

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JUN 30 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

In the Matter of the Appeal)
and Petition for Review of:)
BART Permit No. MD-6040) Docket No. 10-2801
(Jim Bridger Power Plant); and)
BART Permit No. MD-6042)
(Naughton Power Plant).)

**PETITIONER PACIFICORP'S MEMORANDUM IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Pursuant to Wyo. R. Civ. P. 7(b)(1) and 56, and the Environmental Quality Council Rules, Chapter II, Sections 3 and 14, Petitioner, PacifiCorp, through its counsel of record, respectfully submits the following memorandum of points and authority in support of its Motion for Partial Summary Judgment.

I. REGULATORY BACKGROUND

Section 169A of the Clean Air Act ("CAA") sets forth the national goal of the "prevention of any future, and the remedying of any existing, impairment of visibility¹ in Class I areas which impairment results from manmade air pollution." Class I areas include national parks and wilderness areas. EPA has stated that "Section 169A of the CAA calls for States to develop implementation plans ensuring reasonable progress toward the national goal, including emission limits, schedules of compliance and other measures as necessary." 64 FR 35727.

These state implementation plans, or "SIPs", are intended to be updated periodically in an effort

¹ EPA has found that "regional haze is visibility impairment caused by the cumulative air pollutant emissions from numerous sources over a wide geographic area." 64 FR 35714. "Regional haze" is often the "buzzword" used to refer to "visibility impairment" and the federal and state regulations addressing visibility impairment are often called "regional haze rules."

to gradually work toward achieving the goal of “natural visibility conditions” by the year 2064.² SIPs must include “(1) best available retrofit technology (BART) for certain existing stationary sources that emit pollutants that ‘may reasonably be anticipated to cause or contribute’ to visibility impairment in a mandatory Class I area . . . and (2) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal.” The Clean Air Act Handbook, Martineau and Novello, 2 Ed., pg 197. (2004). This memorandum addresses Wyoming Division of Air Quality’s (“DAQ”) improper attempt to impose part of its long-term strategy in a BART permit without regulatory authority to do so and without first adopting that long-term strategy as part of its SIP.

II. INTRODUCTION

This memorandum and accompanying motion relate solely to certain issues³ raised by the Best Available Retrofit Technology (“BART”) permit issued to PacifiCorp’s Jim Bridger power plant (the “Bridger BART Permit”).⁴ As required by regulation, DAQ reviewed the Bridger plant’s BART permit application,⁵ issued a BART Application Analysis, allowed public input, made a “BART determination,” and issued a BART permit. The Bridger BART Permit,

² 40 CFR 51.308(d)(1)(i)(B).

³ Other issues raised in PacifiCorp’s appeal concerning the Jim Bridger plant and PacifiCorp’s Naughton Unit 3 will be considered at a later time in this proceeding as needed.

⁴ The formal permit title for the Bridger BART Permit is “**Permit No. MD-6040 (BART Permit for the Jim Bridger Plant)**” dated December 31, 2009.

⁵ “Wyoming’s Environmental Quality Council approved a State-only BART regulation . . . on October 10, 2006, that became effective in December 2006. The provisions of the regulation required BART-subject sources to submit an application, according to a schedule determined by the Air Quality Division, for a BART determination.” See Wyoming 2009 draft Regional Haze SIP, pg. 90.

however, improperly contains two permit conditions (17 and 18) that essentially require the installation of selective catalytic reduction systems (“SCR”) to control nitrogen oxide (“NO_x”) at all four Bridger plant units. These conditions exceed the scope and authority of the applicable regulations and are inconsistent with DAQ’s actual BART determination found in the permit. For additional context, DAQ notes in the BART Application Analysis for the Bridger Plant that the “capital costs for SCR on Units 1 – 4 are \$166,500,000 per unit.”⁶ Needless to say, the outcome of this issue will have a significant impact on PacifiCorp and its customers. Because there are no factual disputes in regard to these issues, they are ripe for summary judgment during this initial dispositive motion period.

III. STATEMENT OF THE ISSUES

In its Appeal and Petition for Review of BART Permits, which was submitted February 26, 2010, PacifiCorp set forth numerous grounds upon which it appeals DAQ’s issuance of the Bridger BART Permit. At this time, PacifiCorp moves for partial summary judgment as a matter of law only on the following grounds:

First, DAQ erred when it included non-BART elements of its draft “long-term strategy” (“LTS”)⁷ (Conditions 17 and 18) in the Bridger BART Permit for Bridger Units 1 - 4. Neither Wyoming’s BART or LTS regulations, nor Wyoming’s draft (unapproved)

⁶ Bridger Plant BART Application Analysis, p. 49.

⁷ As explained more fully below, a “long-term strategy” is another aspect of addressing regional haze in addition to, and separate from, BART requirements. In general, DAQ is required to impose BART requirements under BART permits and also is required to address separately non-BART issues as part of a “long-term strategy.” Nothing in the regional haze program suggests that non-BART elements of a state’s “long-term strategy” should be combined with BART requirements and included in BART permits.

Regional Haze SIP, support DAQ's inclusion of Conditions 17 and 18 in the Bridger BART permit. Accordingly, PacifiCorp is entitled to judgment as a matter of law and Conditions 17 and 18 should be stricken from the permit.

Second, even if non-BART elements of a draft LTS are appropriate in a BART permit, DAQ erred by including within Conditions 17 and 18 the requirements that PacifiCorp must submit future air permit applications that would: (i) as to Bridger Units 3 and 4, require "the installation of selective catalytic reduction (SCR) . . . achieving 0.07 lb/MMBtu on a 30-day rolling average;" and (ii) as to Bridger Units 1 and 2, "address each add-on NO_x control as a system of continuous emissions reduction *achieving the lowest viable NO_x emission.*" Neither state nor federal regulations require these controls or limits as part of a LTS. There are no applicable legal standards or criteria to identify or choose the "lowest viable" NO_x emissions reduction system for Units 1 and 2. Accordingly, PacifiCorp is entitled to judgment as a matter of law for the additional reason that Conditions 17 and 18 are arbitrary and capricious.

Third, even if non-BART elements of a draft LTS are appropriate in a BART permit, DAQ erred by requiring in Condition 18 as to Units 1 and 2 that PacifiCorp conduct an "objective" four factor analysis in the future while at the same time mandating what the outcome of that analysis will be (i.e., "a maximum NO_x emissions rate of 0.07 lb/MMBtu"). The four factor analysis is intended to reach an outcome determined by objectively applying each of the four factors. It is not intended to result in a pre-determined outcome.

Accordingly, PacifiCorp is entitled to judgment as a matter of law that Condition 18 is arbitrary and capricious.

IV. LEGAL STANDARD

The Wyoming Department of Environmental Quality's ("DEQ") Rules of Practice & Procedure ("RPP") provide that the Wyoming Rules of Civil Procedure apply to matters before the Environmental Quality Council ("EQC"). *See* DEQ RPP Ch. 2, § 14; *see also Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, ¶ 6; 152 P.3d 367, 370 (Wyo. 2007) (Wyoming Supreme Court recognized that "Rule 56 of the Wyoming Rules of Civil Procedure apply to administrative cases."). Pursuant to Rule 56 of the Wyoming Rules of Civil Procedure, summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Wyo. R. Civ. P. 56(b), (c)*.

"The purpose of summary judgment is to dispose of suits before trial that present no genuine issues of material fact. 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." *See Rollins*, 2007 WY 28, ¶ 6 (citing *Markstein v. Countryside I, LLC*, 2003 WY 122, ¶ 11, 77 P.3d 389, 393 (Wyo. 2003)). Where there are no genuine issues of material fact, summary judgment requires strict application of the law. *See Board of County Comm'rs of County of Laramie v. City of Cheyenne*, 2004 WY 16, ¶ 8; 85 P.3d 999, 1002 (Wyo. 2004).

V. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. As required by DAQ's BART regulations,⁸ PacifiCorp timely submitted a BART permit application for its Bridger power plant on January 16, 2007. PacifiCorp also submitted subsequent information and amendments to DAQ in support of the application. *See* DEQ Notice of Publication for Permit Application 6040, attached as Exhibit "A."

2. DAQ published BART Application Analysis AP-6040 for the Bridger plant on May 29, 2009 and solicited public comment. *Id.* A public hearing was held in August of 2009. *See* Bridger BART Permit, attached as Exhibit "B."

3. PacifiCorp submitted both oral and written comments (which are supportive of PacifiCorp's Petition) on August 4, 2009 regarding the proposed Bridger BART Permit. *See* Exhibit "C." After reviewing and responding to comments by PacifiCorp and others, DAQ issued the final Bridger BART Permit on December 31, 2009. *See* DAQ Response to PacifiCorp's Appeal at ¶ 2; *see also* Exhibit B.

4. The Bridger BART Permit contains "NOx BART" requirements for the four Bridger units, including NOx emissions limits of 0.26 lb/MMBtu on a 30-day rolling average and the installation and operation of low-NOx burners with over-fire air. Bridger BART Permit, Conditions 5, 7, and 16

5. Condition 17, one of two non-BART provisions in the Bridger BART Permit, requires PacifiCorp to submit "a permit application for installation of selective catalytic reduction (SCR) on Jim Bridger Units 3 and 4 to the Division under the Long-Term Strategy of the Wyoming § 308 Regional Haze State Implementation Plan. . . ." Condition 17 further

⁸ Wyoming's BART regulations are found at Wyoming Air Quality Standards and Regulations, Ch. 6, §9.

requires that SCR is to be installed on Unit 3 by December 31, 2015 and Unit 4 by December 31, 2016. *See* Exhibit B, ¶ 17.

6. In addition, Condition 18, the second of the non-BART provisions in the Bridger BART Permit, requires that PacifiCorp “submit a permit application for installation of additional add-on NO_x control on Jim Bridger Units 1 and 2 to the Division no later than January 1, 2015, under the Long-Term Strategy of the Wyoming §308 Regional Haze State Implementation Plan.” *Id.* at ¶ 18. The application required by Condition 18 must include “an analysis of the four statutory factors and the associated visibility impacts from the application of each proposed NO_x control and resulting emissions level” and shall address “each add-on NO_x control as a system of continuous emissions reduction achieving the lowest viable NO_x emission, not to exceed a maximum of 0.07 lb/MMBtu on a 30-day rolling average.” Finally, the Bridger BART Permit requires that additional add-on NO_x controls be installed and operational on Bridger Unit 1 and 2 by December 31, 2023. *See id.*

7. DAQ issued for public comment, on August 25, 2009, a draft Wyoming State Implementation Plan for Regional Haze (“Regional Haze SIP”) intended, in part, to address NO_x emission controls at the Bridger Power plant. *See* Exhibit “D” at 97. The Regional Haze SIP, however, has neither been proposed for final approval by DAQ nor in fact approved by the Wyoming Environmental Quality Council, the Director of the Wyoming Department of Environmental Quality, the Wyoming Governor, or by the EPA. DAQ’s website, as of June 30, 2010, states that DAQ is

currently addressing regional haze (under 40 CFR 51.309(g)) in Wyoming (and neighboring states) with the focus on impairment caused by sources of nitrogen oxides and particulate matter. Earlier work listed below under “Work Completed” dealt primarily with impairment caused by sulfur dioxide. The AQD

held a SIP hearing on October 27, 2009 in Casper, Wyoming at the Casper DEQ Field Office. The comment period has closed. The Division is currently reviewing public comments.

8. At this point in time, the Regional Haze SIP is in draft form and unapproved.

No other Wyoming SIP has authorized DAQ to require SCRs be installed at the Bridger power plant as part of a Long-Term Strategy.

9. Several years ago, Wyoming adopted a Long Term Strategy for regional haze, as evidenced by WDAQ's 2003 Long Term Strategy Report. See Exhibit "E." However, the 2003 Long Term Strategy Report does not contain any SCR-related requirements for the Bridger power plant and, to PacifiCorp's knowledge, no revisions to Wyoming's Long Term Strategy have been made that would give DAQ authority to impose Long Term Strategy requirements in Bridger's BART permit.

VI. ARGUMENT

A. DAQ may not Act Outside its Statutory and Regulatory Limits.

It is axiomatic that DAQ can only act within the powers that it has. "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 they must find within the statutes warrant for the exercise of any authority which they claim.'" *Amoco Prod. Co. v.*

Wyoming State Bd. of Equalization, 12 P.3d 668, 673 (Wyo. 2000) (internal citations omitted).⁹

⁹ See also *Pedro/Aspen, Ltd. v. Board of County Comm'rs for Natrona County*, 2004 WY 84, ¶ 29; 94 P.3d 412, 420 (Wyo. 2004) (An administrative agency is not a 'super legislature' empowered to change statutory law under the cloak of an assumed delegated power."). "When an administrative agency takes an action that exceeds its authority or proceeds in a manner unauthorized by law, that action is null and void." See *id.*; *Mayland v. Flitner*, 2001 WY 69, ¶ 47; 28 P.3d 838, 854 (Wyo. 2001) ("Any agency decision that falls outside the confines of the statutory guidelines articulated by the legislature is contrary to law and cannot stand."). If there

Further, in Wyoming, “[r]ules adopted pursuant to statutory authority and properly promulgated have the force and effect of law. . . . and [a]n administrative agency must follow its own rules and regulations.” *State v. Buggy Bath Unlimited, Inc.*, 2001 WY 27, *19; 18 P.3d 1182, 1188 (Wyo. 2001) (internal citations omitted). An agency that does not follow its own rules will “face reversal of its action.” *See RME Petroleum Co. v. Wyo. Dep’t. of Rev.*, 2007 WY 16, ¶ 40 ; 150 P.3d 673, 688 (Wyo. 2007); *see also Goedert v. Wyo. Workers’ Safety & Comp.*, 991 P.2d 1225, 1227 (Wyo. 1999) (“if agencies had failed to follow their rules, we would have been obliged to reverse their decisions”).

As explained below, DAQ’s decision to include SCR-related LTS elements (“SCR/LTS”) in the Bridger BART Permit exceeded DAQ’s statutory/regulatory grant of authority with respect to issuing BART permits and also is contrary to DAQ’s own rules.

A.1. Wyoming’s Statutes and BART regulations do not provide DAQ the authority to include SCR/LTS requirements in the Bridger BART Permit.

DAQ cites no statute or law as the legal basis for Conditions 17 and 18 of the Bridger BART Permit. No Wyoming statute gives DAQ “LTS permitting authority;” nor is there any specific Wyoming law that allows DAQ to expand its BART permitting program to include LTS elements. In sum, DAQ’s statutory basis to impose Conditions 17 and 18 in the Bridger BART Permit is undeveloped and unclear.

Wyoming’s BART permit regulations, however, are clear. They specify exactly who must apply for a BART permit, what guidelines should be used in making BART determinations, what information must be included in BART permit applications, and the nature of resulting

is “reasonable doubt of the existence of a power[, it] must be resolved against the exercise thereof. A doubtful power does not exist.” *See Mayland*, 2001 WY 69, ¶ 47 (citations omitted).

BART permit requirements. *See* Wyoming Air Quality Standards and Regulations, Ch. 6, § 9. A BART permit application requires, among other things, the “name and address (physical location) of the existing stationary facility **subject to BART**”, “a proposal and justification for **BART emissions limits and control technology** that reflect the **BART requirements . . .**”, and a “schedule to install and operate **BART**.” *Id.* at (e)(i) (emphasis added). Nothing in Wyoming’s BART permit application regulations, however, require a BART applicant to include in its application any information regarding potential, future LTS emissions limits or potential, future LTS technology requirements. If DAQ cannot properly ask for LTS information in a BART application, and the Bridger Plant did not include such information in its BART application, then how can DAQ now impose elements of its LTS in the Bridger BART Permit? The answer, of course, is that DAQ cannot. This is particularly true because DAQ’s BART requirements do not give any notice to PacifiCorp, the regulated community or the public of this possible outcome. *See, e.g., Rissler & McMurray Co. v. Env’tl. Quality Council*, 856 P.2d 450, 454 (Wyo. 1993) (the purpose of standards and regulations is to “furnish notice to the public of how [a] decision may be reached”).

Likewise, the BART permit approval regulations fail to mention LTS elements or issues. The BART permit approval regulations state that DAQ may “approve, or amend the proposed emission limits, **BART technology**, and compliance schedule.” *Id.* at (e)(iii) (emphasis added). No authority is given to DAQ in the BART permit approval regulations to require “LTS technology” or “LTS emissions limits” as DAQ did in Conditions 17 and 18 of the Bridger BART Permit. Additionally, Wyoming’s BART permit approval regulations require that “**BART requirements** established pursuant to any **BART permit . . .** shall be included in a[n] . .

. Operating Permit” *Id.* at (e)(vi) (emphasis added). The BART permit approval regulations do not address how a source would incorporate into the operating permits LTS elements found in BART permits, and the BART regulations cannot be read fairly to require such.

Sources operating under a BART permit must install and operate BART technology “as expeditiously as practicable but in no event later than five years” after the approval of Wyoming’s Regional Haze SIP.¹⁰ Given that Conditions 17 and 18 allow installation and operation of the LTS-related NO_x control equipment (SCRs) beyond this five year window, Conditions 17 and 18 cannot be considered “BART” requirements and, therefore, should not be included in the Bridger BART Permit.

Finally, Conditions 17 and 18 should be stricken from the Bridger BART Permit because DAQ, in fact, concluded that SCR is not BART for the Bridger plant. *See* Exhibit B at DAQ’s Response to Comments for Bridger BART Permit, II.1 (“ . . . SCR was not determined to be BART). Accordingly, DAQ did not have authority to include SCR/LTS in the Bridger BART Permit.

A.2. Wyoming’s draft, unapproved Regional Haze SIP does not provide DAQ the authority to include SCR/LTS requirements in the Bridger BART Permit.

Because Conditions 17 and 18 cannot be BART requirements, what are they? The answer is that Conditions 17 and 18 are what they say they are -- requirements that DAQ is attempting to impose under “the Long-Term Strategy of the Wyoming Sec. 308 Regional Haze State Implementation Plan.” However, DAQ has not explained nor justified how a draft,

¹⁰ The federal regulations also contain the five-year BART time requirement. 40 CFR 51.308(e)(1)(iv).

unapproved Regional Haze SIP could possibly provide DAQ with authority to impose NO_x emissions control requirements in a BART permit. A SIP is not valid until approved and adopted. *See, e.g.*, 40 C.F.R. Part 51, App. V (stating that a State must submit evidence that the SIP has been adopted in “final form” before the EPA will consider the SIP “complete;” completeness is one step along the SIP process road to final EPA approval.).¹¹ Hence, the draft Regional Haze SIP cannot provide the needed authority for DAQ to justify its actions relative to Conditions 17 and 18.

PacifiCorp raised this very concern in its public comments regarding DAQ’s BART Application Analysis for the Bridger plant and stated that it “is premature to use a BART application analysis to propose emissions reductions requirements under a Long-Term Strategy which has not yet been released.” DAQ then responded:

The BART permit conditions that are associated with Long-Term Strategy have been included in the August 25, 2009 draft of Wyoming’s Regional Haze SIP without modification. The particular Long-Term Strategy requirements, in this case add-on NO_x controls for Units 1 through 4 at the Jim Bridger plant, are **established as enforceable on the source by the Division through inclusion in the BART permit.**

See DAQ’s Response to Comments for Bridger BART Permit, IV.9. (emphasis added).

DAQ’s reasoning, however, is circular at best. In the text of Conditions 17 and 18, DAQ cites the draft, unapproved Regional Haze SIP as the authority for Conditions 17 and 18. In the comments quoted above, DAQ states that it has the authority to include Conditions 17 and 18 in

¹¹ EPA will begin the SIP review and approval process only after EPA determines the SIP is “complete.” To be considered “complete”, a SIP must include: a formal letter from the governor or appropriate designee; evidence of state adoption of the plan; evidence of the state’s legal authority; etc. Within 12 months after EPA considers the SIP “complete”, the EPA must approve or disapprove (in part or in full) the SIP, or provide conditional approval. The Clean Air Act Handbook, Martineau and Novello, 2 Ed., pgs 50-52. (2004).

the Bridger BART Permit because it made them “enforceable . . . through inclusion in the BART permit.” In short, DAQ’s position seems to be that it can impose LTS requirements in a BART permit because the draft Regional Haze SIP allows as much and the draft Regional Haze SIP allows as much because the LTS requirements are included in the Bridger BART Permit. Such circular reasoning, of course, can only collapse on itself and can never be used to justify DAQ’s inclusion of SCR/LTS in the Bridger BART Permit. Tellingly, DAQ has not relied on any other statutory and/or regulatory authority to justify Conditions 17 and 18. For these additional reasons, these conditions should be stricken from the Bridger BART permit as arbitrary and capricious.

A.3. Wyoming’s “Long-Term Strategy” regulations also do not provide DAQ the authority to include SCR/LTS elements in the Bridger BART Permit.

Wyoming’s “Long Term Strategy” regulations likewise do not support DAQ’s inclusion of Condition 17 and 18 in the Bridger BART Permit. Wyoming’s air quality regulations define “long term strategy” as “a 10-15 year plan for making ‘reasonable progress’ toward the national goal specified in Chapter 9, Section 2(a).” *See* Wyoming Air Quality Standards and Regulations, Chapter 6, Section 2(c)(v). Conditions 17 and 18 -- standing alone -- arguably could be construed as part of a “10-15 year plan” solely because of the timing for the ordered controls at the Bridger plant within the next 10-15 years. The fact is, however, that these conditions do not stand alone and instead are imposed as part of a BART permit that is intended to have a five year time frame. “Force fitting” a 10-15 year planning requirement into a short term BART permit cannot be tolerated under the Wyoming air quality regulations. Additionally, DAQ has failed in the Bridger BART Permit to identify how Conditions 17 and 18 assist Wyoming in meeting its

“reasonable progress goals,” and even has failed to identify the “reasonable progress goal” that Conditions 17 and 18 are meant to support.

Moreover, Wyoming’s specific “Long Term Strategy” regulations do not provide any authority for the addition of LTS/SCR elements in the Bridger BART Permit. *Id.* at (f). Rather, Wyoming’s “Long Term Strategy” regulations authorize DAQ to review and revise the Long Term Strategy every 3 years, if appropriate, and require a report that includes details about the Long Term Strategy. The Long Term Strategy report must be subject to public notice and comment. *Id.*

The most recent Long Term Strategy Report PacifiCorp could locate was adopted by Wyoming in 2003. *See* Exhibit E. The 2003 Long Term Strategy Report does not contain any SCR-related requirements for the Bridger power plant. *See e.g.*, Exhibit E at 23, 30. Also, to PacifiCorp’s knowledge, no revisions to Wyoming’s Long Term Strategy have been formally and legally made that would give DAQ authority to impose NO_x related Long Term Strategy requirements in Bridger’s BART permit. Therefore, DAQ lacked authority to include Conditions 17 and 18 in the Bridger BART Permit.

B. Even if LTS Requirements are Allowable in a BART Permit, DAQ Cannot Support Requiring PacifiCorp to Install SCR (Units 3 and 4) or Control Equipment with the “Lowest Viable” NO_x Emissions Rate (Units 1 and 2).

“In the absence of the appropriate criteria or factors adopted by administrative rulemaking, classifications made on an ad hoc basis are inherently arbitrary and capricious.” *See In Matter of Bessemer Mt.*, 856 P.2d 450, 451 (Wyo. 1993). In this particular case, DAQ requires in Condition 17 of the Bridger BART Permit that PacifiCorp’s add-on NO_x emission controls “not exceed a maximum of .07 lb/MMBtu on a 30-day rolling average” Condition 18 contains a similar limitation, although it has additional language requiring control equipment

be capable of achieving the “lowest viable NO_x” emissions rate. No Wyoming or federal regulations, however, establish or support these particular standards as a LTS requirement in a BART permit. For this additional reason, Conditions 17 and 18 are improper and should be removed from the Bridger BART Permit.

Moreover, DAQ has not provided the “link” between what Wyoming’s BART or LTS regulations require and the requirements in Condition 17 and 18. DAQ must “invoke [its] expertise to create standards” and “[is to] furnish notice to the public of how the decision may be reached.” *See Rissler & McMurray Co. v. Envtl. Quality Council*, 856 P.2d 450, 454 (Wyo. 1993). Without DAQ establishing some factors or criteria giving notice to PacifiCorp, the regulated community and the public as to how LTS emission standards in a BART permit are determined, stakeholders have not received any notice of how DAQ reached this decision. As such, Conditions 17 and 18 of the Bridger BART Permit are arbitrary and capricious. *See Yeik v. Dept. of Revenue and Taxation*, 595 P.2d 965, 969 (Wyo. 1979) (Where the rules and regulations fail to give guidance to those seeking review of an agency’s decision, the court determined that failing to have “such rules can be prejudicially fatal.”)

C. The Permit Application Requirements of Condition 18 are Arbitrary and Capricious Because they are Inconsistent and Contradictory.

Condition 18 of the Bridger BART Permit is arbitrary and capricious because it mandates that PacifiCorp conduct an “objective” analysis of certain factors while at the same time mandating what the outcome of that analysis will be. In Condition 18, PacifiCorp is ordered to conduct “an analysis of the four statutory factors and the associated visibility impacts from the application of each proposed NO_x control and resulting emissions levels.” Presumably the “four statutory factors,” (which DAQ fails to identify), are the four factors identified in Section

169A(g)(1) of the Clean Air Act (“CAA”), which include “costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any existing source” 42 U.S.C.S § 7491(g)(1).

Even though this analysis of the “four statutory factors” could lead PacifiCorp to identify something other than the “lowest viable NO_x emissions” control equipment or an emissions rate of more than 0.07 lb/MMBtu, DAQ has predetermined that PacifiCorp’s analysis can only result in control equipment which achieves the “lowest viable NO_x emissions” and has a maximum emissions rate of 0.07 lb/MMBtu for NO_x.¹² A couple of examples illustrate this point. PacifiCorp could find, for instance, that the “lowest viable NO_x emissions” control equipment is prohibitively costly under its analysis of the “four statutory factors,” but would still be faced with a contradictory requirement to install such equipment in Condition 18. Or, the “remaining useful life” of the Bridger units may not justify the expense of installing control equipment that has a maximum emissions rate of 0.07 lb/MMBtu, but Condition 18 would still require that such equipment be installed. It is inappropriate, arbitrary, and capricious for DAQ to mandate the outcome ahead of what is supposed to be an objective balancing of many factors which are intended to dictate the final result.

¹² In fact, considering these same four factors, PacifiCorp *and* DAQ concluded that the “lowest viable NO_x emissions” control equipment (SCR) and an emissions rate greater than 0.07 were not BART for the Bridger units. DAQ cannot expect PacifiCorp to conduct the same analysis again but this time reach a different conclusion. Moreover, DAQ already has conducted a “four factor” analysis at another PacifiCorp plant, Dave Johnston, and found that SCR and a stringent 0.07 lb/MMBtu limit was not appropriate. “Therefore, based on the relatively low cost effectiveness, the reasonable control efficiency, possible reduction in fuel usage, low electricity requirements, and the fact that solid waste and wastewater will not be produced, the LNB or LNB w/OFA seem to be the most reasonable choice for the Dave Johnston Electric Generating Station boilers BW41 and BW42 based on the **four factor analysis.**” Wyoming 2009 draft Regional Haze SIP, pg. 116 (emphasis added).

Additionally, although DAQ claims that Condition 18's requirements are part of its "Long-Term Strategy of the Wyoming Sec. 308 Regional Haze SIP," Condition 18 does not even address the factors that must be considered in developing a Long Term Strategy. EPA's regional haze rules require consideration of the following factors in developing a Long Term Strategy:

(A) Emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment; (B) Measures to mitigate the impacts of construction activities; (C) Emissions limitations and schedules for compliance to achieve the reasonable progress goal; (D) Source retirement and replacement schedules; (E) Smoke management techniques for agricultural and forestry management purposes including plans as they currently exist within the State for these purposes; (F) Enforceability of emissions limitations and control measures; and (G) The anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy.

40 CFR 51.308(d)(3)(v). Although DAQ has agreed that it must consider the seven federal factors when establishing its LTS, (see Wyoming 2009 draft Regional Haze SIP, pg. 137), it utterly fails to do so in Condition 18. For all of these reasons, Condition 18 should be stricken.

CONCLUSION

For the reasons stated above, PacifiCorp asks that the EQC find that:

- A. Conditions 17 and 18 of the Bridger BART Permit are arbitrary and capricious because DAQ erred when it included LTS/SCR elements (Conditions 17 and 18) in the Bridger BART Permit;
- B. DAQ erred because it required as part of Conditions 17 and 18 that the applications include a NO_x emissions limit not "to exceed a *maximum of 0.07 lb/MMBtu* on a 30-day rolling average" and further erred by including in Condition 18 of the Bridger BART Permit the requirement that PacifiCorp submit applications that would "address each add-

on NO_x control as a system of continuous emissions reduction *achieving the lowest viable NO_x emission*";

- C. Condition 18 of the Bridger BART Permit is arbitrary and capricious because it mandates that PacifiCorp conduct an "objective" four factor analysis while at the same time predetermining what the outcome of that analysis will be.

DATED this 30th day of June, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of June, 2010, a true and correct copy of the foregoing PETITIONER PACIFICORP'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT was served as follows:

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