cover of this letter I am sending you the BART Air Modeling Protocol compiled by the Air Quality Division for your use in determining Individual Source Visibility Assessments in your BART Control Analyses.

Per Section IV. A. of the BART Guidelines, you must address six factors in your analysis of appropriate BART control for SO₂, NO_x and Particulate Matter: 1) the technology available, 2) the costs of compliance, 3) the energy and non-air quality environmental impacts of compliance, 4) any pollution control equipment in use or in existence at the source, 5) the remaining useful life of the source, and 6) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. You will use the attached BART Air Modeling Protocol to address the last of these factors; the visibility improvement achieved by your control selection.

In compiling a BART control scenario, we have discussed the use of "presumptive" levels of control technology, defined for SO₂ and NO_x in the BART Guidelines. Initially we felt that if a source committed to the use of these presumptive levels of control, that they would not have to provide any additional assessment of the first five BART factors. Subsequent conversations have altered our thinking on this matter, and we now are informing you that should you commit to implementation of these presumptive levels of control for your facilities, we still will need some sort of "minimal" assessment of these other five factors.

Conversations with EPA and other Air Managers involved in Regional Haze have suggested that it is possible that there could be some sort of economic benefit in an individual application, or other

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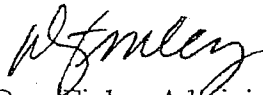


peculiarity associated with a specific site that would recommend use of control levels more stringent than the BART presumptive levels. In order to evaluate such a possibility, if you decide to select presumptive levels as your control choice, we are asking you to address these other five BART factors in some manner. Our current thinking is that some sort of "1 page" evaluation on each of the other five factors would probably be sufficient, but we would leave the decision on the depth of that analysis up to you as you look into the details of your particular installation.

The Division recognizes that applying these federal guidelines will be challenging. In order to assist facility owners and establish a level playing field for all affected sources, at the Gillette Hearing, the Division proposed to establish a state BART rule which will define how the BART process will be applied in Wyoming. The proposal was endorsed by the Air Quality Advisory Board at that meeting, with a recommendation to extend the deadline for completing the required BART control analyses. The Division will therefore recommend changing the BART Rule to delay the submission date to December 15, 2006, and this revised proposal will now go before the Environmental Quality Council at their October 10, 2006 Pinedale, Wyoming meeting. The NOTICE OF INTENT TO ADOPT RULES AND REGULATIONS and the July 27th Version of the Chapter 6, Section 9 Draft Rule are posted on the Air Quality Website <http://deq.state.wy.us/aqd/index.asp?pageid=8> under the "Proposed Rules" link. Owners and operators of sources subject to BART are encouraged to attend.

If you have any additional questions regarding this requirement, please feel free to call me at 307-777-7391 or contact Lee Gribovicz at 307-777-6993 for further assistance.

Sincerely,



Dave Finley, Administrator
Air Quality Division

cc: District Engineers Lee Gribovicz Bernie Dailey
 Robert Gill Tina Anderson Mike Stoll

Enclosure #1: September, 2006 – "BART Air Modeling Protocol: Individual Source Visibility Impairment Analysis"