

FILED 7

AUG 06 2010

**Jim Ruby, Executive Secretary
Environmental Quality Council**

Nancy Vehr (#6-3341)
Senior Assistant Attorney General
Affie Ellis (#6-4406)
Assistant Attorney General
123 Capital Building
Cheyenne, WY 82002
Telephone: (307) 777-6946
Facsimile: (307) 777-3542

Attorney for the State of Wyoming,
Department of Environmental Quality

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

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).)

**DEQ'S RESPONSE OPPOSING PACIFICORP'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

The Department of Environmental Quality (DEQ), through the Office of the Attorney General, and pursuant to WYO. R. CIV. P. Rules 7(b)(1) and 56 and Environmental Quality Council Rules, Chapter II, Sections 3 and 14, provides the following Response in Opposition to PacifiCorp's Motion for Partial Summary Judgment. PacifiCorp's Motion should be denied because PacifiCorp is incorrect on the law and there are genuine issues of material fact.

I. LEGAL BACKGROUND

A. Clean Air Act

The Clean Air Act's (CAA) goals of protecting and enhancing the nation's air quality and promoting public health, welfare and economic development by preventing

and controlling air pollution are achieved through a cooperative federalism approach with states.¹ The CAA provides states with primary regulatory authority over air quality if EPA has approved the state's SIP specifying the state's strategies for attaining, maintaining and enforcing National Ambient Air Quality Standards (NAAQS). 42 U.S.C. § 7407(a). Wyoming exercises primary air quality regulatory authority through the Department of Environmental Quality (DEQ) with EPA oversight. *See* 40 C.F.R. part 52, subpart ZZ.

B. Wyoming Environmental Quality Act (WEQA)

The underlying foundation for Wyoming's air quality program is the Wyoming Environmental Quality Act (WEQA). WYO. STAT. ANN. §§ 35-11-101 through -1904. The WEQA is designed to preserve, protect, use, develop, reclaim and enhance the State's air resources:

Whereas pollution of the air ... of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve, and enhance the air ... of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air ... resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air [.]

¹ *See* 42 U.S.C. §§ 7401 – 7671(q)(2000); 40 C.F.R. parts 1 through 789 (2008); 40 C.F.R. part 52, subpart ZZ; WYO. STAT. ANN. §§ 35-11-201 through -214; and WAQSR Chs. 1 – 14.

WYO. STAT. ANN. § 35-11-102. In enacting the WEQA, “[t]he legislature knew that business and industry, essential to the state’s economic health, had to be maintained.” *State v. Platte Pipe Line Co.*, 649 P.2d 208, 212 (Wyo. 1982).

In accordance with the CAA and the WEQA, the DEQ regulates Wyoming’s air quality pursuant to a carefully crafted, intricately woven, federal and state statutory and regulatory system with many highly technical provisions.² At the core of the CAA and the State’s air quality program are ambient air quality standards.

C. Ambient Air Quality Standards

Ambient air quality standards established at the federal level are referred to as “national ambient air quality standards” (NAAQS). *See* 42 U.S.C. § 7409. NAAQS set the maximum ambient air concentrations for certain “criteria” pollutants at levels sufficient to protect public health (primary standards) and welfare (secondary standards)³ with a built in safety margin. *See* 42 U.S.C. §§ 7408-7409; 40 C.F.R. pt. 50. The DEQ is responsible for assuring Wyoming’s air quality meets the NAAQS and therefore has incorporated the NAAQS and state specific ambient air quality standards into the State’s air quality program. *See* 42 U.S.C. § 7407(a), 2 WAQSR §§ 1-11.

² *See* WYO. STAT. ANN. § 35-11-109; *Id.* at § 35-11-110; *Id.* at §§ 35-11-201 through -214; WAQSR chs. 1-14; *see also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984) (CAA is “a lengthy, detailed, technical, complex, and comprehensive response to a major social issue”).

³ Effects on welfare include visibility impacts. 42 U.S.C. § 7602(h).

D. Ambient Air Quality Designations

Areas where ambient air quality meets the NAAQS for a particular pollutant are deemed in “attainment;” areas that cannot be classified on the basis of available information as meeting or not meeting the NAAQS are deemed “unclassifiable”; and areas that do not meet the NAAQS are designated as “nonattainment.” *See* 42 U.S.C. § 7407(d)(1)(A). The Prevention of Significant Deterioration (PSD) program only applies to areas that have been designated as attainment or unclassifiable. 42 U.S.C. § 7471. All areas within Wyoming are designated as attainment or unclassifiable, except for the City of Sheridan which has been designated as non-attainment for PM₁₀. 40 C.F.R. § 81.351. The Jim Bridger Plant is located in Sweetwater County which has been designated as unclassifiable or in attainment for all NAAQS.⁴ *Id.*

E. Area Classifications

In addition to designating areas by attainment status, areas are classified by type as either Class I (national parks and wilderness areas greater than 5,000 acres and certain state or tribal designated areas), Class II (most other areas), or Class III. *See* 42 U.S.C. §§ 7472, 7474; 40 C.F.R. § 81.436 (mandatory federal Class I areas in Wyoming). Class I areas are afforded greater protections under the CAA.

⁴ In 2009, the State recommended that EPA designate a portion of Sweetwater County as an ozone non-attainment area. EPA’s decision is pending.

F. Prevention of Significant Deterioration

In 1977, Congress adopted the PSD program for major sources in areas designated as “attainment” or “unclassifiable” to insure that ambient air quality in those areas does not deteriorate to unacceptable levels. *See* 42 U.S.C. §§ 7471, 7473. The PSD program requires major sources undergo a detailed review and analysis to assure that the NAAQS are maintained, clean air is protected, appropriate emission controls are applied, and economic development opportunities are maximized consistent with the protection of clean air, and permitting decisions are made after careful evaluation and public participation. *See* 42 U.S.C. §§ 7470, 7475. Essentially, the PSD program balances “economic growth” with “the preservation of existing clean air resources.” *See* 42 U.S.C. § 7470(3); *see also Id.* §§ 7470-79, *Alabama Power Co. v. Costle*, 636 F.2d 323, 346-52 (D.C. Cir. 1979) (describing history and background of PSD program).

G. Regional Haze⁵

As part of the PSD program, Congress also established a national goal to improve visibility in Class I areas: “Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade pollution.” 42 U.S.C. § 7491(a)(1). Congress directed the Environmental Protection Agency (EPA) to establish regulations assuring “reasonable progress toward meeting the national goal.” 42 U.S.C. §

⁵ “Regional haze” is the aggregate of particles in the air absorbing and scattering sunlight located over a wide geographic area. 40 C.F.R. § 51.301.

7491(a)(4). Congress required states to determine which sources emitted air pollutants “which may reasonably be anticipated to cause or contribute” to visibility impairment in Class I areas. 42 U.S.C. § 7491(b)(2)(A). Congress further required states to determine Best Available Retrofit Technology (BART) for controlling emissions. 42 U.S.C. § 7491(g)(2).

In 1980, the EPA promulgated visibility regulations to address visibility impairment commonly referred to as “plume blight” or “reasonably attributable” visibility impairment. 45 Fed. Reg. 80084 (Dec. 2, 1980). *See also* 40 C.F.R. §§ 51.300 through .307. Reasonably attributable impairment is “visibility impairment that is caused by the emission of air pollutants from one, or a small number of sources. 40 C.F.R. at § 51.301

In 1990, Congress again amended the CAA to further address visibility. 42 U.S.C. § 7492. In response, EPA adopted the Regional Haze Rule (RHR) on July 1, 1999, to address regional haze not corrected by its 1980 regulations. 64 Fed. Reg. 35714 (July 1, 1999). The CAA’s BART requirements formed the cornerstone for EPA’s RHR.

H. Best Available Retrofit Technology (BART)

EPA’s RHR requires states to determine BART for each BART-eligible source on a case-by-case basis to reduce emissions of nitrogen oxides (NO_x), particulate matter (PM), and sulfur dioxide (SO₂). 40 C.F.R. § 51.308(e)(1)(ii); WAQSR Ch. 6, § 9(b). A BART determination considers (1) the costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any pollution equipment in use or in existence at the source, (4) the remaining useful life of the source, and (5) the degree of

improvement in visibility which may reasonably be anticipated to result from the use of such technology. 40 C.F.R. Part 51, Appendix Y; WAQSR Ch. 6, § 9(b). In 2006, the EQC approved the adoption of Wyoming's BART requirements. *See* WAQSR Ch. 6, § 9.

I. § 308 SIP

Regional haze SIPs establish reasonable progress goals for visibility improvement on the most impaired days and prevent degradation of visibility on the least impaired days. 40 C.F.R. § 51.308(d). In addition, the State must develop a long term strategy (LTS) to be included in the SIP. *Id.* The LTS must include emission limits, compliance schedules and other items necessary to achieve the State's reasonable progress goals. 40 C.F.R. §§ 51.308(d)(3).

II. FACTS

PacifiCorp's Jim Bridger Power Plant is comprised of four (4) nominal 530 megawatt (MW) tangentially fired boilers burning pulverized coal. Ex. 10 at 002575. Jim Bridger Unit 1 was placed into service in 1974, Unit 2 in 1975, Unit 3 in 1976, and Unit 4 in 1979. *Id.*

After EPA adopted the Regional Haze Rule (RHR) in 1999, and the *Guidelines for BART Determinations Under the Regional Haze Rule* in 2005, the DEQ/AQD adopted BART guidelines requiring sources "subject to BART" submit BART applications. *See* 64 Fed. Reg. 35714 (July 1, 1999) (RHR); 70 Fed. Reg. 39104 (July 6, 2005) (EPA BART Guidelines are also referred to as "Appendix Y"); WAQSR Ch. 6, § 9. Following the adoption of EPA's RHR, the DEQ/AQD determined that the Jim Bridger plant was "Subject to BART" and was required to undergo a BART analysis because the plant

contributed to visibility impairment in at least one Class I area. Schlichtemeier Aff. at ¶ 13; Ex. 1.

On January 16, 2007, the DEQ/AQD received PacifiCorp's initial BART applications for the Jim Bridger units. *Id.* at ¶¶ 14-15; Ex. 2, 3. Over the next year, the DEQ/AQD received revised applications and addendums from PacifiCorp for Units 1-4. *Id.* at ¶¶ 16 -18, Ex. 4-6. PacifiCorp recommended that Low NOx Burners (LNB) with over-fired air (OFA) as BART for NOx at all four Jim Bridger Units. *Id.* at ¶ 29; Exs. 2, 4, 5, 6. After PacifiCorp submitted its addendums, the DEQ/AQD received preliminary comments from EPA in May, 2008, encouraging the DEQ/AQD "to make BART determinations . . . requiring LNB/OFA/SCR and 0.07 lbs/mmBtu or lower NOx limits." *Id.* at ¶ 19; Ex. 7.

By July 2008, the DEQ/AQD had completed preliminary BART reviews for Jim Bridger Units 1-4. Schlichtemeier Aff. at ¶¶ 29-32. The DEQ/AQD compared the costs to install NOx controls as BART to recent BACT (Best Available Control Technology) determinations and also prepared charts projecting the amount of visibility improvement on the affected Class I areas if the various proposed BART NOx control technologies were installed. *Id.*; Ex. 17. Based on the DEQ/AQD's preliminary review, the DEQ/AQD's preliminary NOx BART determination for Jim Bridger Units 1-4 was LNB/OFA/SCR (Selective Catalytic Reduction). *Id.*; Ex. 17.

On July 23, 2008, the DEQ/AQD met with PacifiCorp and discussed the DEQ/AQD's preliminary NOx BART determinations for Units 1-4. *Id.*; Ex. 17. During this meeting, PacifiCorp told the DEQ/AQD that due to cost considerations and pollution

control projects, it was not possible for PacifiCorp to install SCR during the 5-year BART period. *Id.* at ¶¶ 29-32; Potter Aff. at ¶¶ 12-15; Cole Anderson Aff. at 9. Given that one of the BART factors is costs of compliance, the DEQ/AQD discussed the possibility of PacifiCorp committing to install SCR as part of the long term strategy (LTS) instead of as BART. Schlichtemeier Aff. at ¶¶ 29- 32; Potter Aff. at ¶ 15.

Sometime after this initial meeting, PacifiCorp allowed the DEQ/AQD to view, but not retain, a copy of [REDACTED] [REDACTED].⁶ Schlichtemeier Aff. at ¶¶ 29-32; Potter Aff. at ¶¶ 12-15. Over the next several months, the DEQ/AQD and PacifiCorp continued to discuss the possibility of DEQ/AQD accepting LNB/OFA as BART and PacifiCorp committing to install further NOx controls as part of LTS for all Jim Bridger units. Schlichtemeier Aff. at ¶¶ 29 – 33; Potter Aff. at ¶ 15. Ultimately, these discussions resulted in the DEQ/AQD and PacifiCorp mutually agreeing upon a NOx control strategy

⁶ PacifiCorp has asserted claims of confidentiality and privilege for certain oral and written statements PacifiCorp provided to the DEQ/AQD during the permitting process. Such statements have been redacted from this Response and form the basis for DEQ/AQD's contention that there are genuine issues of material fact. The DEQ/AQD and PacifiCorp have moved for a Protective Order and the DEQ/AQD has filed Affidavits of such statements and the corresponding documents under seal. The DEQ has also filed an unredacted copy of this Response, under seal, with the EQC.

for Jim Bridger Units 1-4. Schlichtemeier Aff. at ¶¶ 29-35; Potter Aff. at ¶¶ 16-20; Cole Anderson Aff. at ¶¶ 9, 14.

In January 2009, PacifiCorp [REDACTED] [REDACTED] in a letter to the DEQ/AQD purporting to contain confidential commercial and trade secret information. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. at ¶¶ 16-20; Cole Anderson Aff. at ¶¶ 9, 14; Ex. 18. PacifiCorp [REDACTED]. *Id.*; Ex. 18. [REDACTED] DEQ/AQD's understanding of PacifiCorp's and the DEQ/AQD's mutually agreed upon NOx control strategy. *Id.* In part, the DEQ/AQD relied upon this mutually agreed NOx control strategy for Conditions 17 and 18 of Permit MD-6040. *Id.*

Condition 17's SCR NOx emission rate is premised on the DEQ/AQD's position that if a control technology is installed, it should be operated as designed. Schlichtemeier Aff. at ¶¶ 34-36. Meaning if the system was designed to meet 90 percent control efficiency, the DEQ/AQD expected the system to be operated and maintained at that level. *Id.* The DEQ/AQD determined that a NOx emission rate of 0.07 lb/MMBtu represented a well maintained system for an SCR retrofit application. *Id.* PacifiCorp had also represented that a 0.07 lb/MMBtu emission rate was the control level for LNB/OFA/SCR. *Id.*

The DEQ/AQD did not mandate any particular NOx control strategy in Condition 18 because the permit application due dates were far enough into the future that new control technologies or regulations may need to be analyzed. *Id.* at ¶ 37. The DEQ/AQD

established a maximum emission rate of 0.07 lb/MMBtu to reflect current SCR capabilities. *Id.* PacifiCorp [REDACTED]

[REDACTED]. *Id.*; Ex. 18.

On May 29, 2009, the DEQ/AQD completed and provided its permit application analysis to PacifiCorp. *Id.* at ¶ 22; Ex. 10. The DEQ/AQD advertised its proposed decision and took public comment up through the conclusion of the public hearing on August 4, 2009. *Id.* at ¶¶ 22-24; Ex. 11, 12. During the public comment period, the DEQ/AQD received numerous comments, including comments from EPA and PacifiCorp. *Id.* at ¶¶ 25 - 26; Ex. 13, 14. On December 31, 2009, after considering the public comments and additional submittals, the DEQ/AQD issued its decision, comment response, and BART Permit MD-6040 for Jim Bridger Units 1-4. *Id.* at ¶¶ 27-28, 38-39; Ex. 15-16, 19-20.

Additional statements of material fact are set forth in DEQ's Response to PacifiCorp's Statement of Undisputed Facts.

III. STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Wyoming Rules of Civil Procedure governs cases before the EQC on a motion for summary judgment. DEP'T OF ENVTL. QUALITY R. OF PRACTICE AND PROCEDURE, Ch. 2, § 14; *see also Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, ¶ 6, 152 P.3d 367, 369 (Wyo. 2007). "The moving party bears the initial burden of establishing a prima facie case for summary judgment. If the movant carries this burden, the opposing party is obligated to demonstrate that a genuine issue of material fact does exist." *Weber v. McCoy*, 950 P.2d 548, 551 (Wyo. 1997). The evidence offered in

support and in opposition to a motion for summary judgment is viewed in a light most favorable to the party opposing the motion. *Long v. Daly*, 2007 WY 69, ¶ 7, 156 P.3d 994, 997 (Wyo. 2007). A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense. *Id.*

IV. ARGUMENT

PacifiCorp moves for partial summary judgment on three issues. First, PacifiCorp argues that Conditions 17 and 18 in Jim Bridger Permit MD-6040 (MD-6040) be “stricken from the permit” as unsupported by Wyoming regulations or draft Regional Haze State Implementation Plan (RH SIP). Second, even if Conditions 17 and 18 are appropriate to include in a BART permit, PacifiCorp argues that the permit requirements for SCR on Units 3 and 4 are arbitrary and capricious. Third, even if Condition 18 is appropriate to include in a BART permit, PacifiCorp argues the permit requirement that the lowest viable NO_x emission limit for Units 1 and 2 must be less than “a maximum of 0.07 lb/MMBtu on a 30-day rolling average” is arbitrary and capricious. For the reasons stated below, DEQ/AQD requests that the Council deny PacifiCorp’s motion.

A. DEQ Has Legal Authority to Issue Conditions 17 and 18

PacifiCorp alleges that the DEQ acted outside statutory and regulatory bounds in establishing the NO_x emission control limits contained in Conditions 17 and 18 of Permit MD-6040. PacifiCorp’s Mot. at 3. PacifiCorp claims that the DEQ lacks authority to impose permitting requirements for additional NO_x controls because the statutes, rules, or SIP do not explicitly state DEQ has such authority. *Id.* at 8-14. PacifiCorp’s claims

fail, because the statutory framework of the WEQA and regulatory framework of the WAQSR authorize DEQ to impose such pollution control requirements.

1. WEQA Authorizes DEQ to Impose Permit Conditions to Accomplish the Act's Purpose

Recognizing that pollution results from some commerce, the legislature enacted Wyoming's permitting system to authorize businesses "in advance to continue polluting so long as the pollution remained within certain acceptable limits." *Platte Pipeline Co.*, 649 P.2d at 212. Wyoming's legislature further provided that:

(a) 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.

(c) A permit to construct is required before construction or modification of any industrial facility capable of causing or increasing air or water pollution in excess of standards established by the department is commenced.

WYO. STAT. ANN. § 35-11-801(a) and (c). The plain language of this statute authorizes DEQ to impose necessary permit conditions to accomplish the WEQA's purpose: preventing, reducing and eliminating air pollution. *See* WYO. STAT. ANN. 35-11-102. It is undisputed that Jim Bridger Units 1-4 emit NOx. It is also undisputed that Selective Catalytic Reduction (SCR) is a control technology designed to reduce NOx emissions. Permitting requirements aimed at reducing and eliminating air pollution are consistent with the WEQA. Conditions 17 and 18 are aimed at further reducing NOx emissions from Units 1-4 and are therefore consistent with the WEQA's purpose.

2. WAQSR Authorizes DEQ to Determine BART and Impose Permit Requirements

BART permit applications are required for sources subject to BART. WAQSR Ch. 6, § 9(e). BART permit applications include various types of information, including “[a]dditional relevant information as the Administrator may request.” *Id.* at § 9(e)(i)(H). BART permit application review is conducted in accordance with Ch. 6, § 2(g) of the WAQSR. *Id.* at § 9(e)(ii). Ch. 6, § 2(g) deems a complete application as one that includes “all material and analyses which the Administrator determines are necessary for the Division to review the facility as a source of air pollution.” The language in Ch. 6, § 2(g) is broader than the language specific to BART determinations and allows the administrator to “review the facility as a source of air pollution.” Following review of the BART permit application, the Administrator may “approve, or amend the proposed emission limits.” *Id.* at § 9(e)(iii).

In this case, the Administrator, having reviewed the Jim Bridger facility “as a source of air pollution,” addressed NO_x controls by requiring the installation of SCR on Units 3 and 4 in 2015 and 2016, respectively, and requiring additional add-on NO_x controls for Units 1 and 2 be installed by 2023. Ex. 20 at 2788. The BART regulations do not prohibit DEQ’s permitting approach to lower emissions. In fact, the regulations impose a duty on the Administrator to review facilities as air pollution sources. Requiring that a review be conducted, but then prohibiting the Administrator from imposing necessary emission control requirements based on such a review, makes no sense. Absurd results should be avoided in the construction of statutes and regulations. *See Matter of Cordova*, 882 P.2d 880, 883 (Wyo. 1994).

3. WAQSR Authorizes DEQ to Impose Reasonable Permit Conditions

To obtain an air quality permit, the WAQSR requires the applicant demonstrate to the satisfaction of the AQD Administrator that the proposed facility: (1) will comply with the WAQSR and WEQA; (2) will not prevent the attainment or maintenance of any ambient air quality standard; (3) will not cause significant deterioration of existing ambient air quality; (4) will be located in accordance with proper land use planning; (5) will use Best Available Control Technology (BACT); (6) will have provisions for measuring emissions; (7) will achieve the performance specified in the permit application; and (8) will not prevent attainment in other states' requirements for PSD or visibility. WAQSR Ch. 6, § 2 (i – viii). The AQD Administrator may also impose “any reasonable conditions upon an approval to construct [or] modify[.]” WAQSR Ch. 6, § 2(f). Therefore, DEQ may impose reasonable permit conditions that are not inconsistent with DEQ regulations and standards. The DEQ/AQD contends that Conditions 17 and 18 are reasonable and consistent with DEQ’s existing rules, regulations and standards. PacifiCorp has failed to demonstrate that Conditions 17 and 18 are per se unreasonable or inconsistent with such regulations. DEQ’s actions were reasonable and consistent with the requirements in WAQSR Ch. 6, §§ 2 and 9.

4. Permitted Emission Control Requirements may be Incorporated into the RH SIP

The DEQ/AQD’s permitting requirements set forth in Sections 2 and 9 of the WAQSR, are related to Wyoming’s SIP. SIPs contain the regulations and other requirements adopted by the state for maintaining NAAQS compliance. *See discussion supra* at I.A. Although permitting and emission control requirements may be

incorporated into a SIP, the administrative process for doing so is separate and independent from the permitting process. *Compare* 40 C.F.R. § 51.308 with WAQSR Ch. 6, §§ 2 and 9. The draft RH SIP does not provide the authority for DEQ's permitting actions. Instead, the emission controls and reductions resulting from DEQ's permitting action are anticipated to be rolled into the RH SIP. *See* PacifiCorp Ex. D.

B. Conditions 17 and 18 are Reasonable and Supported in Fact.

1. PacifiCorp was aware of and agreed to Conditions 17 and 18.

PacifiCorp alleges that Conditions 17 and 18 are arbitrary and capricious in part because DEQ did not “[give] notice to PacifiCorp, the regulated community and the public as to how LTS emission standards in a BART permit are determined.” PacifiCorp Mot. at 15. However, the DEQ/AQD contends that PacifiCorp had worked closely with the DEQ/AQD through the permitting process to develop the LTS control requirements, [REDACTED], and ultimately agreed to Conditions 17 and 18. *Schlichtemeier Aff.* at ¶¶ 29-37; Ex. 17, 18.

Furthermore, because PacifiCorp did not object to Conditions 17 and 18 during the permitting process, but agreed to such conditions, PacifiCorp waived its right to challenge the DEQ/AQD's determination. *See Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 7 P.3d 900, 906 (Wyo. 2000) (Party must object to preserve rights on appeal).

Furthermore, PacifiCorp maintained that certain submittals and discussions were to be treated as confidential business and trade secret information. *Schlichtemeier Aff.* at

¶¶ 31, 33; Potter Aff. at ¶¶ 14, 16, 21; Ex. 18. Since obtaining the information, the DEQ/AQD has treated the information as confidential business and trade secret information. Schlichtemeier Aff. at ¶ 18. The DEQ/AQD contends that PacifiCorp, by asserting that such information needs to be maintained out of the public domain, then hiding behind such claims to allege the DEQ/AQD failed to inform PacifiCorp of the basis for Conditions 17 and 18, has only provided the Council with partial information. With the exception of subject matter jurisdiction, parties are generally bound by the theories advanced below. *See Appeal of Williams*, 626 P.2d 564, 571 (Wyo. 1981). The Wyoming Supreme Court “has taken a dim view of a litigant trying a case on one theory and appealing it on another.” *WW Enterprises v. City of Cheyenne*, 956 P.2d 353, 356 (Wyo. 1998). PacifiCorp’s claims appear to be less than fully candid.

Additional support for DEQ/AQD’s contention that PacifiCorp was aware of and agreed to Conditions 17 and 18 is evidenced by the Affidavits attached hereto. The Affidavits also support DEQ/AQD’s contention that whether PacifiCorp was aware of and agreed to Conditions 17 and 18 is a genuine issue of material fact. Material facts include:

- The DEQ/AQD initially considered BART to be the installation of low NOx burners with overfire air and SCR on all four units at Jim Bridger. Schlichtemeier Aff. at ¶¶ 29-30; Potter Aff. at ¶¶ 12-13; Cole Anderson Aff. at ¶ 10; Ex. 17.
- PacifiCorp worked closely with the DEQ/AQD from the summer of 2008 through the spring of 2009, to develop a control strategy that met the BART requirements

and the company's objectives. Schlichtemeier Aff. at ¶¶ 29-37; Potter Aff. at ¶¶ 11-21; Cole Anderson Aff. at ¶ 8.

- On July 23, 2008, the DEQ/AQD met with PacifiCorp and discussed the DEQ/AQD's preliminary BART determination for Jim Bridger Units 1- 4 as being LNB/OFA/SCR for all units. During this July 23, 2008 meeting, PacifiCorp asserted that due to costs, pollution control projects, and time limitations, it was not possible for PacifiCorp to install SCR during the 5-year BART period. Given these issues and one of the factors in determining BART is cost of compliance, the Division discussed with PacifiCorp the possibility of not requiring SCR as BART at Jim Bridger Units 1-4 if PacifiCorp would commit to install SCR as part the long term strategy (LTS). Schlichtemeier Aff. at ¶¶ 29-32; Potter Aff. at ¶¶ 12-14; Cole Anderson Aff. at ¶¶ 8-10; Ex. 17.
- After this July 23, 2008 meeting, PacifiCorp provided the DEQ/AQD with [REDACTED]. PacifiCorp did not let the DEQ/AQD keep this document, but the DEQ/AQD's recollection is that [REDACTED] [REDACTED] Schlichtemeier Aff. at ¶ 31; Potter Aff. at ¶ 14.
- After the DEQ/AQD and PacifiCorp had discussed and negotiated a mutually agreed control strategy, PacifiCorp submitted a confidential letter dated January 29, 2009, [REDACTED] [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. For Units 1 and 2, Condition 18 requires installation of NOx control equipment by December 31, 2023 [REDACTED]

[REDACTED]
[REDACTED]. After receiving this letter, the DEQ/AQD asked PacifiCorp if it would remove the confidentiality claims [REDACTED]
[REDACTED].

PacifiCorp did not oblige. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. at ¶¶ 16-20; Ex. 18.

- The DEQ/AQD and PacifiCorp had discussed and negotiated a mutually agreed control strategy which the DEQ/AQD relied upon for the installation schedules in Conditions 17 and 18. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. at ¶¶ 16-20; Cole Anderson at ¶ 9; Ex. 18.
- The DEQ/AQD accepted LNB/OFA for the Jim Bridger Units as representing BART based on the fact that further NOx controls were going to be installed on all units as part of LTS. Schlichtemeier Aff. at ¶ 34; Potter Aff. at ¶ 17.
- There is nothing in the public file from PacifiCorp committing to install SCR on Units 3 and 4 and additional add-on NOx control on Units 1 and 2 as part of LTS. In hindsight, the DEQ/AQD acknowledges it should have requested PacifiCorp put their commitment in writing. Schlichtemeier Aff. at ¶ 35; Potter Aff. at ¶ 18.

- The DEQ/AQD identified the NOx control technology and emission level for Condition 17. The SCR installation schedule for Jim Bridger Units 3 and 4

[REDACTED]

[REDACTED]

DEQ/AQD's understanding is that PacifiCorp will start engineering approximately four (4) years in advance of the compliance date. Given this timeline, SCR was specified as the control technology. In establishing emission control levels, the DEQ/AQD's position is that installed controls should be operated as designed. Meaning, if a control technology is designed to meet 90 percent control efficiency, the DEQ/AQD expects the control equipment to be operated and maintained to meet that level. Based on the DEQ/AQD's experience with BACT determinations, the DEQ/AQD determined the 0.07 lb/MMBtu emission rate represents a well maintained system for a SCR retrofit application. PacifiCorp had also submitted 0.07 lb/MMBtu as the control level for LNB/OFA/SCR. The DEQ/AQD worked closely with PacifiCorp in developing Condition 17. The DEQ/AQD's position is that PacifiCorp agreed to Condition 17. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. at ¶¶ 16-19; Cole Anderson Aff. at ¶¶ 9-14 ; Ex. 18.

- Condition 18 was developed and based on the DEQ/AQD and PacifiCorp's mutually agreed NOx control strategy. Condition 18 allows for the NOx control technology to be determined during the permitting process, which will occur six (6) years prior to the compliance dates. The maximum emission rate of 0.07 lb/MMBtu was added to the condition reflecting the capabilities of SCR today.

The condition also requires evaluation of the lowest viable NOx emission rate considering the LTS four (4) statutory factors plus visibility impacts. As stated for Condition 17, the DEQ/AQD's position is that if controls are installed they should be operated as designed. [REDACTED]

[REDACTED] NOx emission rates established through a BACT review are more likely to be more stringent than rates established through the four factor analysis plus visibility. The DEQ/AQD worked closely with PacifiCorp in developing Condition 18. The DEQ/AQD's position is that PacifiCorp agreed to Condition 18. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. at 16-20; Ex. 18.

- The four prescribed factors used in selecting the Reasonable Progress Goals (RPG), for which the Long term Strategy (LTS) is designed to achieve, and the five statutory factors used to evaluate control technologies under BART, are almost identical. There is one additional RPG factor mentioned: "the time necessary for compliance", which is indirectly addressed in a BART review since the EPA made the determination that BART controls must be installed within five years of SIP approval. There are two additional factors included in a BART analysis: (1) "any pollution control equipment in use at the source" and (2) "the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology". Cole Anderson Aff. at ¶ 13.

The overwhelming weight of the evidence at this stage of proceedings supports DEQ/AQD's contention that PacifiCorp was aware of and concurred in the DEQ's

approach for addressing NOx emissions in Permit MD-6040. At the very least, the evidence DEQ/AQD has submitted supports DEQ/AQD's contention that there is a material dispute of fact as to PacifiCorp's knowledge and concurrence with DEQ/AQD's approach.

2. PacifiCorp failed to Prove Arbitrary and Capricious Agency Action

PacifiCorp has the burden of proof to show that Permit MD-6040 was not issued in accordance with regulatory requirements. "It is well settled that in proceedings before commissions, as in courts, the burden of proof rests upon complainants." *Application of Chicago & N.W. Ry. Co.*, 334 P.2d 519, 521 (Wyo. 1959). "The burden of proving a lack of substantial evidence is upon the party appealing the agency's determination." *Mountain Fuel Supply Co. v. Pub. Serv. Comm'n of Wyo.*, 662 P.2d 878, 883 (Wyo. 1983). The burden to demonstrate that the agency's findings and conclusions are not supported by substantial evidence is on the appellant. *Gonzales v. State ex rel. Wyo. Workers' Comp. Div.*, 970 P.2d 865, 869 (Wyo. 1998). The burden of proving arbitrary administrative action is on the complainant, and this burden includes placement of evidence in the record to sustain the complainant's position. *Knight v. Env'tl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991).

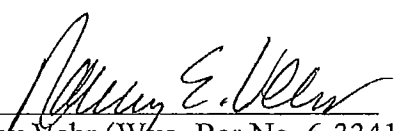
At this stage of the proceedings, the DEQ/AQD has brought forth sufficient evidence demonstrating that a genuine issue of material fact exists regarding PacifiCorp's knowledge of, participation in the development of, and concurrence with Conditions 17 and 18 of Permit MD-6040. *See* DEQ's Response to PacifiCorp's Statement of Facts; & the attached Affs. and Exs. Because there is a genuine issue of fact, the DEQ/AQD

maintains this matter is not ripe for summary judgment and PacifiCorp has failed to sustain its burden.

V. CONCLUSION

For the reasons stated above, the DEQ/AQD requests the EQC deny PacifiCorp's Motion for Partial Summary Judgment.

FOR RESPONDENT DEQ:



Nancy Vehr (Wyo. Bar No. 6-3341)
Senior Assistant Attorney General
Affie Ellis (Wyo. Bar No. 6-4406)
123 Capital Building
Cheyenne, WY 82002
Telephone: (307) 777-6946
Facsimile: (307) 777-3542
Email: nvehr@state.wy.us
Attorney for the State of Wyoming,
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2010, a true and correct copy of the foregoing *DEQ's Response Opposing PacifiCorp's Motion for Partial Summary Judgment* [UNREDACTED COPY SEALED AND STAMPED CONFIDENTIAL] was served by placing the same in the United States mail, postage pre-paid, addressed to:

Paul Hickey
John Coppede
Hickey and Evans, LLP
1800 Carey Avenue, Suite 700
Cheyenne, WY 82001

E. Blaine Rawson
Janna B. Custer
Holme Roberts & Owen LLP
299 South Main Street, Suite 1800
Salt Lake City, UT 84111

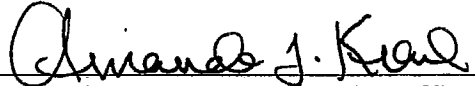
Michael Jenkins
PacifiCorp
1407 West North Temple, Suite 320
Salt Lake City, UT 84116

and REDACTED copy via email addressed to:

PHickey@hickeyevans.com
JCoppede@hickeyevans.com
Blaine.Rawson@hro.com
Janna.custer@hro.com
Michael.Jenkins@PacifiCorp.com

and via hand delivery to

John Corra, DEQ Director
Herschler Building, 4th Floor



Wyoming Attorney General's Office