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

In the Matter of: )  
Basin Electric Power Cooperative ) Docket No. 10-2802  
Air Quality Permit No. MD-6047 )  
BART Permit: Laramie River Station )

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**DEQ'S RESPONSE OPPOSING BASIN ELECTRIC'S MOTION FOR  
SUMMARY JUDGMENT**

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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 Basin Electric's Motion for Summary Judgment. Basin Electric's Motion should be denied because Basin Electric 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.<sup>1</sup> 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 [.]

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<sup>1</sup> *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.<sup>2</sup> 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)<sup>3</sup> 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.

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<sup>2</sup> *See* WYO. STAT. ANN. §§ 35-11-109; *Id.* at § 35-11-110 ; *Id.* at § 35-11-201 through -214; WAQSR chs. 1-14; *see 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”).

<sup>3</sup> 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 PM<sub>10</sub>.<sup>4</sup> 40 C.F.R. § 81.351. The Laramie River Station is located in Platte County which has been designated as unclassifiable or in attainment for all NAAQS. *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.

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<sup>4</sup> 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 Haze<sup>5</sup>**

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. §

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<sup>5</sup> “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<sub>x</sub>), particulate matter (PM), and sulfur dioxide (SO<sub>2</sub>). 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**

Basin Electric's Laramie River Station (LRS) is comprised of three (3) 550 megawatt (MW) (net) dry-bottom, wall fired boilers burning pulverized coal. Ex. 13 at 000414. LRS Unit 1 was placed into service in 1980, Unit 2 in 1981, and Unit 3 in 1982. *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 LRS was "Subject to

BART” and was required to undergo a BART analysis because the LRS contributed to visibility impairment in at least one Class I area. Schlichtemeier Aff. at ¶ 13; Ex. 1.

On March 5, 2007, the DEQ/AQD received Basin Electric’s initial BART review and analysis for the LRS. *Id.* at ¶¶ 14-15; Ex. 2, 3. On May 3, 2007, the DEQ/AQD notified Basin Electric that despite Basin Electric’s commitment to implement presumptive control levels, Basin Electric was required to submit additional information and analysis. *Id.* at ¶ 16; Ex. 4. On September 28, 2007, the DEQ/AQD received Basin Electric’s BART application, identifying overfired air (OFA), New Low NOx Burners (LNB) with OFA, and Selective Catalytic Reduction (SCR) as possible BART controls. *Id.* at ¶ 17; Ex. 5. Over the next eighteen months, the DEQ/AQD received additional submittals from Basin Electric. *Id.* at ¶¶ 19 (7/28/08), 27 (3/2/09), 28 (3/16/09); Exs. 7, 10, 11; Nall Aff. at ¶¶ 17 (2/15/08), 19 (7/28/08); Exs. 22, 23. In the spring of 2008, the DEQ/AQD received preliminary comments from EPA, encouraging DEQ/AQD “to make BART determinations and do a Reasonable Progress analysis requiring LNB/OFA/SCR and 0.07 lbs/mmBtu or lower NOx limits at as many sources as is cost effective.” *Id.* at ¶ 18; Ex. 6.

By August 2008, the DEQ/AQD had completed preliminary BART reviews for LRS Units 1-3. *Id.* at ¶ 20. The DEQ/AQD compared the costs to install various NOx controls as BART to recent BACT (Best Available Control Technology) determinations and also prepared charts showing the visibility improvement on the affected Class I areas for each of the proposed control scenarios. *Id.* Based on the DEQ/AQD’s preliminary



review, the DEQ/AQD's preliminary NOx BART determination for the LRS Units 1-3 was LNB/OFA/SCR. *Id.*; Potter Aff. at ¶ 13; Cole Anderson Aff. at ¶ 10.

On September 8, 2008, the DEQ/AQD met with Basin Electric and discussed the DEQ/AQD's preliminary NOx BART determinations for Units 1-3. Schlichtemeier Aff. at ¶ 21; Ex. 8. During this meeting, Basin Electric told the DEQ/AQD that it was difficult to get SCR funding authorization in the 5-year BART timeframe because of Basin Electric's reliance on meeting the presumptive NOx BART levels and Basin Electric's power cooperative organizational structure. *Id.*; Potter Aff. at ¶ 14. Basin Electric also said that it would be difficult to install SCR during the 5-year BART timeframe due to costs, engineering constraints, and time needed to obtain power cooperative approval. Potter Aff. at ¶ 14. Given that one of the BART factors is costs of compliance, the DEQ/AQD discussed the possibility of Basin Electric committing to install SCR as part of the long term strategy (LTS) instead of as BART. Schlichtemeier Aff. at ¶ 21; Potter Aff. at ¶ 14.

Between September 2008, and May 2009, the DEQ/AQD and Basin Electric had several meetings and discussions centered around engineering options and constraints for LNB/OFA BART NOx emission rates and LTS add-on NOx controls. Potter Aff. at ¶ 16. One of Basin Electric's concerns was specifying an add-on NOx control technology requirement several years in advance in light of potential greenhouse gas regulations. Schlichtemeier Aff. at ¶ 23; Potter Aff. at ¶ 15. The DEQ/AQD was willing to specify a control level in lieu of a specific NOx control technology for the add-on NOx control requirements. Potter Aff. at ¶ 16. Another of Basin Electric's concerns was being able to

meet the 0.07 lb/MMBtu NOx emission limit for the add-on NOx control. Schlichtemeier Aff. at ¶ 25. The DEQ/AQD took the position if installed controls are well-maintained and operated as designed, the control should meet its designed control efficiency. *Id.* Ultimately these discussions resulted in the DEQ/AQD and Basin Electric mutually agreeing upon a NOx control strategy for Basin Electric's LRS Units 1-3. *Id.* at ¶¶ 25, 37-38; Potter Aff. at ¶¶ 17-19; Tina Anderson Aff. at ¶ 12.

On May 27, 2009, the DEQ/AQD completed and provided its permit application analysis to Basin Electric. Schlichtemeier Aff. at ¶ 29; Exs. 12, 13. The DEQ/AQD advertised its proposed decision and took public comment up through the conclusion of the public hearing on August 6, 2009. *Id.* at ¶¶ 40-41; Exs. 14, 15. During the public comment period, the DEQ/AQD received numerous comments, including comments from EPA and Basin Electric. *Id.* at ¶¶ 42-43; Exs. 16, 17. On December 31, 2009, after considering the public comments and additional submittals, the DEQ/AQD issued its decision, comment response, and BART Permit MD-6047 for LRS Units 1-3. *Id.* at ¶¶ 44-47; Exs. 18-21. The DEQ/AQD modified Condition 16 in response to Basin Electric's request to shorten the permit application submittal timeframe for add-on NOx controls from six years to two years before installation. *Id.* at ¶ 46; Potter Aff. at ¶ 19.

Additional statements of material fact are set forth in DEQ's Response to Basin Electric's Annex.

### **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**

Basin Electric moved for summary judgment on four issues. First, Basin Electric argues that the DEQ/AQD lacked authority to include Condition 16 in Permit MD-6047 for the Laramie River Station. (Basin Electric’s Memo. at 8-9). Second, the proper vehicle for imposing Condition 16 permit requirements is the RH SIP, not the permit. (*Id.* at 9-10). Third, the DEQ/AQD failed to comply with the long term strategy RH SIP process by including future permit application requirements in Condition 16. (*Id.* at 11-14). Finally, Basin Electric argues Condition 16 is arbitrary. (*Id.* at 14). For the reasons stated below, DEQ/AQD requests that the Council deny Basin Electric’s motion.

##### **A. DEQ has Legal Authority to Issue Condition 16**

Basin Electric argues that the DEQ/AQD lacked authority to include Condition 16’s permitting requirements for additional add-on NOx controls because Wyoming

statutes and regulations do not explicitly address “Long-term Strategy” permits. Basin Electric Memo. at 8-9. Basin Electric’s claims fail, because the statutory framework of the WEQA and regulatory framework of the WAQSR authorize DEQ to impose such pollution control requirements in permitting actions.

**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.

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(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 Basin Electric’s LRS Units 1-3 emit NOx. It is also undisputed that NOx controls are intended to reduce NOx emissions. Therefore, permitting requirements aimed at reducing and eliminating air pollution are consistent with the WEQA.

Condition 16's requirement for add-on NOx controls at lower emission levels is aimed at further reducing NOx emissions from the LRS and is 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 LRS facility “as a source of air pollution,” addressed NOx emissions by requiring the installation of new Low NOx burners with overfire air (LNB/OFA) on Unit 1 (2012), Unit 2 (2013), and Unit 3 (2014), and requiring additional add-on NOx controls for one unit by 2018 and a second unit by 2023. Ex. 21 at 000471. 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 Condition 16 is reasonable and consistent with DEQ’s existing rules, regulations and standards. *Schlichtemeier Aff.* at ¶¶ 24-25, 30, 38; *Potter Aff.* at ¶ 11, 17-19; *Cole Anderson Aff.* at ¶¶ 7, 11. Basin Electric has failed to demonstrate that Condition 16 is 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. *Tina Anderson Aff.* at ¶¶ 8-10. *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. WAQSR Ch. 6. Instead, the emission controls and reductions resulting from DEQ's permitting action are anticipated to be rolled into the RH SIP. *Tina Anderson Aff.* at ¶¶ 10, 13.

**B. NOx Emission Controls are Properly Imposed in Permit MD-6047**

**1. Chapter 6 of the WAQSR provides for Emission Limit Permit Requirements**

Basin Electric, without citing any legal authority, argues that the proper vehicle for imposing the add-on NOx requirements contained in Condition 16 is the RH SIP, not Permit MD-6047. *Memo.* at 9-10. The Wyoming Supreme Court has "consistently refused to consider claims not supported by cogent argument or citation to pertinent legal authority." *Forbis v. Forbis*, 2009 WY 41, ¶ 10, 203 P.3d 421, 424 (Wyo. 2009). For this reason alone, the Council should reject Basin Electric's contention. The DEQ/AQD contends, for all the reasons and arguments set forth in section IV.A, *supra*, that the DEQ/AQD has legal authority in permitting actions to impose pollution control

requirements aimed at reducing or eliminating air pollution. *See* WYO. STAT. ANN. §§ 35-11-102, -801(a) and (c); WAQSR Ch. 6, §§ 2, 9.

The RHR requires that states, including Wyoming, prepare a RH SIP. 40 C.F.R. § 51.308. The RHR specifically requires the RH SIP include BART determinations for BART sources. *Id.* at § 51.308(e). The DEQ/AQD made the LRS BART determination through the BART process set forth in the WAQSR. *Schlichtemeier Aff.* at ¶¶ 30 – 36. The DEQ/AQD accepted LNB/OFA as BART because Basin Electric needed more time to install NOx controls. *Potter Aff.* at ¶¶ 16-19. The RHR planning periods provided a sensible timeframe for add-on NOx control installation deadlines. *Id.* Use of such time periods is not prohibited by the WAQSR. *See* WAQSR Ch. 6, § 2. Eventually, the add-on NOx requirements of Condition 16 may be included in the RH SIP. *Id.* at ¶ 38.

## **2. The RH SIP Process is a Separate Process from Permitting**

Basin Electric contends that the DEQ/AQD failed to comply with the long term strategy RH SIP process by including LTS conditions in permit MD-6047. *Memo.* at 11-14. As discussed in Section I.G – I, *supra*, the RHR requires states determine BART for BART eligible sources. 40 C.F.R. § 51.308(e). BART is an emission limit. WAQSR Ch. 6, § 9(b). In Wyoming, BART limits are established through a permitting process. *Id.* at §§ 2 and 9. Wyoming's permitting process provides authority for permit requirements aimed at reducing or eliminating air pollution. *See discussion supra* at Section IV.A.

The RH SIP process differs from the permitting process. A permit imposes requirements upon the permittee. *See* WAQSR Ch. 6. A SIP imposes requirements upon



the state. *See* 40 C.F.R. § 51.308 (“each State . . . must submit . . . an implementation plan for regional haze[.]”) After permit MD-6047 was issued, the enforceable requirements may be included in the SIP. In Basin Electric’s case, the draft RH SIP went out for comment with proposed, not final, permit conditions. Tina Anderson Aff. at ¶ 13. The DEQ/AQD is reviewing comments and making revisions to the draft RH SIP. *Id.* at ¶ 9. Basin Electric’s contentions regarding the RH SIP development process are outside the scope of the permitting process, and are better addressed in the SIP process, than in this case.

**C. Conditions 16 is Reasonable and Supported in Fact**

**1. Basin Electric Agreed with and Committed to the NOx Control Strategy**

Basin Electric alleges that Condition 16 is arbitrary because there are no statutory, regulatory, or permit definition for “lowest viable NOx emission.” Memo at. p. 14. Basin Electric’s argument is without merit because, with the exception of the permit application submittal deadline, Basin Electric agreed with, and committed to, this permit condition as proposed by DEQ/AQD in May 2009. Schlichtmeier Aff. at ¶¶ 24-25; Potter Aff. at ¶¶ 17-19. Because Basin Electric did not object to any other portion of Condition 16 during the permitting process, but instead agreed with Condition 16, Basin Electric has waived any rights it may have had to challenge this Condition. *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). With the exception of subject matter jurisdiction, parties are generally bound by the theories they’ve 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). Basin Electric should not be allowed to raise new concerns that it had the opportunity to, but chose not to raise during the permitting proceedings.

Additional support for DEQ/AQD’s contention that Basin Electric agreed to Condition 16 is evidenced by the Affidavits attached hereto. The Affidavits also support DEQ/AQD’s contention that whether Basin Electric agreed to Condition 16 is a genuine issue of material fact, including:

- During the pendency of its permit application, Basin Electric committed to LNB/OFA as BART and installing additional add-on NOx controls at one LRS by December 2018, and a second unit by December 2023. Schlichtemeier Aff. at ¶¶ 24-25; Potter Aff. at ¶¶ 17-19.
- Basin Electric’s permit application reflects that a 0.07 lb/mmBtu emission rate was the control level for SCR. Schlichtemeier Aff. at ¶ 25; Potter Aff. at ¶ 19; Cole Anderson Aff. at ¶ 9.
- Basin Electric specifically requested the DEQ/AQD refrain from specifying a control technology. Schlichtemeier Aff. at ¶ 25; Potter Aff. at ¶¶ 18-19.
- DEQ/AQD and Basin Electric worked closely to develop, and reach, a mutually agreeable NOx control strategy that satisfied BART requirements and Basin Electric’s objectives. Schlichtemeier Aff. at ¶¶ 24-25; Potter Aff. at ¶¶ 18-19.

The weight of the evidence at this stage of proceedings supports DEQ/AQD's contention that Basin Electric was aware of and concurred in the DEQ/AQD's approach for addressing NOx emissions in Permit MD-6047. At the very least, the evidence DEQ/AQD has submitted supports DEQ/AQD's contention that there are material disputes of fact as to Basin Electric's agreement and concurrence with the DEQ/AQD's approach.

## **2. Basin Electric Failed to Prove Arbitrary and Capricious Agency Action**

Basin Electric has the burden of proof to show that Permit MD-6047 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 re. 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. Envtl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991).

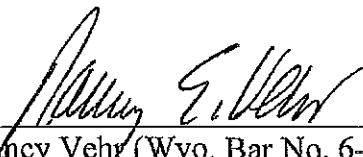
At this stage of the proceedings, the DEQ/AQD has brought forth sufficient evidence demonstrating that genuine issues of material fact exist regarding Basin Electric's knowledge of, participation in the development of, and concurrence with

Condition 16 of Permit MD-6047. *See* DEQ's Response to Basin Electric's Annex; and the attached Affs. and Exs. Because there are genuine issues of material fact, the DEQ/AQD maintains this matter is not ripe for summary judgment and Basin Electric has failed to sustain its burden.

## V. CONCLUSION

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

FOR RESPONDENT DEQ:



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of July, 2010, a true and correct copy of the foregoing *DEQ's Response Opposing Basin Electric's Motion for Summary Judgment* was served by placing the same in the United States mail, postage pre-paid, addressed to:

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John Corra, DEQ Director  
Herschler Building, 4<sup>th</sup> Floor



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