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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	)	

RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Respondent, the Department of Environmental Quality (DEQ) by and through undersigned counsel and pursuant to WYO. R. CIV. P. Rules 12(b)(6) and 6(c)(1), the Environmental Quality Council Rules, Chapter II, Sections 3 and 14, and this Council's ORDER dated January 30, 2008, provides the following Reply in Support of Its Motion to Dismiss.

I. ARGUMENT

The DEQ does not currently regulate CO_2 and other greenhouse gases. Neither the Clean Air Act (CAA) and corresponding Environmental Protection Agency (EPA) regulations, the Wyoming Environmental Quality Act (WEQA), nor the Wyoming Air Quality Standards and Regulations (WAQSR) currently impose the legal duties that Protestants allege regarding CO_2 and other greenhouse gases. Consequently, where CO_2 and

other greenhouse gases are not currently regulated or subject to regulation, Protestants' claims fail as a matter of law and must be dismissed.

Despite Protestants' assertions, climate change is not the issue in front of the Council. Whether and how CO_2 and other greenhouse gases should be regulated is also not the issue in front of the Council. The issue that is in front of the Council is whether the DEQ was legally required to conduct a Best Available Control Technology (BACT) analysis for CO_2 and other greenhouse gases that are currently unregulated pollutants.[1] As DEQ set forth in its Memorandum in Support of Motion to Dismiss (DEQ Memorandum), CO_2 is not currently a regulated pollutant pursuant to the CAA and corresponding EPA regulations, the WEQA nor the WAQSR. DEQ does not currently regulate CO_2 or other greenhouse gases. Therefore Protestants' CO_2 and other greenhouse gas claims fail as a matter of law and must be dismissed.

A. CO2 AND OTHER GREENHOUSE GASES ARE NOT CURRENTLY REGULATED UNDER THE CAA OR THE WEQA

DEQ and Protestants do not dispute that BACT is required for "regulated NSR pollutants." *See* DEQ Memorandum, pgs 8-12; Protestants' Resp. pg. 7. A "regulated NSR pollutant" means:

> (i) Any pollutant for which a national ambient air quality standard [NAAQS] has been promulgated and any constituents or precursors for such pollutants identified by the EPA

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[1] Protestants cite to a variety of state policy actions and say Wyoming should follow suit. Although outside the scope of this proceeding, the DEQ notes that almost one year ago Wyoming joined "The Climate Registry" along with 31 other states. See "WY Joins 31 states in Effort to Address Global Warming," DEQ Press Release (May 8, 2007) *available at* http://deq.state.wy.us/out/downloads/climateregistry1.pdf.

> Administrator (e.g., volatile organic compounds are precursors for ozone);
>
> (ii) Any pollutant that is subject to any standard promulgated under section 111 [NSPS] of the Federal Clean Air Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by Title VI of the Federal Clean Air Act; or
>
> (iv) Any pollutant that otherwise is subject to regulation under the Federal Clean Air Act; except that any or all hazardous air pollutants either listed in section 112 of the Federal Clean Air Act or added to the list pursuant to section 112(b)(2) of the Federal Clean Air Act, which have not been delisted pursuant to section 112 (b)(3) of the Federal Clean Air Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Federal Clean Air Act.

6 WASQR § 4(a); *see also* 40 C.F.R. §§ 52.21(b)(50) and 51.166(b)(49).

Protestants' Response does not dispute that: 1) there are no NAAQS or WAAQS currently promulgated for CO_2 or other greenhouse gases; 2) CO_2 and other greenhouse gases are not currently subject to any NSPS standard; or 3) CO_2 and other greenhouse gases are not currently subject to any standards established pursuant to Title VI of the CAA. Therefore, the only remaining point of dispute is whether CO_2 and other greenhouse gases are "otherwise subject to regulation" under the CAA.

B. A POLLUTANT MAY BE AN "AIR POLLUTANT" BUT NOT BE CURRENTLY SUBJECT TO REGULATION PURSUANT TO *MASSACHUSETTS v. EPA*

Protestants assert that the Supreme Court in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007) held that "congress intended to regulate greenhouse gas emissions under the Clean

Air Act." Protestants' Resp. pg. 12. What the Supreme Court actually held was that CO_2 met the definition of "air pollutant" and the EPA had the authority to regulate emissions of such gases from new motor vehicles. *Massachusetts*, 127 S. Ct. at 1459-60. The Court did not hold that CO_2 was already a regulated pollutant nor did the Court direct EPA to regulate CO_2. Instead, the Court remanded the matter back to EPA to make a determination whether CO_2 "may reasonably be anticipated to endanger public health or welfare." *Id.* at 1462-63. By remanding the matter to EPA, the Court implicitly recognized that CO_2 was not currently regulated and that before EPA could regulate CO_2, EPA had to take additional action.

Since the remand, EPA has been considering how to respond to the Court's remand. Last week, the EPA informed the House Committee on Energy and Commerce that EPA plans to solicit public input and information through an Advance Notice of Proposed Rulemaking (ANPR) regarding "the specific effects of climate change and potential regulation of greenhouse gas emissions." *See* Attachment 2, Letter from Stephen L. Johnson, Administrator, EPA, to the Honorable John Dingell, Chairman, Committee on Energy and Commerce (March 27, 2008). Specifically, the ANPR:

> will also raise potential issues in the New Source Review (NSR) program, including greenhouse gas thresholds and whether permitting authorities might need to define best available control technologies. If greenhouse gases were to become regulated under the NSR [new source review] program, the number of Clean Air Act permits could increase significantly and the nature of the sources requiring permits could expand to include many smaller sources not previously regulated under the Clean Air Act. This notice will provide EPA an opportunity to hear from the public and from states on these issues.

Id. at pg. 2.

Since the Supreme Court's decision in *Massachusetts v. EPA*, various courts and administrative hearing bodies have determined whether a BACT analysis is currently required for CO_2. DEQ is not aware of (and Protestants have not indicated that) any court or administrative hearing body has determined that a BACT analysis is required for CO_2. To the contrary, DEQ's Memorandum noted that the Utah Air Quality Board rejected Sierra Club's arguments that BACT requires consideration of CO_2 or other greenhouse gases where no rules have been promulgated requiring the limitation or consideration of such gases as part of the permit process. *See* Attachment 1 to DEQ Memorandum, *In re Sevier Power Company Power Plant*, Utah Air Quality Board Docket No. DAQE-AN2529001-04, *Findings of Fact, Conclusions of Law, and Final Order* (Jan. 9, 2008); *see also* Attachment 3, *Friends of the Chattahoochee, Inc. v. Couch*, Georgia Office of State Administrative Hearings Docket No. OSAH-BNR-AQ-0732139-60 - Howells, *Memorandum Opinion and Order on Motions for Summary Determination* (Dec. 18, 2007) at pgs. 5-6 (CO_2 BACT not required where neither EPA nor GA currently promulgated any regulations "restricting or limiting the emissions of CO_2"); Attachment 4, *In re Appeal by Southern Montana Electric Regarding its Air Quality Permit No. 3423-00 for the Highwood Generation Station,* Montana Board of Environmental Review Docket No. BER 2007-06 AQ, *Third Order Setting Hearing and Denying Motion to Strike Portions of Affidavit of Appellants* (Jan. 22, 2008) at pg 1 (CO_2 is not a regulated pollutant "subject to regulation" and BACT); *In re Otter Tail Power Company*, 744 N.W. 2d 594 (S.D. 2008)(upholding S.D. Public Utilities Commission decision granting a permit in part because "CO_2 is not currently regulated either by Congress or South Dakota").

Although the Supreme Court held that CO_2 is an air pollutant, the Supreme Court, EPA and other states recognize that CO_2 is not currently subject to regulation under the CAA. DEQ does not currently regulate CO_2 or other greenhouse gases. Therefore Protestants' CO_2 and other greenhouse gas claims fail as a matter of law and must be dismissed.

C. CO_2 AND OTHER GREENHOUSE GASES ARE NOT SUBJECT TO REGULATION PURSUANT TO § 821 OF PUBLIC LAW 101-549

Protestants contend that the information gathering, monitoring and data collection provisions of section 821 of Public Law 101-549 (hereinafter referred to as "§ 821") and EPA's attendant regulations subject CO_2 to regulation. Protestants' Resp. pgs. 8-13. The § 821 provisions do not constitute regulation of CO_2 because they do not mandate any control of CO_2 nor do they establish emission limits or performance standards for CO_2. Protestants' contention ignores the distinction between regulations that actually control emissions (NAAQS, NSPS) and those that impose other requirements having nothing to do with limiting or controlling emissions (data collection).

Protestants argue that, if Congress wanted to limit BACT to pollutants subject to actual control of emissions, Congress could have used the words "emission limitations" and "emission standards" instead of "regulation." Protestants' Resp. pgs. 9-10. However, it is not necessary to read such language into the statute to reach that conclusion.

Applying the doctrine of *ejusdem generis* to the phrase "otherwise is subject to regulation" sheds light on its meaning. Under this doctrine, where general words follow specific words in a statute, the meaning of the general words are limited by the content and

meaning of the specific words. *See Laughter v. Bd. of County Comm'rs for Sweetwater County*, 2005 WY 54, ¶ 39, 110 P.3d 875, 39 (Wyo. 2005). *Ejusdem generis* recognizes that where the legislature uses a catch-all phrase, the intent is to include things "similar to those specifically listed." *Sponsel v. Park County*, 2006 WY 6, ¶ 16, 126 P.3d 105, 16 (Wyo. 2006).

As discussed in section I.A. above, the first three categories in the definition of "regulated NSR pollutants" are specific and limit the definition to pollutants requiring emission standards or controls, such as NAAQS, NSPS, and standards established pursuant to Title VI of the CAA. The final category uses the catch-all phrase "otherwise is subject to regulation" under the CAA. Applying *ejusdem generis* to the definition of "regulated NSR pollutant" requires the general phrase "otherwise subject to regulation" to be read in light of the preceding specific phrases limiting the definition to standards that clearly control emissions. Therefore, "subject to regulation" means subject to emission standards or controls, in essence regulated. The DEQ does not currently regulate CO_2 and other greenhouse gases.

The definition of BACT, which presupposes an existing limit or standard, provides additional support: "[a]pplication of BACT shall not result in emissions in excess of those allowed ...." 6 WAQSR § 4(a)(emphasis added). To know what level of emissions are "allowed," one must know the emission standards or controls prescribed. DEQ does not currently regulate CO_2 or other greenhouse gases because DEQ has not established any emission standards or controls for CO_2. CO_2 is not otherwise "subject to regulation."

Therefore Protestants' CO_2 and other greenhouse gas claims fail as a matter of law and must be dismissed.

Finally, Protestants' attempt to discredit two Environmental Appeals Board (EAB) cases on the basis that those cases did not explicitly discuss § 821 fall flat. Protestants' Resp. pgs. 11-12. Both cases were decided after § 821 was enacted and, despite Protestants' claims to the contrary, both recognize that CO_2 is not regulated under the CAA nor subject to PSD permitting. *See In re Inter-power of New York, Inc.*, 5 E.A.D. 130, 151 (EAB 1994); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1994).

D. DEQ IS NOT REQUIRED TO CONSIDER CO_2 AND OTHER GREENHOUSE GASES IN BACT COLLATERAL IMPACTS ANALYSIS

Protestants argue that even if CO_2 is not subject to regulation, DEQ must still consider the collateral environmental impacts of CO_2 in the BACT analysis. Protestants' Resp. pgs. 11-22. However, as set forth in DEQ's Memorandum, the focus of a BACT collateral impact analysis is on local impacts directly attributable to the proposed facility. DEQ Memo. pgs. 19-21. By focusing on unusual or unique circumstances specific to the facility, the BACT collateral impact analysis allows the air quality permitting agency to reject the most effective technology and mandate less effective technology for controlling the particular pollutant. *See In re Columbia Gulf Transmission Co.*, 2 E.A.D. 824, 827 (EAB 1989); *see also* Protestants' Response, pg. 21 (recognizing one purpose of the collateral impacts analysis is to allow DEQ to consider less stringent control technology), *In re World Color Press, Inc.* 3 E.A.D. 474, 478 (Adm'r 1990) (collateral impact focus is on specific local impacts), *In re*

Kawaihae Cogeneration Project, 7 E.A.D. at 116-17 (focus is on circumstances or concerns "unusual or unique" to the facility or locality).

II. CONCLUSION

Protestants' CO_2 and other greenhouse gas claims fail as a matter of law because CO_2 is not currently a regulated pollutant pursuant to the federal Clean Air Act (CAA) and corresponding EPA regulations, the Wyoming Environmental Quality Act (WEQA) or Wyoming's Air Quality Standards and Regulations (WAQSR). Consequently, as a matter of law, it is impossible for Protestants to assert any legally cognizable claims that the DEQ's decision did not comply with statutory and regulatory requirements where neither the CAA, the WEQA, nor the WAQSR currently impose the legal duties that Protestants allege regarding CO_2 and other greenhouse gases – the simple fact is that CO_2 and other greenhouse gases are not currently regulated under either federal or Wyoming law. Thus, Protestants can not make any claims under Wyoming law that the DEQ failed to consider CO_2 or other greenhouse gas emissions in issuing the Dry Fork Station permit, and their Petition should be dismissed as to those claims.

DATED this 3rd day of April, 2008.

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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 in Support of its Motion to Dismiss* through United States mail, postage prepaid on this the 3rd day of April, 2008 to the following:

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