

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

NOV 02 2009

Jim Ruby, Executive Secretary  
Environmental Quality Council

IN THE MATTER OF )  
MEDICINE BOW FUEL & POWER )  
AIR PERMIT CT-5873 )

Docket No. 09-2801

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**ORDER DENYING RESPONDENTS' MOTION FOR DISMISSAL OF CLAIM  
VII AND GRANTING DISMISSAL OF CLAIM VIII**

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THIS MATTER came before the Environmental Quality Council on September 1, 2009, for oral argument on the Motion for Dismissal of Petitioner's Claims VII and VIII filed by Respondent, Department of Environmental Quality on August 3, 2009. Respondent, Permittee joined the Department in its motion.

Council members present at the hearing included Presiding Officer F. David Searle, Dr. Fred Ogden and Mr. John Morris. Council members participating remotely by telephone and/or video included Mssrs. Dennis Boal, Tim Flitner, Tom Coverdale and Ms. Cathy Guschewsky. Mr. Coverdale was unable to hear all argument and thus elected not to participate in the ultimate decision on the motion on Claim VII but did participate in the decision on Claim VIII.

Petitioner appeared via telephone and was represented by Ms. Andrea Issod. The Department of Environmental Quality appeared and was represented by Ms. Nancy Vehr, Senior Assistant Attorney General. The Permittee appeared and was represented by Ms. Mary Throne and Mr. John Coppede.

The issues presented by Claim VII and VIII are:

- A. Whether the Department of Environmental Quality is required to make a finding that the use of the PM-10 surrogate is reasonable to set a limit for PM-2.5 emissions.
- B. Whether the Department of Environmental Quality is required to determine the Best Available Control Technology for Carbon Dioxide and other greenhouse gases.

The Council, having considered the motion, the memoranda in support of and opposition to, having heard argument and having deliberated upon the motion, makes the following findings and decision.

#### FINDINGS OF FACT

1. On December 31, 2006, the Permittee applied for a permit to construct an underground coal mine and an industrial gasification and liquefaction plant to produce transportation fuels and other products. The facility is a major stationary source of air pollutants within the meaning of 6 WAQSR § 4(b)(2006).
2. Following technical review of more than two years, the Department issued Permittee a construction permit, CT-5873, March 4, 2009. Among the provisions of the permit were those pertaining to emission of particulate matter using PM<sub>10</sub> as a “surrogate” for PM<sub>2.5</sub>, and none pertaining to emission of carbon dioxide (CO<sub>2</sub>).
3. By issuing the permit, the Department Director determined that the Permittee’s application to construct the facility satisfied the applicable statutory and regulatory

requirements, and that the permit application satisfied both New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements.

4. On May 4, 2009, Petitioner filed a protest and petitioned for hearing on its objections. The Council docketed the matter as a contested case, pursuant to WYO. STAT. ANN. § 35-11-112(a) and Ch. 1, § 16, General Rules of Practice and Procedure, Department of Environmental Quality.

5. Under Wyoming's Air Quality Standards and Regulations, this facility is required to obtain a "PSD/NSR" construction permit which includes a "Best Available Control Technology" (BACT) limit for "each pollutant subject to regulation. . ." 6 Wyo. Air Quality Standards and Regulations §§ 2, 4(b)(ii) (2006).

6. Permit CT-5873 included a BACT limit for particulate matter.

7. Neither the EPA nor the State of Wyoming have enacted standards or limitations with respect to CO<sub>2</sub> and other greenhouse gas emissions to air from facilities of the type permitted under CT-5873.

8. Permit CT-5873 did not include a BACT limit for CO<sub>2</sub> or other greenhouse gas emissions.

## VI. CONCLUSIONS OF LAW

9. The Environmental Quality Council is empowered to act as the hearing examiner for the Department of Environmental Quality and determine all cases arising under laws, rules, regulations, standards or orders issued or administered by that department, pursuant to WYO. STAT. ANN. § 35-11-112(a). It is further empowered, under WYO. STAT. ANN.

§35-11-112(a)(iv), to conduct hearings in any case contesting the grant, suspension or denial of a permit of the type at issue in this matter.

10. Hearings before the Council are held pursuant to applicable provisions of the Environmental Quality Act, WYO. STAT. ANN. §§ 35-11-101 through 1104, the Wyoming Administrative Procedure Act, WYO. STAT. ANN. §§ 16-3-101 through 115, and the Department of Environmental Quality Rules of Practice and Procedure.

11. When reviewing a motion to dismiss filed pursuant to WYO. R. CIV. P. 12(b)(6), well-pleaded factual allegations of the claimant are taken as true, and construed in the light most favorable to the claimant. *Wilson v. Bd. of County Comm'rs of County of Teton*, 2007 WY 42, ¶ 12, 153 P.3d 917, 921 (Wyo. 2007). The claim should be dismissed only if it is apparent from the face of the pleadings that no facts can be stated which would entitle the claimant to relief. *Duncan v. Afton, Inc.*, 991 P.2d 739, 742 (Wyo. 1999). Though dismissal is a “drastic remedy” and “sparingly granted”, it is the proper method by which to test the legal sufficiency of a claim. *Id.*

12. Preconstruction review and permitting of major sources was mandated by Congress in the 1977 Clean Air Act amendments when the PSD/NSR program was adopted to insure that “economic growth will occur in a manner consistent with the preservation of existing clear air resources[.]” 42 U.S.C. § 7470(3).

13. Wyoming’s Air Quality Standards and Regulations require a “new source” of air pollution in Wyoming to obtain a PSD/NSR construction permit. 6 WAQSR § 2(a)(i)(2006).

14. Among other requirements, a permit applicant must demonstrate that it will meet all applicable national ambient air quality standards, will prevent significant deterioration of existing air quality and will use the “best available control technology” (BACT) for “each pollutant subject to regulation” under applicable state regulations and the federal Clean Air Act. 6 WAQSR § 4(b)(2006).

15. The regulatory definition of BACT is:

Best available control technology means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under [relevant state or federal regulations], which would be emitted from or which results for any proposed major stationary source . . . which the [Department’s Air Quality Division] Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application or production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, he may instead prescribe a design, equipment, work practice or operational standard or combination thereof to satisfy the requirement of Best Available Control Technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results. Application of BACT shall not result in emissions in excess of those allowed under Chapter 5, Section 2 or Section 3 of these regulations and any other new source performance standard or national emission standards for hazardous air pollutant promulgated by the EPA but not yet adopted by the State of Wyoming.

6 WAQSR § 4(a)(2006).

16. A “Regulated NSR pollutant” is defined as:

- (i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the EPA Administrator (e.g., volatile organic compounds are precursors for ozone);

- (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Federal Clean Air Act;
- (iii) Any Class I or II substance subject to a standard promulgated under or established by Title VI of the Federal Clean Air Act; or
- (iv) Any pollutant that otherwise is subject to regulation under the Federal Clean Air Act; except that any or all hazardous air pollutants either listed in section 112 of the Federal Clean Air Act or added to the list pursuant to section 112(b)(2) of the Federal Clean Air Act, which have not been delisted pursuant to section 112(b)(3) of the Federal Clean Air Act, are not regulated NSR pollutants, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Federal Clean Air Act.

17. The facility is a major stationary source of air pollutants within the meaning of 6 WAQSR § 4(b)(2006).

18. Particulate matter is a pollutant subject to regulation.

19. The issue raised by the Department with respect to Claim VII is whether the claim challenging the Department's decision to analyze PM<sub>2.5</sub> emissions using PM<sub>10</sub> as a "surrogate" in keeping with Wyoming's federally-approved State Implementation Plan failed as a matter of law. The Permittee did not file its own memorandum in support of the Department's motion, but argued in support of dismissal for the reasons expressed by the Department.

20. Petitioner, citing a case issued after the permit in this matter had been applied for, reviewed and issued, *In the Matter of Louisville Gas and Electric Co.,(Trimble)*, Petitioner IV-2008-3 at p. 42-46 (August 12, 2009) argued that the DEQ is required to perform an analysis regarding the use of the PM-10 surrogate and that the analysis must include at a minimum:

(1) “a strong statistical relationship between PM-10 and PM-2.5 emissions from the proposed unit” and (2) a showing that the “degree of control of PM-2.5 by the control technology selected in the PM-10 BACT analysis will be at least as effective as the technology that would have been selected if a BACT analysis specific to PM-2.5 emissions had been conducted.” *Trimble*, at 45.

21. *Trimble*, provided the Council with a historical perspective on the law regarding the use of surrogates as the law existed prior to the decision made by DEQ.

22. On this record, on a Motion to Dismiss, two issues remain unresolved. The first is whether the Department is unable to implement a PSD program for the PM-2.5 NAAQS based upon the EPA rule established on May 16, 2008. See 96 *Fed. Reg.* 28,321 (May 16, 2008). “Specifically, EPA concluded that, if a SIP-approved state is unable to implement a PSD program for the PM-2.5 NAAQS based on that rule, the state may continue to implement a PM-10 program as a surrogate to meet the PSD program requirements for PM-2.5 under the PM-10 Surrogate Policy in the Seitz Memorandum.” *Trimble* at 43, citing 96 *Fed. Reg.* at 28,340-28,341.

23. The second is whether or not the use of the surrogate in this application has been shown to be a reasonable substitute. “Further, we believe that this case law governs the use of EPA’s PM-10 Surrogate Policy, and thus that the legal principle from the case law applies where a permit applicant or state permitting authority seeks to rely upon the PM-10 surrogate policy in lieu of a PM-2.5 analysis to obtain a PSD permit.” *Trimble* at 43 (citing a line of cases requiring such an analysis going back as far as 1999). The *Trimble* decision further states: “EPA believes that these cases demonstrate the need for permit

applicants and permitting authorities to determine whether PM-10 is a reasonable surrogate for PM-2.5 under the facts and circumstances of the specific permit at issue, and not proceed on a general presumption that PM-10 is always a reasonable surrogate for PM-2.5.” *Id.* at 44. It would not be proper to dismiss it at this time. *Simon v. Teton Bd. of Realtors*, 4 P.3d 197 (Wyo. 2000).

24. The Motion to Approve the DEQ’s Motion to Dismiss failed to receive a majority vote of the Council. The vote on the motion was 3 in support, 3 in opposition and 1 abstaining.

25. The facility is a major stationary source of air pollutants within the meaning of 6 WAQSR § 4(b)(2006).

26. The issue with respect to Claim VIII was whether the assertion that the Department erred in failing to impose permit restrictions relating to carbon dioxide (CO<sub>2</sub>) and other greenhouse gases should fail as a matter of law. The Department claimed that CO<sub>2</sub> is not currently a regulated pollutant or “subject to regulation” under applicable state or federal law and regulations.

27. Petitioner argues that the Environmental Appeals Board of the Environmental Protection Agency in *Deseret Electric Power Coop.*, P.S.D. Appeal. No. 07-03, 2008 WL 5572891(EAB Nov. 13,2008) that CO<sub>2</sub> is a pollutant subject to regulation.

28. Recently, the Georgia Supreme Court overturned a district court case in which the district court found CO<sub>2</sub> to be a pollutant subject to regulation. *Longleaf Energy Assoc.*,

*LLC v. Friends of the Chattahoochee, Inc.*, -S.E.2d -' 2009 WL 1929192 at \*2-\*5 (Ga.App. 2009)

29. The Department is responsible for assuring Wyoming's air quality meets the national ambient air quality standards. (NAAQS). *See* 42 U.S.C. sec. 7407(a). NAAQS set the maximum ambient air concentration for certain criteria pollutants at levels to protect the public health and welfare. *See* 42 U.S.C. sec. 7408-7409.

30. CO<sub>2</sub> is not currently regulated pursuant to either the NAAQS or the Wyoming ambient air quality standards (WAAQS). *Deseret* at 11-12.

31. A pollutant may be a CAA air pollutant but not subject to regulation for BACT purposes until an emission control standard has been promulgated. *Alabama Power Co.*, 636 F.2d at 370.

32. Petitioner's Claim VIII fails as a matter of law because CO<sub>2</sub> and other greenhouse gases are not currently regulated pollutants (or subject to regulation) pursuant to the Federal Clean Air Act and corresponding EPA regulations, the Wyoming Environmental Quality Act or Wyoming's Air Quality Standards and Regulations. Therefore, no legal duties are currently imposed on DEQ to regulate CO<sub>2</sub> and other greenhouse gases in the manner sought by Petitioner.

33. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007) does not require DEQ to treat CO<sub>2</sub> and other greenhouse gases in the manner sought by Petitioner for purposes of Permit

CT-5873. The United States Supreme Court remanded the case to EPA to make a determination as to whether vehicle greenhouse gas emissions contribute to global climate change and thereby “endanger public health or welfare.” The case did not make a finding that emissions from coal fired power plants “endanger public health or welfare,” nor has EPA adopted final regulations for such emissions of CO<sub>2</sub>.

34. Whether or not CO<sub>2</sub> and other greenhouse gases *may* be “subject to regulation,” the EPA has not determined how it will regulate the greenhouse gas. The matter is currently under vigorous national debate. CO<sub>2</sub> is still not regulated at the federal level. No specific emission standards have been firmly established for facilities of this type for CO<sub>2</sub>.

35. The definition of BACT provides that the application of BACT shall not result in emissions in excess of those allowed. Currently, no CO<sub>2</sub> emission levels or controls have been established by DEQ or the EPA and this Council declines to do so here, bearing in mind that WYO. STAT. ANN. § 35-11-213 restricts both the Council and the Department from imposing restrictions relating to “greenhouse gas emissions,” including CO<sub>2</sub>.

36. The Motion to Approve the DEQ’s Motion to Dismiss received a majority vote of the Council. The vote on the motion was 7 in support, 0 in opposition and 0 abstaining.

### **ORDER**

IT IS THEREFORE ORDERED that:

1. The Department of Environmental Quality’s motion to dismiss Claim VII, pertaining to the regulation of PM<sub>2.5</sub>, should be and hereby is DENIED.

2. The Department of Environmental Quality's motion to dismiss Claim VIII, pertaining to consideration of greenhouse gas emissions, should be and hereby is GRANTED.

3. The contested case hearing on the remaining claims remains set for the week of December 7<sup>th</sup>, 2009.

DONE this 30 day of October, 2009.

  
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F. David Searle, Presiding Officer  
Presiding Officer  
Environmental Quality Council 

**CERTIFICATE OF SERVICE**

I hereby certify that the original of the foregoing document was served by the Environmental Quality Council upon the parties by electronic e-mail, on the 2nd day of November, 2009 addressed to the following:

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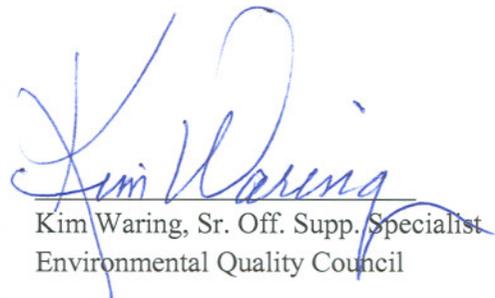
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