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**FILED**

**FEB 01 2008**

**Terri A. Lorenzon, Director  
Environmental Quality Council**

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

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

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**DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
MOTION FOR PROTECTIVE ORDER**

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Respondent, the Department of Environmental Quality (DEQ) by and through its undersigned counsel and pursuant to WYO. STAT. ANN. § 16-3-107(g), the Environmental Quality Council Rules, Chapter II, Sections 3 and 4, and WYO. R. CIV. P. Rule 26(c), hereby moves for an order limiting the scope of discovery in the above captioned matter.

In support of this motion, Respondent states as follows:

1. Protestants, Sierra Club, Powder River Basin Resource Council and Wyoming Outdoor Council ("Protestants"), filed a Protest and Petition for Hearing (Petition) in the above-captioned matter with the EQC on November 1, 2007.

2. On January 3, 2008, Protestants issued their *First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions Served on the DEQ*. Many of Protestants' discovery requests seek information related to CO<sub>2</sub>, methane and nitrous oxide (which Protestants' have defined as "greenhouse gases" and will hereinafter be referred to as such) and global warming, specifically Interrogatories Nos. 4 and 5, Requests for Production of Documents related to Interrogatories Nos. 4 and 5, and Requests for Admissions Nos. 1 through 17. A copy of *Protestants' First Set of [Discovery] Served on the DEQ* is attached hereto as Exhibit 1. Respondent DEQ's deadline for responding to Protestants' First Set of discovery requests is February 5, 2008.

3. On January 11, 2008, the EQC issued a Scheduling Conference Order which included a discovery schedule. On January 30, 2008, following the Parties' request to extend the briefing schedule, the EQC amended the Scheduling Order by extending the deadline for preliminary or procedural motions to February 8, 2008.

4. On or about February 8, 2008, Respondent DEQ will file a Motion to Dismiss Count I of the Issues Presented for Review in Protestants' Petition as well as any other claims referencing CO<sub>2</sub> and other greenhouses gases and global warming contained in the Petition pursuant to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure for Protestants' failure to state a claim upon which relief may be granted. No discovery is or will be needed to resolve the questions of law presented in Respondent DEQ's Motion to Dismiss. The Motion to Dismiss, if granted in whole or in part, will dispose of all or

some of Protestants' claims referencing CO<sub>2</sub> and other greenhouse gases and global warming.

5. The Wyoming Administrative Procedures Act provides that contested case discovery is available in accordance with specific provisions of the Wyoming Rules of Civil Procedure, including Rule 26. WYO. STAT. ANN. § 16-3-107(g); *see also In re Contempt Order Issued Against Anderson*, 765 P2d 933, 935 (Wyo. 1988) (contested case discovery is governed by the Wyoming Administrative Procedures Act).

6. The scope of discovery is limited to matters, not privileged, that are relevant to the claim or defense of the party seeking discovery. WYO. R. CIV. P. 26(b)(1)(A).

7. However, the scope of discovery may be further limited by a protective order limiting or barring discovery to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." WYO. R. CIV. P. 26(c)(1).

8. The Wyoming Rules of Civil Procedure further provide that the filing of a motion for protective order stays discovery regarding the matters at which the motion is directed. WYO. R. CIV. P. 26(c)(4).

9. A protective order would protect Respondent DEQ against needless expenditure of time, money and resources of state personnel, and prevent inefficient use of state resources on needless discovery that later may become irrelevant especially where, if Respondent DEQ's Motion to Dismiss is granted in whole or part, would dispose of all or some of Protestants CO<sub>2</sub> and other greenhouse gases and global warming

claims. This is particularly true in light of the fact that no discovery is needed to resolve the questions of law presented in Respondent DEQ's Motion to Dismiss.

10. Discovery should not be allowed where the issue before the Council is purely a question of law that is potentially dispositive. *See Persons v. Runyon*, 172 F.3d 879, 1999 WL 104427, \*3 (10th Cir. 1999)(unpublished) (discovery was not appropriate where legal issues determined the outcome), *Feist v. Jefferson County Comm'rs Court*, 778 F.2d 250, 252 (5th Cir. 1985) (proper to first determine whether plaintiff raised a claim upon which relief could be granted before authorizing discovery), *Florsheim Shoe Co. v. U.S.*, 744 F.2d 787, 797 (Fed. Cir. 1984) (motion to suspend discovery pending disposition of the motion to dismiss was proper because motion raised questions of law for which factual discovery was not necessary or appropriate).

11. Whether CO<sub>2</sub> and other greenhouse gases that may contribute to global warming are "Regulated NSR pollutants" or "subject to regulation" by the DEQ is purely a question of law. As will be more fully set forth in Respondent DEQ's Motion to Dismiss, the DEQ has not and does not currently regulate CO<sub>2</sub>, methane or nitrous oxide. *See* Chapter 6 of the Wyoming Air Quality Standards and Regulations (WAQSR) § 4(a) (defining "Regulated NSR pollutant"); 2 WAQSR §§ 2-11 (list of air pollutants subject to ambient standards does not include CO<sub>2</sub>, methane or nitrous oxide); 3 WAQSR §§ 2 - 8 (list of air pollutants subject to general emission standards does not include CO<sub>2</sub>, methane or nitrous oxide); 5 WAQSR § 2 (New Source Performance Standards (NSPS) regulating criteria pollutant emissions from specific categories of new sources); 5 WAQSR § 3

(National Emission Standards for Hazardous Air Pollutants (NESHAP) regulating hazardous air pollutant emissions from specific categories of new and existing sources); *see also* 3 WAQSR § 6(a) (incorporating the definition of “volatile organic compounds” (VOCs) found in 40 C.F.R. § 51.100(s)(1) explicitly excluding CO<sub>2</sub> and methane from the definition of VOCs) and 5 WAQSR § 2(e)(i) defining “nitrogen oxides” to mean “all oxides of nitrogen except nitrogen oxide”).

12. Respondent DEQ’s request for a Protective Order barring discovery relating to CO<sub>2</sub> and other greenhouse gases and global warming until the EQC has ruled on Respondent DEQ’s Motion to Dismiss would not prejudice Protestants because the discovery cut off deadline is not until August 1, 2008.

13. As required by WYO. R. Civ. P. Rule 26(c)(2) Respondent’s counsel has in good faith conferred with Protestants’ counsel in an effort to resolve the issue without EQC action, but such effort was unproductive. On January 24, 2008, Respondent’s counsel asked Protestants to forego discovery regarding the above stated claims and issues related to greenhouses gas, but Protestants would not agree. Respondent’s counsel informed Protestants’ counsel that this motion would be forthcoming.

14. Respondent’s counsel also conferred with Intervenors on January 24, 2008. Intervenors do not oppose this motion for protective order.

15. Therefore, Respondent respectfully moves this Council for an order barring discovery relating to CO<sub>2</sub> and other greenhouse gases and global warming in the above referenced matter pending the Council’s ruling on Respondent DEQ’s Motion to Dismiss

to be filed on or before February 8, 2008. In the alternative, by virtue of this Motion having been filed, discovery regarding CO<sub>2</sub> and other greenhouse gases and global warming is currently stayed, Respondent DEQ requests this Council refrain from ruling on this Motion for Protective Order pending this Council's ruling on Respondent DEQ's Motion to Dismiss.

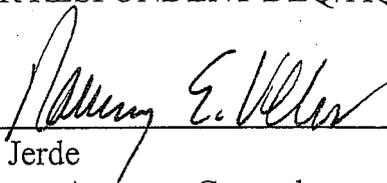
16. Should this Council decide to issue a Protective Order before ruling on Respondent DEQ's Motion to Dismiss, Respondent DEQ respectfully requests this Council order that the DEQ is not required to provide responses to Protestants' discovery regarding the issues of CO<sub>2</sub> and other greenhouse gas or global warming until such time as the EQC rules on Respondent DEQ's Motion to Dismiss. Respondent DEQ specifically requests this Council order that the DEQ does not have to respond to Interrogatories Nos. 4 and 5, Requests for Production of Documents related to Interrogatories Nos. 4 and 5, and Requests for Admissions Nos. 1 through 17, nor answer or respond to any subsequent written discovery requests or any questions posed in deposition relating to CO<sub>2</sub> and other greenhouse gases and global warming.

17. Should this Council grant Respondent DEQ's Motion to Dismiss, Respondent DEQ respectfully requests this Council order that the DEQ is not required to provide responses to Protestants' discovery regarding the issues of CO<sub>2</sub> and other greenhouse gas or global warming. Respondent specifically requests this Council order that the DEQ does not have to respond to Interrogatories Nos. 4 and 5, Requests for

Production of Documents related to Interrogatories Nos. 4 and 5, and Requests for Admissions Nos. 1 through 17, nor answer or respond to any subsequent written discovery requests or any questions posed in deposition relating to CO<sub>2</sub> and other greenhouse gases and global warming.

DATED this 1<sup>st</sup> day of February, 2008.

FOR RESPONDENT DEQ/AQD:



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Attorneys for the State of Wyoming

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing *Department of Environmental Quality's Motion for Protective Order* through United States mail, postage prepaid on this the 15<sup>th</sup> day of February, 2008 to the following:

James S. Angell  
Robin Cooley  
Andrea Zaccardi  
Earthjustice  
1400 Glenarm Place, #300  
Denver, CO 80202

Patrick R. Day, P.C.  
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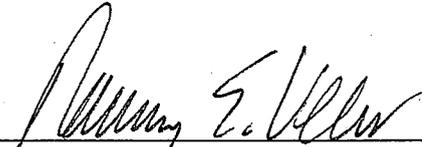
  
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Wyoming Attorney General's Office

EXHIBIT 1  
to  
Respondent DEQ's Motion for  
Protective Order

*In re Basin Electric Dry Fork Air Permit CT-4631 - EQC Docket No. 07-2801*

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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
OF THE STATE OF WYOMING

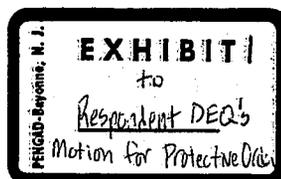
IN THE MATTER OF: )  
BASIN ELECTRIC POWER COOPERATIVE )  
DRY FORK STATION, ) Docket No. 07-2801  
AIR PERMIT CT - 4631 ) Presiding Officer, F. David Searle  
\_\_\_\_\_ )

**PROTESTANT'S FIRST SET OF INTERROGATORIES, REQUESTS FOR  
PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSIONS SERVED ON  
THE DEPARTMENT OF ENVIRONMENTAL QUALITY**

Pursuant to Wyoming Rules of Civil Procedure 26, 33, 34, 36 and the following definitions and instructions, Protestant Powder River Basin Resources Council requests that the Wyoming Department of Environmental Quality ("WYDEQ") or any agency, officer or employee of WYDEQ who has relevant information answer fully and under oath the following Interrogatories, Requests for Production of Documents, and Requests for Admissions within 30 days of the date of service.

**DEFINITIONS**

1. "Administrative Record" means any and all communications or documents obtained, reviewed, considered, relied upon, or produced by WYDEQ as part of the permit application and approval process for Air Permit CT-4631 for the Dry Fork Station.



2. "Basin Electric" means the permittee Basin Electric Power Cooperative and includes any employee, officer, agent, expert, or member cooperative of Basin Electric.

3. "Communication(s)" means conversations, discussions, meetings, telephone calls, notes, letters, memoranda, reports, telecopies of facsimiles (faxes), electronic mail, voice mail, text messages, data or file transfer, pictures or photographs, and all other forms of oral, written or electronic expression by which information may be conveyed, including any mechanical or electronic sound recording or transcription thereof.

4. "Describe" means to specify in detail and to particularize the content of the answer to the question and not just to state the reply in summary or outline fashion, including all pertinent facts about the fact, event, or situation in question, including but not limited to:

(a) the time, date, and place;

(b) identification of all persons present or involved;

(c) identification of all oral or written communications made during the event or situation;

(d) a detailed description of all actions taken.

5. "Document(s)" is used in the broadest sense contemplated by Wyo. R. Civ. P. 34. It means all records and other tangible forms of expression, including information in electronic, magnetic, or photographic form, in your possession, custody, or control, including drafts and any copies thereof that contain notes or otherwise differ from the original, however many, by whomever created, however prepared, circulated, sent, received, dated or used, produced or stores (manually, mechanically, electronically, or otherwise), including but not limited to books, papers, files, modeling files and data, notes, correspondence, memoranda, reports, writings, drawings, photographs, telegrams, facsimiles (faxes), telephone logs, contracts, agreements, calendars, datebooks, worksheets, summaries, magnetic tapes, data files, other data compilations

from which information can be obtained, electronic mail, disks, diskettes, disk packs, and other electronic media, microfilm, microfiche, and storage devices. It includes all material that relates or refers in whole or in part to the subjects referred to in any Interrogatory and also includes the file jackets, and any labels thereon, in which responsive documents are contained. If any documents contain attachments or appendices, describe the attachments or appendices.

6. "Identify" means:

(a) When applied to an individual person, state the full name, present or last known business address, position with the state or other employer, job description, and telephone number;

(b) When applied to a document, state the title, date(s), author(s), signer(s), intended recipient(s), addressee(s), present location and custodian of the document, and current or last known address of the custodian of the document.

(c) When applied to oral communication, identify the speaker(s) and the person(s) addressed, state the date, place and medium of the communication and describe completely the content of the communication.

7. "Including" means "including, but not limited to."

8. "Regarding," "Related to," and "Concerning" means concerning, referring to, alluding to, responding to, relating to, connected with, commenting upon, in respect of, about, establishing, analyzing, criticizing, touching upon, constituting, supporting, refuting and/or being.

9. "WYDEQ" refers to the Wyoming Department of Environmental Quality or any agency, officer or employee of WYDEQ. This includes the Wyoming Division of Air Quality ("Air Division"), and any agency, officer or employee of the Air Division.

10. "You" or "Your" means WYDEQ or any agency, officer, or employee of WYDEQ. This includes the Air Division and any agency, officer or employee of the Air Division.

## INSTRUCTIONS

In responding to these Interrogatories, Requests for Production of Documents, and Requests for Admissions, please adhere to the following instructions:

1. Furnish all information that is available to you, known to you, or that can be known after reasonable inquiry, including information in the possession, custody, or control of your attorneys, staff, agents, employees, officers, consultants, experts, or other representatives. In answering, you are required to make a reasonable inquiry to ascertain the information or knowledge necessary to respond in detail to such request. Answers must be specific and responsive.

2. If you do not or cannot answer any discovery request after exercising due diligence in attempting to secure the information, please state your answer to the extent possible and indicate your inability to answer the remainder. Include whatever information you may have concerning the unanswered portions and set forth in detail all efforts undertaken to ascertain the requested information.

3. If anything is deleted from a document produced in response to a discovery request, state the reason for the deletion, the subject matter of the deletion, and the name of the person or persons who decided to delete the information.

4. If any information otherwise responsive to these discovery requests is withheld pursuant to an objection or claim of privilege, answer portions of the request for which the privilege does not apply, identify the objection or privilege claimed, set forth a specific basis upon which the objection is raised or the privilege is claimed, and provide a privilege log and/or index of documents withheld that includes the following information: a statement identifying the nature of the information withheld, the date and subject matter of any communication containing

that information, the names of all persons with knowledge of the information including the author, and the basis for withholding the information.

5. Answer all discovery requests under oath, and provide verification from appropriate representatives of WYDEQ, to support these answers.

6. Provide answers to these discovery requests within 30 days of the date of service. If you cannot complete these answers within this time, provide immediate notice to Plaintiffs' counsel so that an amicable resolution to the problem can be reached.

7. These discovery requests are to be deemed continuing in nature. Supplement all answers as required by Wyo. R. Civ. P. 26(e).

#### **INTERROGATORIES**

1. Identify and describe all persons at WYDEQ who were involved in any aspect of the permit application and approval process for Air Permit CT-4631 and their role in the process.

2. Identify and describe each step of the application and approval process for Air Permit CT-4631.

3. Identify and describe all communications between WYDEQ and Basin Electric regarding Air Permit CT-4631 that are not otherwise part of the Administrative Record.

4. Identify and describe any communications or documents in WYDEQ's possession relating to WYDEQ's consideration of greenhouse gases, supercritical or ultra-supercritical boilers, Integrated Gasification Combined Cycle technology, or Best Available Control Technology limits for air pollutants, including carbon dioxide, nitrous oxides, sulfur dioxide, mercury, or particulate matter with respect to Air Permit CT-4631.

5. Identify and describe any documents or communications in WYDEQ's possession discussing the issue of global warming or emissions of greenhouse gases, including any studies,

proposals, proposed rules, comments on legislation, comments on permit applications, internal discussions, inter-agency discussions, or communications with the Governor or his staff.

6. Identify all persons who assisted with the responses to these Interrogatories, Requests for Production, and Requests for Admissions.

### **REQUESTS FOR PRODUCTION OF DOCUMENTS**

1. Provide a certified copy of the Administrative Record for Air Permit CT-4631.

2. Provide a certified copy of all documents in WYDEQ's possession relating to Basin Electric's proposal to build and operate the Dry Fork Station that are not otherwise part of the Administrative Record.

3. Provide a certified copy of any document used to answer any of the enclosed Interrogatories or Requests for Admissions.

4. Provide a certified copy of any document that contains information responsive to any of the enclosed Interrogatories or Requests for Admissions.

### **REQUESTS FOR ADMISSIONS**

1. Admit or deny that the Dry Fork Station, if built and operated under the conditions established by WYDEQ in Air Permit CT-4631, will emit carbon dioxide, methane, and nitrous oxide.

2. Admit or deny that the Dry Fork Station, if built and operated under the conditions established by WYDEQ in Air Permit CT-4631, has the potential to emit more than 3 million tons of carbon dioxide per year.

3. Admit or deny that the Dry Fork Station, if built and operated under the conditions established by WYDEQ in Air Permit CT-4631, has the potential to emit more than 20 tons of methane per year.

4. Admit or deny that the Dry Fork Station, if built and operated under the conditions established by WYDEQ in Air Permit CT-4631, has the potential to emit more than 50 tons of nitrous oxide per year.

5. Admit or deny that carbon dioxide, methane, and nitrous oxide are “greenhouse gases,” meaning they trap infrared radiation reflected from Earth inside the Earth’s atmosphere.

6. Admit or deny that human activities, including burning of fossil fuels, have increased the concentrations of greenhouse gases in the Earth’s atmosphere.

7. Admit or deny that the Dry Fork Station, if built and operated under the conditions established by WYDEQ in Air Permit CT-4631, will increase the quantity of greenhouse gases in the Earth’s atmosphere.

8. Admit or deny that it is likely that increased levels of greenhouse gases in the atmosphere as a result of human activities have contributed to an increase in the average air temperature on Earth.

9. Admit or deny that it is likely that increased levels of greenhouse gases in the atmosphere as a result of human activities have contributed to an increase in the average water temperature on Earth.

10. Admit or deny that it is likely that the increase in the average air and/or water temperature on Earth has contributed to shrinking of mountain glaciers.

11. Admit or deny that it is likely that the increase in the average air and/or water temperature on Earth has contributed to reductions in snow-cover and earlier melting of snow in the spring.

12. Admit or deny that it is likely that the increase in the average air and/or water temperatures on Earth has contributed to an accelerated rate of sea level rise.

13. Admit or deny that it is likely that increases in greenhouse gas emissions above current levels will cause further warming of the average air and water temperatures on Earth.

14. Admit or deny that any further warming of the average air and/or water temperature on Earth as a result of human activities will likely contribute to shrinking of mountain glaciers.

15. Admit or deny that any further warming of the average air and/or water temperature on Earth as a result of human activities will likely contribute to reductions in snow-cover and earlier melting of snow in the spring.

16. Admit or deny that any further warming of the average air and/or water temperature on Earth as a result of human activities will likely contribute to an accelerated rate of sea level rise.

17. Admit or deny that any further warming of the average air and/or water temperature on Earth as a result of human activities will likely impact water supplies in the western United States.

Dated: January 3, 2008

s/ James S. Angell  
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