BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

PACIFICORP'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON CONDITIONS 17 AND 18 OF THE BRIDGER BART PERMIT

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 Reply In Support of Its Motion for Partial Summary Judgment.

INTRODUCTION

In spite of the various legal positions and multitude of alleged "genuine issues of material fact" asserted by the Wyoming Division of Air Quality ("DAQ"), its arguments simply do not support DAQ's contention that the Wyoming Environmental Quality Council ("Council") should deny PacifiCorp's motion for partial summary judgment. First, most of the factual disputes asserted by DAQ are, upon close examination, not relevant to PacifiCorp's motion and have no bearing upon the narrow legal issues presented. Moreover, DAQ's legal arguments in no way justify DAQ requiring selective catalytic reduction equipment ("SCR") (or equivalent) and associated NOx emission rates at the Bridger plant under the guise of Long-Term Strategy ("LTS") requirements in Conditions 17 and 18 of the Bridger best available retrofit technology ("BART") permit. And, even if DAQ somehow is found to have legal authority to insert LTS

requirements in a BART permit, the manner in which DAQ did so in the Bridger BART permit was arbitrary and capricious.

Of course, granting PacifiCorp's motion does not leave DAQ without a path forward for proposing LTS requirements at the Bridger plant if they are justified and supported by regulation. That path would be for DAQ to include them in the regional haze state implementation plan ("RH SIP") as a LTS requirement and not as a BART permit requirement. Although some may see this as "splitting hairs" or "form over substance," it is an important distinction. Once DAQ uses the proper path to impose LTS requirements, PacifiCorp and other stakeholders will be in a position to react to those proposed LTS requirements at the Bridger plant in the proper context and after DAQ has followed the appropriate LTS and SIP procedures.

UNDISPUTED FACTS

DAQ asserts such copious "facts" in its Opposition Memorandum and supporting papers that it nearly obscures the meaningful, undisputed core facts relating to PacifiCorp's motion. These core, undisputed facts, however, are the very ones on which the Council should focus. The other asserted facts simply are not relevant to the motion at hand. As shown below, the "material" facts to this motion are undisputed.

1. PacifiCorp never agreed that SCR qualifies as BART at the Jim Bridger plant. *See* DAQ Exhibit 14.[1] In fact, in its BART applications and subsequent filings, PacifiCorp continuously asserted that Low NOx Burners and Over-fire Air ("LNB/OFA") were BART, not SCRs. *See* Affidavit of Chad Schlictemeir, Para. 29; Affidavit of Darla Potter, Para. 12; DAQ Exhibits 2, 4, 5, and 6.

[1] For ease of use, for purposes of this Reply Memorandum PacifiCorp adopts and incorporates DAQ's Exhibits filed with its Opposition Memorandum and refers to those Exhibits in this Undisputed Fact section.

2. DAQ found that SCRs are not BART for NOx control at the Jim Bridger plant. DAQ's Response to PacifiCorp's Statement of Facts, Paras. 5 and 6. DAQ repeatedly stated that its NOx BART determination for the Bridger plant was based upon a review of the required statutory factors. *See* DAQ Exhibit 10, page 6; Exhibit 19, Comment II.1.

3. Despite acknowledging that SCRs are not BART for the Bridger plant, DAQ included Conditions 17 and 18 (which require the installation of SCRs) in the Bridger BART permit. *See* DAQ Exhibit 20. In the Bridger BART permit and in other public contemporaneous statements, DAQ clearly stated that Conditions 17 and 18 are required "under the Long-Term Strategy of Wyoming's Regional Haze SIP." *See* DAQ Exhibit 10, page 60; DAQ Exhibit 12, pages 1-4; DAQ Exhibit 20. Prior to PacifiCorp's appeal, DAQ never provided any other statutory or regulatory basis for Conditions 17 and 18.

4. PacifiCorp has consistently challenged DAQ's decision to require SCRs as a Long-Term Strategy ("LTS") under Conditions 17 and 18 of the Bridger BART permit; stating, to the contrary, that non-BART LTS requirements cannot be included in a BART permit and must be instituted only through the Wyoming RH SIP. *See* DAQ Exhibit 14; DAQ Exhibit 12, pages 5-6.

5. Even in this litigation, DAQ has made statements regarding its authority to require SCRs in BART permits contrary to that argued in its Opposition Memorandum. For example, Chad Schlictemeir stated in his affidavit, Para. 34, that "It should be noted that LTS for the other PacifiCorp units was not included in the BART permits because the installation dates fall outside the second regional haze planning period (2023). These units will be addressed in future regional haze planning periods." *See also,* Potter Affidavit, Para. 17.

ARGUMENT

A. DAQ Does Not Have Legal Authority to Issue Conditions 17 and 18.

None of the legal arguments or factual assertions made by DAQ support the imposition of non-BART emissions reduction requirements in a BART permit.

1. *The WEQA Does Not Provide DAQ the Authority to Impose Conditions 17 and 18 in a BART Permit.*

DAQ improperly attempts to justify Conditions 17 and 18 of the Bridger BART permit based on generic language in the WEQA that empowers the director "to 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." WYO. STAT. ANN. § 35-11-801(a) (emphasis added). Without even attempting to explain specifically how imposing non-BART conditions in a BART permit is consistent with BART rules, regulations and standards, DEQ summarily states that "Conditions 17 and 18 are aimed at further reducing NOx emissions from Units 1-4 and are therefore consistent with the WEQA's purpose." DEQ Resp. at 13. In other words, DAQ seems to be asserting that if a condition unrelated to the BART permit at issue results in reduced NOx emissions, then it is justified in imposing that condition without regard to whether it is otherwise authorized by, or consistent with, BART permit requirements. Such a position, of course, cannot and should not be sustained for several reasons.

First, DAQ's reading of the cited statute is overly broad. In fact, taking DAQ's interpretation to its logical extreme, DAQ could have inserted a condition in the Bridger BART permit that restricts plant operations to daylight hours, requires the plant to close on weekends, and/or requires the plant to convert to natural gas – all because such conditions would "reduce NOx emissions from Units 1-4" and would, therefore, be "consistent with the WEQA's purpose." The Council should not sanction such a position.

Moreover, by selectively applying only portions of the cited statute to suit its needs in this proceeding, DAQ fails to consider the statute in its entirety, which reads as follows:

> When the department has, **by rule or regulation, required a permit to be obtained** it is the duty of the director to issue such permits upon proof by the applicant that the procedures of this act and **the rules and regulations promulgated hereunder have been complied with.** 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.** An administrator shall not issue permits and may issue a license under this act only as specifically authorized in this act.

WYO. STAT. ANN. § 35-11-801(a) (emphasis added). In other words, this statute does not, by itself, allow DAQ to impose non-BART permit conditions in a BART permit. Rather, it is intended to provide DAQ with general legal authority to impose permit conditions consistent within the specific "rules, regulations and standards" which govern a particular permit. The Council must interpret this statute in its entirety and according to the plain meaning of the words used, and not parse out the wording as encouraged by DAQ. *Dept. of Revenue v. Buggy Bath*, 18 P.3d 1182, 1185 (Wyo. 2001) ("Our review of statutory interpretation begins with an inquiry into the ordinary and obvious meaning of the words employed by the legislature according to the manner in which those words are arranged.") Thus, DAQ's duty under this statute and regarding the Bridger BART permit is to ensure that Wyoming's BART permit regulations have been followed. It is not DAQ's duty or right to ignore the underlying BART permit regulations and impose non-BART conditions in a BART permit.

2. *The WAQSR's Generic Permitting Application Regulation Does Not Provide DAQ the Authority to Impose Conditions 17 and 18 in a BART Permit.*

DAQ next argues that, because it has a right to review the Bridger BART permit application, and also because the generic permit application regulation[2] uses the term "a source

[2] The generic permitting application regulations cited by DAQ provide that a BART permit application should include "[a]dditional relevant information as the Administrator may

of air pollution," DAQ cannot be restricted when imposing any pollution controls or emission limits it decides are appropriate based on that review. In this argument, DAQ misconstrues the limits of its own authority, misreads the applicable regulations, and ignores the bounds set by the specific BART permit regulations which govern the very BART permit conditions at issue.

As noted before, DAQ's authority, like that of any other state agency, is constrained by both the limitations of its statutory grant of power and the restrictions its own rules and regulations place on its exercise of power. *See Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) (Agencies must find warrant for the exercise of any authority which they claim in the statute that created them); *see also, State v. Buggy Bath Unlimited, Inc.*, 18 P.3d 1182, 1188 (Wyo. 2001) (administrative agency must follow its own rules and regulations). Further, when a specific manner in which an agency can exercise its power is mandated, the agency exceeds its authority by exercising that power in a different way. *Horse Creek Conservation Dist. v. State ex rel. Wyo AG*, 221 P.3d 306, 316 (Wyo. 2009); *see also, Buggy Bath*, 18 P.3d at 1188.

The parties are before this Council talking about a BART permit; we are not here talking about an "all-purpose" air permit in which DAQ can impose any condition that strikes its fancy.

---

request" and is not complete until it includes "all material and analyses which the Administrator determines are necessary for the Division to review the facility as a source of air pollution." WAQSR Ch. 6 § 9(e)(i)(H) and § 2(g). DAQ's argument that a generic "permit application" regulation should be read to give it authority to require non-BART emissions controls and limits in a BART permit, when the applicable BART and LTS regulations do not provide DAQ with that authority, is contrary to established precedent. "Our controlling consideration in interpreting statutes is the intent of the legislature. To ascertain that intent, we construe a statute in pari materia with other statutes. When possible, we will harmonize statutes relating to the same subject matter. Accordingly, we apply the rule that a specific statute will govern over a general statute." *Cooper v. Town of Pinedale*, 1 P.3d 1197, 1200 (Wyo. 2000). Also, *Dept. of Revenue v. Buggy Bath* states that "the rules of statutory construction also apply to the interpretation of administrative rules and regulations." 18 P.3d 1182, 1185 (Wyo. 2001). "Harmonizing" the applicable BART regulations in this case with the generic regulations cited by DAQ results in a finding that DAQ lacks authority to impose Conditions 17 and 18.

In this context, DAQ can only require a source subject to BART to "install and operate best available control technology" within the appropriate five year time frame, as specifically stated in the applicable BART regulations. WAQSR Ch. 6 § 9(e)(iii), (viii). It is really that simple. DAQ has authority to impose BART conditions in a BART permit and the WAQSR do not authorize DAQ to impose non-BART conditions in a BART permit.

3. *Whether WAQSR Authorizes DAQ to Impose Reasonable Permit Conditions in Construction Permits is not Relevant to Conditions 17 and 18.*

DAQ next alleges WAQSR Ch. 6 §§ 2(c)(i – viii) and 2(f) allow it to impose "reasonable conditions" on a permittee, including Conditions 17 and 18. However, unlike the preceding argument, DAQ does not even attempt to explain how these regulations relate to BART permits nor does DAQ identify any BART permit regulation that incorporates these regulations. The "reasonable conditions" regulations that DAQ relies upon are inapplicable here because they are specific to DAQ's authority to issue permits for new or modified sources of pollution and, in this setting, the Bridger plant is not a "new or modified source of pollution." Therefore, these regulations do not relate to BART permits and they cannot provide a basis for DAQ imposing non-BART conditions in a BART permit.

4. *Neither the RH SIP nor the LTS regulations Justify Imposing Conditions 17 and 18.*

In its Opposition Memorandum, DAQ fails to address or discuss Wyoming's LTS regulations which are absolutely critical to a proper resolution of PacifiCorp's Motion. Moreover, DAQ admits in its Opposition Memorandum that the "draft SIP does not provide the authority for DEQs' permitting actions [in the Bridger BART permit]." *DAQ Opp. Memo* at 16.[3]

[3] DAQ affirmed this position in its recent response to PacifiCorp's discovery requests, stating that "the RH SIP was not the basis or justification for any part of the Naughton or Bridger BART permits." DAQ's Response to Interrogatory No. 3, submitted August 27, 2010.

DAQ's recent admission that neither the LTS regulations or RH SIP give it authority to impose Conditions 17 and 18 is in direct opposition to the language of the BART permit and DAQ's public statement about the permit conditions. *See* Undisputed Fact 3. Because DAQ acknowledges that neither Wyoming's LTS regulations nor the draft RH SIP give it the authority to place Conditions 17 and 18 in the Bridger BART Permit, and because the statutory and regulatory sources of authority that DAQ claims as a basis for its actions do not give it the authority to impose Conditions 17 and 18, PacifiCorp is entitled to have its Motion granted as a matter of law.

B. Even if DAQ is Somehow Found to Have Authority to Impose Conditions 17 and 18, DAQ's Determination Still is Arbitrary and Capricious.

DAQ next argues that PacifiCorp somehow waived its right to challenge Conditions 17 and 18 by agreeing to them during the permitting process. DAQ further argues that PacifiCorp has not met its burden of proof to show that DAQ's actions were arbitrary and capricious. These arguments are simply wrong.

1. PacifiCorp Did Not Waive Its Right to Challenge Conditions 17 and 18.

DAQ states that, "because PacifiCorp did not object to Conditions 17 and 18 during the permitting process, but agreed to such, PacifiCorp waived its right to challenge the DEQ/AQD's determination." DAQ's Resp. at 16. This is simply not the case. Under Wyoming law, "waiver" is an affirmative defense and the burden of proving it falls on the party asserting it (in this case DAQ). *Murphy v. Stevens*, 645 P.2d 82, 93 (Wyo. 1982). The elements of waiver are "1) an existing right; 2) knowledge of that right; and 3) an intent to relinquish it." *Jackson State Bank v. Homar*, 837 P.2d 1081, 1086 (Wyo. 1992) (internal citations omitted). There is simply no evidence in the record to support DAQ's claim that PacifiCorp relinquished its right to appeal Conditions 17 and 18.

In fact, PacifiCorp's written and oral comments in response to the proposed Bridger BART permit make it crystal clear that PacifiCorp has always been opposed to Conditions 17 and 18 for the very reasons it is asserting now in this proceeding. *See* Undisputed Fact 4. For example, in its public comment letter (page 5) responding to the draft Bridger BART permit (submitted by DAQ as Exhibit 14), PacifiCorp stated that "it is premature to use a BART Application Analysis to propose emission reduction requirements under a Long-Term Strategy which has not yet been released." As this letter and other evidence demonstrates, PacifiCorp did not remain silent about Conditions 17 and 18; rather, it objected to them when DAQ first proposed them and it has appealed them after DAQ imposed them.

Further, the affidavit evidence that DAQ alleges shows PacifiCorp's intent to waive its right to appeal Conditions 17 and 18 does not show any such intent. At most, the affidavit evidence supports a finding that PacifiCorp agreed to work with DAQ to implement the state's Long-Term Strategy after the RH SIP is adopted upon completion of the proper procedure for doing so. Because DAQ cannot show that PacifiCorp ever communicated an intention to relinquish its appeal rights or its right not to object to LTS requirements inserted in a BART permit, its affirmative defense of waiver must fail.

Moreover, none of the "material facts"[4] asserted by DAQ at pages 17 – 22 of its Response are relevant to the issue of waiver or to any other aspect of PacifiCorp's motion. Even

[4] "In considering a motion for summary judgment it is appropriate for a court to identify the **essential elements** of the plaintiff's cause or of the **defense asserted**, and to then **determine the materiality** of any fact in the light of whether it will establish or refute one of those essential elements. If it does not have that effect, it **would not be a material fact** in the controversy, and a genuine issue with respect to that fact, no matter how sharp, would not foreclose the granting of a motion for summary judgment." *Johnson v. Soulis*, 542 P.2d 867, 871 (Wyo. 1975)(emphasis added). An analysis of the "essential elements" of PacifiCorp's narrow legal argument demonstrates that only the facts addressed in this Reply Memorandum are "material"

if those material facts are accepted as true, none of them establish that PacifiCorp agreed to Conditions 17 or 18 or that PacifiCorp waived its right to object to them. Rather, at best, the asserted facts – taken in the light most favorable to DAQ – can be read to say that PacifiCorp will consider installing SCR at Bridger during the time periods noted only if justified as a LTS under the RH SIP or mandated by some other legal requirement. DAQ's asserted facts cannot be read, however, to conclude that PacifiCorp agreed that DAQ has authority to include non-BART requirements in a BART permit.

Finally, the "waiver" doctrine does not apply where the party is challenging an agency's statutory authority, or "jurisdiction," to require certain conditions and requirements. *See Appeal of Williams*, 626 P.2d 564, 571-72 (Wyo. 1981). In *Williams* (a case cited by DAQ), the Supreme Court stated that "a challenge to a court's or a quasi-judicial body's jurisdiction over the subject matter can never be waived." *Id.* The Supreme Court then found the appellant in *Williams* had not waived its argument because it challenged "the jurisdiction of the PSC to grant conditional certificates of convenience and necessity" by contending, in part, that there was "no statutory authorization for the PSC's action." *Id.* While the Supreme Court ultimately found in *Williams* the PSC had authority under the applicable statute, this opinion is highly instructive here. Under *Williams*, PacifiCorp cannot waive its challenge to DAQ's statutory authority, or "jurisdiction," to impose Conditions 17 and 18. Therefore, DAQ's claims of "waiver" are inapplicable.

As noted above, PacifiCorp is asking this Council to remove Conditions 17 and 18 from the Bridger BART permit. Once DAQ follows the proper procedural process and uses its RH

---

to PacifiCorp's Motion and that the numerous "facts" alleged by DAQ are not related to the "essential elements."

SIP to implement the LTS, PacifiCorp will be in a position to react to such requirements in the context of the entire LTS and RH SIP.

2. *PacifiCorp Has Carried its Burden of Proof and Shown that DAQ Acted Arbitrarily and Capriciously.*

In its Motion, PacifiCorp established that the inclusion of Conditions 17 and 18 was improper because DAQ acted arbitrarily and capriciously in formulating Conditions 17 and 18. PacifiCorp established this by showing that DAQ's requirements were ad hoc and inconsistent. *See* Motion at 14-19. In its Response, DAQ does not dispute that its actions were ad hoc or inconsistent, but, instead alleges that PacifiCorp failed to meet its burden of showing that its actions in imposing Conditions 17 and 18 on the Bridger BART Permit were arbitrary and capricious because DAQ claims it 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." DEQ's Resp. at 22.

DAQ errs by confusing the evidence and standards applicable to its affirmative defense, with evidence applicable to PacifiCorp's burden of showing that DAQ acted arbitrarily and capriciously. As PacifiCorp established in its Motion and DAQ does not dispute in its Response, the wording of Conditions 17 and 18 contains inconsistent requirements and ad hoc findings. By pointing out the problems with the language of Conditions 17 and 18, PacifiCorp has carried its burden of showing that DAQ acted arbitrarily and capriciously. For these reasons alone, Conditions 17 and 18 should be struck.

CONCLUSION

For the above-stated reasons, PacifiCorp respectfully requests that its Motion for Partial Summary Judgment be granted. There are no disputed issues of "material" fact and PacifiCorp is

entitled to judgment as a matter of law that DAQ does not have the authority to impose Conditions 17 and 18 in the Bridger BART permit.

DATED this 31st day of August 2010.

PACIFICORP

By: _____

Paul J. Hickey
John A. Coppede
HICKEY & EVANS, LLP
1800 Carey Avenue, Suite 700
P.O. Box 467
Cheyenne, WY 82003-0467
Ph: (307) 634-1525
Fx: (307) 638-7335
phickey@hickeyevans.com
jcoppede@hickeyevans.com

and

/s/ E. Blaine Rawson

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

Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of August 2010 a true and correct copy of the foregoing PACIFICORP'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON CONDITIONS 17 AND 18 OF THE BRIDGER BART PERMIT was served as follows:

Nancy Vehr Affie Ellis Senior Assistant Attorney General 123 Capital Building Cheyenne, WY 82002	U.S. Mail, postage prepaid Email: nvehr@state.wy.us Email: aellis@state.wy.us
John Corra, DEQ Director Herschler Building, 4th Floor 122 West 25th Street Cheyenne, WY 82002	U.S. Mail, postage prepaid

HICKEY & EVANS, LLP