

FILED

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

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 TO PACIFICORP'S STATEMENT OF UNDISPUTED
FACTS AND CONTENTIONS OF GENUINE ISSUES OF FACT TO BE TRIED**

The Wyoming Department of Environmental Quality, Air Quality Division (DEQ/AQD), through the Office of the Attorney General of the State of Wyoming and pursuant to WYO. R. CIV. P. Rule 56.1 and the DEQ/EQC Rules of Practice and Procedure, Chapter II, sections 3 and 14, hereby submits the following corrections and clarifications to PacifiCorp's Statement of Undisputed Facts¹, as well as contentions of genuine issues of fact to be tried:

1. **Response to PacifiCorp Annex ¶ 1.** PacifiCorp submitted separate BART permit applications for each of the Jim Bridger units 1 – 4. Schlichtemeier Aff. at ¶ 14;

¹ PacifiCorp included what appear to be identical statement of facts in both its Memorandum (pp. 6-8) and a separate WYO. R. CIV. P. 56.1 pleading. DEQ's response applies to each of PacifiCorp's statements of fact.

Ex. 2 PacifiCorp also submitted and discussed information with the DEQ/AQD under PacifiCorp's claims of confidentiality or privilege. Schlichtemeier Aff. at ¶¶ 31, 33, 37; Potter Aff. at ¶¶ 14, 16, 20, 21; Cole Anderson Aff. at ¶¶ 7, 9; Ex. 18.

2. **Response to PacifiCorp Annex ¶ 2.** The DEQ put its BART Application Analysis for the Jim Bridger Plant, dated May 29, 2009, out for public comment on June 3, 2009. The DEQ/AQD conducted a public hearing on August 4, 2009. Schlichtemeier Aff. at ¶¶ 22-24; Exs. 10, 11, 12.

3. **Response to PacifiCorp Annex ¶ 3.** PacifiCorp submitted oral and written comments, but the DEQ/AQD contends that whether all of PacifiCorp's comments were supportive of its Petition is a genuine issue of fact to be tried. Schlichtemeier Aff. at ¶¶ 31 – 37; Ex. 18.² The DEQ/AQD contends that PacifiCorp agreed to the entire NOx emission control strategy set forth in Permit MD-6040. Schlichtemeier Aff. at ¶¶ 35-37; Cole Anderson Aff. at ¶ 9, 14.

4. **Response to PacifiCorp Annex ¶ 4.** In addition to the lb/MMBtu NOx emission limit on a 30-day rolling average, conditions 5, 7, and 16 of Permit MD-6040

² PacifiCorp has asserted claims of confidentiality and privilege for certain oral and written statements PacifiCorp provided the DEQ/AQD during the permitting process. Such statements form the basis for DEQ/AQD's contention that there is a genuine issue of fact. Therefore, the DEQ/AQD and PacifiCorp have jointly moved for a Protective Order and the DEQ/AQD has filed Affidavits of such statements and the corresponding documents under seal.

also set NOx emission limits on a lb/hr 30-day rolling average and tpy basis. Schlichtemeier Aff. at ¶ 39; Ex. 20.

5. **Response to PacifiCorp Annex ¶ 5.** The requirement that PacifiCorp install selective catalytic reduction (SCR) on Jim Bridger Units 3 and 4 was not the DEQ/AQD's BART determination, but is a condition of Permit MD-6040. The DEQ/AQD contends that after DEQ/AQD and PacifiCorp had discussed and negotiated a mutually agreed control strategy, PacifiCorp submitted a privileged and confidential letter [REDACTED]

[REDACTED]. Schlichtemeier Aff. at ¶ 33; Cole Anderson Aff. at ¶ 9-10, 14; Ex. 18. The DEQ/AQD contends there is a genuine issue of fact to be tried as to whether PacifiCorp had agreed to Condition 17 of Permit MD-6040 during the permitting process.

6. **Response to PacifiCorp Annex ¶ 6.** The requirement that PacifiCorp submit a permit application for additional add-on NOx controls on Jim Bridger Units 1 and 2 was not the DEQ/AQD's BART determination, but is a condition of Permit MD-6040. The DEQ/AQD contends that after the DEQ/AQD and PacifiCorp had discussed and negotiated a mutually agreed control strategy, PacifiCorp submitted a privileged and confidential letter [REDACTED]

[REDACTED]. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. ¶¶ 14, 16, 18; Cole Anderson Aff. at ¶¶ 7, 9; Ex. 18. The

DEQ/AQD contends there is a genuine issue of fact to be tried as to whether PacifiCorp had agreed to Condition 18 of Permit MD-6040 during the permitting process.

7. **Response to PacifiCorp Annex ¶ 7.** The DEQ/AQD submitted a § 309 Regional Haze (RH) State Implementation Plan (SIP) to the EPA on December 29, 2003; a revised § 309 RH SIP on November 21, 2008, and held a public hearing before the Air Quality Advisory Board on Wyoming's Draft RH SIP, dated August 25, 2009. Tina Anderson Aff. at ¶¶ 7, 13. The DEQ/AQD contends that adoption of a RH SIP is not a prerequisite for obtaining a required permit. The proposed NOx emission controls for the Jim Bridger plant were included in the Draft RH SIP, dated August 25, 2009. *Id.* at ¶ 13. The DEQ/AQD is currently reviewing public comments on the Draft RH SIP. *Id.* at ¶ 9. To the extent that PacifiCorp purports that Exhibit D is a true and correct copy of the Draft RH SIP, the DEQ objects. *See* PacifiCorp Ex. D at 62 (yellow highlights appear to have been added to original).

8. **Response to PacifiCorp Annex ¶ 8.** The DEQ/AQD concurs that the RH SIP dated August 25, 2009 is a draft. The DEQ/AQD contends that adoption of the SIP was not required before the DEQ/AQD made its BART determinations and issued Permit MD-6040. As stated in Responses to PacifiCorp Annex ¶¶ 1, 3, 5 and 6, the DEQ/AQD contends there is a genuine issue of fact to be tried as to PacifiCorp agreement to install SCRs as part of a Long-Term Strategy to be included in Permit MD-6040.

9. **Response to PacifiCorp Annex ¶ 9.** Wyoming's State Implementation Plan for Class I Visibility Protection was approved by the EPA on February 15, 1989.

That SIP addresses reasonably attributable visibility impairment and new source review permitting requirements for determining visibility impacts in Class I areas. As stated in Responses to PacifiCorp Annex ¶¶ 1, 3, 5 and 6, the DEQ/AQD contends there is a genuine issue of fact to be tried as to PacifiCorp's agreement to install SCR's and additional add-on NOx controls at Jim Bridger as part of a Long-Term Strategy to be included in Permit MD-6040.

10. On June 14, 2006, the DEQ/AQD notified PacifiCorp that the Jim Bridger Power Plant had been identified as a BART Eligible Source determined to be "Subject to BART" for contributing to visibility impairment in at least one Class I area (Bridger WA, Fitzpatrick WA, and Mount Zirkel WA). The DEQ/AQD requested PacifiCorp conduct and submit a BART application addressing Jim Bridger's Units 1-4 emissions of sulfur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter (PM). Schlichtemeier Aff. at ¶ 13; Ex. 1.

11. On January 16, 2007, the DEQ/AQD received PacifiCorp's initial BART applications for Jim Bridger Units 1-4. Schlichtemeier Aff. at ¶¶ 14-15 Exs. 2, 3.

12. Between October 16, 2007 and March 31, 2008, the DEQ/AQD received revised BART applications and other addendums from PacifiCorp. Schlichtemeier Aff. at ¶¶ 16-18; Exs. 4, 5 and 6.

13. On July 23, 2008, the DEQ/AQD met with PacifiCorp to discuss the DEQ/AQD's preliminary BART determinations. The DEQ/AQD informed PacifiCorp that the preliminary BART determinations for Jim Bridger Units 1-4 was Low NO_x

Burners/Over-Fire Air/Selective Catalytic Reduction (LNB/OFA/SCR) for all units. [REDACTED]

[REDACTED]. Schlichtemeier Aff. at ¶¶ 29-32; Potter Aff. at ¶¶ 12 - 15.³ PacifiCorp also said that it was not possible for them to install SCR during the 5-year BART timeframe because of cost, current pollution control projects, and timing concerns. Schlichtemeier Aff. at ¶¶ 29-32; Potter Aff. at ¶¶ 12-15; Cole Anderson Aff. at 9. The DEQ/AQD discussed with PacifiCorp the possibility of not requiring SCR as BART at Jim Bridger Units 1-4 if PacifiCorp would commit to installing SCR as part of the long-term strategy (LTS). Schlichtemeier Aff. at ¶¶ 29-32; Potter Aff. at ¶ 15.

14. On September 22, 2008, the DEQ/AQD notified PacifiCorp that its BART application was complete and DEQ/AQD would proceed with a technical analysis. Schlichtemeier Aff. at ¶ 20; Ex. 8.

15. On February 2, 2009, the DEQ/AQD received additional information from PacifiCorp regarding its application. Schlichtemeier Aff. at ¶ 21; Ex. 9.

16. Also on February 2, 2009, the DEQ/AQD received PacifiCorp's letter

[REDACTED]

³ Redacted material is a subject of the DEQ's Motion for Protective Order.

██████████⁴ The DEQ/AQD and PacifiCorp had discussed and negotiated a mutually agreed control strategy which the DEQ/AQD relied upon to base the installation schedule in Condition 17 of Permit MD-6040 for Jim Bridger Units 3 and 4. ██████████

██████████⁵ The DEQ/AQD and PacifiCorp had discussed and negotiated a mutually agreed control strategy which the DEQ/AQD relied upon to base the installation schedule in Condition 18 of Permit MD 6040 for Jim Bridger Units 1 and 2, with some additional time added for flexibility. Schlichtemeier Aff. at ¶ 33; Potter Aff. at ¶¶ 16-20; Ex. 18; Cole Anderson Aff. at ¶¶ 9, 14.

17. During the permitting process for Permit MD-6040, the DEQ/AQD and PacifiCorp had several meetings and telephone calls discussing BART and LTS. The DEQ/AQD's consistent position was that BART was LNB/OFA, in part, because of PacifiCorp's verbal commitment to install SCR on Units 3 and 4 and additional add-on NOx controls on Units 1 and 2 as part of LTS. It was the DEQ/AQD's impression that the proposed NOx control strategy met BART requirements and PacifiCorp's ██████████

⁴ PacifiCorp's letter was submitted as "confidential commercial information and a trade secret under WSA § 35-11-1101 *et seq.* and WSA §§ 16-4-202 and 203." Since its receipt, the DEQ/AQD has treated the letter as confidential.

⁵ The redacted material is a subject of the DEQ's Motion for Protective Order.

[REDACTED]⁶ Schlichtemeier Aff. at ¶¶ 8, 29 – 37; Potter Aff. at ¶¶ 11 – 21; Cole Anderson Aff. at ¶¶ 9 - 14.

18. The DEQ/AQD worked closely with PacifiCorp to develop Condition 17. PacifiCorp and the DEQ/AQD mutually agreed upon the terms of Condition 17. Schlichtemeier Aff. at ¶¶ 33-36; Potter Aff. at ¶¶ 11-21; Cole Anderson Aff. at ¶¶ 9-14.

19. The DEQ/AQD worked closely with PacifiCorp to develop Condition 18. PacifiCorp and the DEQ/AQD mutually agreed upon the terms of Condition 18. Schlichtemeier Aff. at ¶¶ 33-37; Potter Aff. at ¶¶ 11-21; Cole Anderson Aff. at ¶¶ 9-14.

20. On May 28, 2009, the DEQ/AQD notified PacifiCorp that it had completed its initial evaluation of PacifiCorp's Jim Bridger BART permit applications for Units 1-4. Schlichtemeier Aff. at ¶ 22; Ex. 10.

21. On June 3, 2009, the DEQ/AQD advertised its proposed decision and announced that the public comment period would run through August 4, 2009. Schlichtemeier Aff. at ¶ 23; Ex. 11.

22. On August 4, 2009, at the end of the public comment period, the DEQ/AQD held a public hearing on its proposed decision. Schlichtemeier Aff. at ¶¶ 24-26; Ex. 12.

23. During the public comment period, the DEQ/AQD received numerous public comments, including comments from EPA and PacifiCorp. Schlichtemeier Aff. at ¶¶ 25-26 Exs, 13, 14.

⁶ The redacted material is a subject of the DEQ's Motion for Protective Order.

24. On August 27, 2009, the DEQ/AQD requested PacifiCorp provide additional information related to NOx controls. Schlichtemeier Aff. at ¶ 27; Ex. 15.

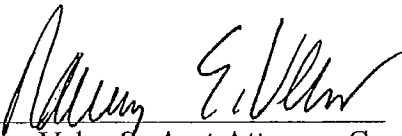
25. On September 18, 2009, the DEQ/AQD received PacifiCorp's response. Schlichtemeier Aff. at ¶ 28; Ex. 16.

26. On December 31, 2009, the DEQ/AQD issued its decision and response to comments. Schlichtemeier Aff. at ¶ 38; Ex. 19.

27. Also on December 31, 2009, the DEQ/AQD issued BART Permit MD-6040 to PacifiCorp for Jim Bridger Units 1-4. Schlichtemeier Aff. at ¶ 39; Ex. 20.

Respectfully submitted this 6th day of August, 2010.

FOR RESPONDENT DEQ:



Nancy Vehr, Sr Asst Attorney General (6-3341)
Affie Ellis, Assistant Attorney General (6-4406)
123 Capital Building
Cheyenne, WY 82002
Telephone: (307) 777-6946
Facsimile: (307) 777-3542
nvehr@state.wy.us
aellis@state.wy.us
Attorneys for the State of Wyoming, DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2010, a true and correct copy of the foregoing *DEQ's Response to PacifiCorp's Statement of Facts* (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

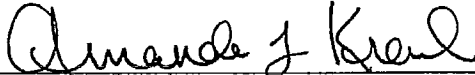
Michael Jenkins
PacifiCorp
1407 West North Temple, Suite 320
Salt Lake City, UT 84116

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