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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Unit 3, Intermountain Power Service, Millard County, Utah DAQE-AN0327010-04	EXECUTIVE SECRETARY'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits this Motion for Judgment on the Pleadings in Support of Motion for Judgment on the Pleadings pertaining to the Request for Agency Action filed by Sierra Club.

This motion is supported by the memorandum in support filed with this motion and all other pleadings on file with the Board in this action.

Dated this 26th day of February, 2007.

MARK L. SHURTLEFF
Utah Attorney General

Paul M. McConkie, Assistant Attorney General
Christian C. Stephens, Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2007, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, and/or emailed to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Unit 3, Intermountain Power Service Corporation, Millard County, Utah DAQE-AN0327010-04	EXECUTIVE SECRETARY'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits this Memorandum in Support of its Motion for Partial Judgment on the Pleadings pertaining to Sierra Club's Request for Agency Action (the "RFA").

At issue in this proceeding is whether the Executive Secretary conducted the proper regulatory review in issuing an Approval Order (AO) to Intermountain Power Service Corporation (IPSC) to construct and operate an additional unit at the Intermountain Power Plant in Millard County, Utah. As the Executive Secretary will show, no genuine issues of material fact remain on the claims addressed in the motion, and consequently the Executive Secretary is entitled to judgment as a matter of law. Accordingly, the Executive Secretary respectfully submits that the accompanying motion for partial judgment on the pleadings should be granted.

INTRODUCTION

On October 15, 2004, the Executive Secretary issued an Approval Order to IPSC to construct and operate a third unit at the Intermountain Power Plant in Millard County, Utah. On November 16, 2004, Sierra Club filed a Request for Agency Action ("RFA") appealing the Approval Order. A hearing on the merits is set for November 2007. For purposes of limiting the evidentiary hearing to those claims where there exists a genuine issue of material fact, the Executive Secretary submits this memorandum in support of its motion for partial judgment on the pleadings.

STANDARD OF REVIEW

The Utah Rules of Civil Procedure allow a defendant to file a Motion for Judgment on the Pleadings pursuant to Rule 12(c) as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A Rule 12(c) motion will be governed by the same standard as a Rule 12(b)(6) motion to dismiss, Seolas v. Bilzerian, 951 F. Supp. 978, 980 (D. Utah 1997) and the moving party must "clearly establish that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." 5C Wright & Miller, Federal Practice and Procedure § 1368 (2005).

The Board has a two-fold responsibility at a hearing on the merits: (1) to determine the facts and (2) to apply the law to those facts. Judgment on the pleadings is a procedural device which allows the Board to resolve claims "when moving party is entitled to judgment on the face

of the pleadings themselves." Mountain America Credit Union v. McClellan, 854 P.2d 590, 591 (Utah Ct. App. 1993). Judgment on the pleadings is appropriate when neither party disputes the material facts underlying their dispute. Town of Mapleton v. Kelly, 17 P. 52 (Utah 1911) (stating that presence of material facts prevents entry of judgment on the pleadings). "A 'material fact' is one which affects the rights or liabilities of the parties." Holland v. Iron Mining Co., 293 P.2d 700, 709 (Utah 1956). In other words, a material fact is one that must be determined by a fact finder at a hearing because the parties do not agree on the basic factual circumstances that have resulted in their dispute. Conversely, no issue of material fact exists when the parties agree as to the facts. If the Board grants this motion, the evidentiary hearing will be limited to claims where a factual dispute remains to be resolved.

STATEMENT OF UNDISPUTED FACTS

1. On December 16, 2002 and May 14, 2003, Intermountain Power Service Corporation submitted a Prevention of Significant Deterioration (PSD) permit application and its Notice of Intent (NOI) to construct an additional 950 megawatt (MW) pulverized coal-fired unit (Unit 3) at the Intermountain Power Plant near Delta, Utah.

2. PSD applies to new major sources or major modifications at existing sources located in areas designated as in attainment or as unclassifiable with the National Ambient Air Quality Standards (NAAQS). It requires the following:

- application of the "Best Available Control Technology" (BACT);
- an air quality analysis;
- an additional impacts analysis; and

- public involvement.

3. The proposed Unit 3 facility is considered a new major source for the pollutants carbon monoxide (CO), nitrogen oxides (NOx), sulfur dioxide (SO_2) and particulate matter (PM).

4. The area where the facility proposes to locate is designated as having attainment status for all pollutants.

5. Integrated Gasification Combined Cycle (IGCC) is a method of producing electricity by gasifying coal, removing pollutants before combustion, and then burning the syngas in a modified combined cycle gas-fired power plant. IGCC is not a control technology but rather a separate process from the proposed CFB technology.

6. The Executive Secretary did not require the applicant to include IGCC as part of its BACT analysis.

7. The Executive Secretary did not require regulation of carbon dioxide (CO_2) or other greenhouse gas emissions from the proposed unit.

8. A public comment period was held in accordance with Utah Admin. Code R307-401-4 and comments were received.

9. On October 15, 2004, Richard W. Sprott, Executive Secretary of the Utah Air Quality Board signed an Approval Order authorizing construction and operation of the proposed IPSC 950 mega-watt pulverized coal-fired unit.

ARGUMENT

This motion addresses the following two claims made by Sierra Club: (1) that the UDAQ was required to but failed to regulate carbon dioxide and other greenhouse gases; and (2) that the UDAQ was required to but failed to consider IGCC as part of the BACT analysis.

1. No Genuine Issue of Material Fact Exists on Either Claim.

Both of Sierra Club's claims are ripe for judgment on the pleadings because no genuine issue of material fact exists on either claim. That is, there is no dispute as to whether the Executive Secretary regulated greenhouse gases, nor is there a dispute as to whether he required that IGCC be considered as part of the BACT analysis. Both parties agree that he did not. The only point of dispute is whether on these two claims, the Executive Secretary properly applied the Board's rules.

2. State Law Sets Forth Stringency Requirements on the Board's Rulemaking Authority

Both claims share common underlying principles for points of reference. First, Utah law provides the Board with authority to make rules and a procedure for making those rules. Pursuant to statute and rule, the Air Quality Board and the Board's Executive Secretary administer the New Source Review program under authority delegated under the federal Clean Air Act (CAA) and under approval and oversight of the United States Environmental Protection Agency (EPA). The United States Supreme Court in Alaska v. EPA, 540 U.S. 461(2004) recognized that "Congress [ ] vested EPA with explicit and sweeping authority to enforce CAA requirements relating to the construction and modification of sources under the PSD program, including BACT" while noting at the same time "the need [by the EPA] to accord appropriate deference to States' BACT designations." See Alaska, at 490.

The Utah Air Conservation Act, § 19-2-104(1)(a), authorizes the Board to make rules "regarding the control, abatement, and prevention of air pollution." Per § 19-2-107(2)(g), the Executive Secretary may enforce those rules. However, Utah law limits the Board's rulemaking

authority. Utah Code Ann. § 19-2-106 limits the Board's authority to make rules that are more stringent than the existing federal regulations:

> (1) Except as provided in Subsection (2), no rule which the board makes for the purpose of administering a program under the federal Clean Air Act may be more stringent than the corresponding federal regulations which address the same circumstances. In making rules, the board may incorporate by reference corresponding federal regulations.
>
> (2) The board may make rules more stringent than corresponding federal regulations for the purpose described in Subsection (1), only if it makes a written finding after public comment and hearing and based on evidence in the record, that corresponding federal regulations are not adequate to protect public health and the environment of the state. Those findings shall be accompanied by an opinion referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the board's conclusion

Thus, unless the Board follows the requirements of § 19-2-106(2), the Board cannot make rules more stringent than the corresponding federal regulations addressing the same circumstances.

In the two claims that are at issue here, Sierra Club cites Utah's rule regarding Best Available Control Technology, or BACT. Under the Prevention of Significant Deterioration (PSD) program requirements, a prospective facility must employ the "best available control technology" for each regulated pollutant emitted. 42 U.S.C. § 7475(a)(4); Utah Admin. Code R307-401-6(1). Utah Admin. Code R307-101-2(4) defines Best Available Control Technology as:

> an *emission limitation* and/or other *controls* to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree or reduction of each pollutant subject to regulation under the Clean Air Act and/or the Utah Air Conservation Act *emitted from or which results from any emitting installation*, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental and economic impacts and other costs, determines is achievable for *such installation* through application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or

> innovative fuel combustion techniques *for control* of each such pollutant. In no event shall applications of BACT result in emissions of any pollutants which will exceed the emissions allowed by Section 111 or 112 of the Clean Air Act.

Id. (emphasis added).

Therefore, BACT is an "emission limitation" to control emissions from an "emitting installation" that the Executive Secretary "determines is achievable for such installation." Id. Utah's BACT rule essentially mirrors the federal BACT rule.[1]

3. The Executive Secretary Regulates Pollutants Based on Rules Promulgated by the Air Quality Board

Sierra Club Claim No. 3: UDAQ failed to address carbon dioxide and other greenhouse gases.

In this claim, Sierra Club makes the single factual allegation that the Executive Secretary did not require regulation of greenhouse gases. The Executive Secretary does not dispute this allegation and acknowledges that he did not require regulation of greenhouse gases. Thus, there is no genuine issue of material fact.

Although Sierra Club claims that both the Clean Air Act and the Utah Air Conservation Act require regulation of greenhouse gases, in its RFA Sierra Club provides no authority from either of those two acts to support its allegation. Neither the Clean Air Act nor the Utah Air Conservation Act lists greenhouse gases as regulated pollutants or contains any other requirement to regulate greenhouse gases. Regulation of greenhouse

[1] The federal BACT definition is found in 42 U.S.C. 7479(3) and provides in pertinent part: "The term best available technology means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, no a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant . . . ."

gases would require rulemaking by the Board, which has not occurred. Because the Board has not made any rules requiring the regulation of greenhouse gases, the Executive Secretary had no rule to enforce, and thus was correct as a matter of law in not requiring regulation of greenhouse gases in the IPSC Approval Order.

4. BACT Rule Applies to Regulated Pollutants

Further, Sierra Club's reliance on the BACT rule is misplaced and out of context. A full reading of the entire BACT rule shows that the "environmental impacts" considered during a BACT analysis apply to ". . . *each pollutant subject to regulation* under the Clean Air Act and/or the Utah Air Conservation Act . . . ." Utah Code Ann. R307-101-2(4) (emphasis added). Therefore, the BACT rule governs only pollutants that are already regulated, and the Executive Secretary was not allowed to consider any theoretical environmental impacts of greenhouse gases during the BACT analysis.

5. EPA Agrees with Executive Secretary on Regulating Greenhouse Gases

The Executive Secretary's position on this issue is consistent with that of the EPA, which has likewise deemed that it (EPA) has no authority under the Clean Air Act to regulate greenhouse gases. For instance, in an April 28, 1997 decision, the EPA's Environmental Appeals Board denied review of a PSD permit issued by the Hawaii Department of Health. See In re Kawaihae Cogeneration Project, 7 E.A.D. 107 (EAB 1997). In that appeal, the petitioners claimed that the Hawaii Department of Health improperly ignored greenhouse gases in its permit decision. Id. The Department responded that "there are no regulations or standards prohibiting, limiting or controlling

the emissions of greenhouse gases from stationary sources [in that] carbon dioxide is not considered a regulated air pollutant for permitting purposes." Id.

Then, in 1999, various groups petitioned EPA to initiate rulemaking to regulate greenhouse gases and EPA denied the petition on the basis that EPA has no authority to regulate greenhouse gases. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (denial of petition Sept. 8, 2003). Although various parties appealed the denial, the District of Columbia Court of Appeals upheld EPA's decision. See Commonwealth of Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005).

Based on the foregoing, the parties have no factual dispute, and thus there is no genuine issue of material fact. Accordingly, the Executive Secretary is entitled to judgment on this claim as a matter of law.

6. Sierra Club's IGCC Claim is Purely a Question of Law

Sierra Club Claim No. 1: UDAQ Failed to Consider Adequately Integrated Gasification Combined Cycle (IGCC) in its BACT Determination and Failed to Require the Production Process for IPP Unit 3.

In its RFA, Sierra Club takes the position that "UDAQ is required to evaluate this technology comprehensively as part of its BACT analysis" and that "consideration of [this] process design is a necessary part of its BACT analysis." Sierra Club RFA at 4. The narrowness of this claim presents only two potential questions of material fact: (1) whether IGCC is a separate process which would redefine the design of the source; and (2) whether the Executive Secretary required consideration of IGCC during the BACT stage of the permitting process.

"Redefining the source" is a term of art used by the EPA in its New Source Review Workshop Manual ("NSR Manual") which means to substitute one design process for an entirely different design process. The NSR Manual provides a concrete (and very similar to the situation here) example when it states that sources are not generally required to redefine the scope of their proposed facilities as part of the BACT analysis: "applicants proposing to construct a coal-fired electric generator would not be required as part of the BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity)." NSR Manual at B.13.

Sierra Club states in its RFA that it considers IGCC to be a "production process" and "*a method of producing electricity* by gasifying coal, removing pollutants – including greenhouse gases – before combustion, and then burning the 'clean' syngas in *a modified combined cycle gas-fired power plant*." Sierra Club RFA at 3 (emphasis added). The Executive Secretary concurs with this definition of the IGCC process. Because the Executive Secretary and the Sierra Club agree (1) on what IGCC is; and (2) that the Executive Secretary did not require its consideration, there remains no genuine issue of material fact. This claim, therefore, is purely a legal question of what the BACT rule requires.

The position taken by Sierra Club in its RFA that the BACT rule requires the Executive Secretary to require the applicant to consider IGCC in its BACT analysis makes this a very narrow issue of law for the Board to rule on because it takes any discretion away from the Executive Secretary. Sierra Club's position is contrary to not only the plain reading of the rule, but is also contrary to Utah law, EPA guidance, and to what regulatory authorities in most states to consider the issue have required.

7. <u>Sierra Club's Position on IGCC Claim is Contrary to Plain Reading of the BACT Rule</u>

Applying a plain reading to the BACT rule, BACT is an "emission limitation" to control emissions from an "emitting installation" that the Executive Secretary "determines is achievable for such installation . . . ." Utah Admin. Code R307-101-2(4). Utah Admin. Code R307-101-2 defines an installation as "a discrete process with identifiable emissions which may be part of a larger industrial plant. The BACT rule goes on to state that determining what is achievable "for such installation" includes "application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques". Utah Admin. Code R307-101-2(4). By definition, the BACT analysis is based on control technologies that can be applied to an installation that has already been identified. Otherwise, there is no emitting installation for which control technology can be analyzed.

On the other hand, Sierra Club's interpretation conflicts with both the definition of BACT as an "emission limitation" for the proposed installation, and the definition of installation, which states that an installation is a "discrete process with identifiable emissions." Utah Admin. Code R307-101-2.

8. <u>In Applying BACT Rule, Executive Secretary Follows EPA Guidance</u>

Because Utah's BACT rule essentially mirrors the federal BACT rule, and because of the restrictions on the Board's rulemaking authority (as it relates to equivalent federal rules), the Executive Secretary looks to the EPA's NSR Manual for guidance in administering Utah's New Source Review program. For the BACT analysis, the UDAQ employs EPA's recommended "top down" methodology. The United States Supreme Court has quoted at length from the NSR Manual, in describing the top-down method:

> . . . . the top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent-or 'top'-alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not 'achievable' in that case. If the most stringent technology is eliminated in this fashion, then the next most stringent alternative is considered, and so on.

Alaska Dept. of Envtl. Conservation v. EPA, 540 U.S. 461, 475-76 (2004) (hereinafter "ADEC") (quoting EPA's New Source Review Workshop Manual at B.2 (Draft Oct. 1990)).

To reiterate from paragraph 6 above, the NSR Manual also states that "production processes" or "available methods, systems and techniques" for pollutant reduction that would "redefine the design of the source" are not required to be included in the BACT analysis:

> [h]istorically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity). However, this is an aspect of the PSD permitting process in which states have the discretion to engage in a broader analysis if they so desire.

NSR Manual, at B.13-14.

This guidance is consistent with the regulatory definition of BACT, which requires the source to consider "application of production processes or available methods, systems and techniques" to control contaminants from a "proposed" source. Utah Admin. Code R307-401-2(1).

Applying EPA guidance to the permit review process for the proposed IPSC Unit 3 facility, the Executive Secretary recognized that while the selected pulverized coal boiler (PC boiler) and IGCC both utilize coal as feedstock, they do so using very different methods. Having concluded that IGCC and the PC boiler were different process technologies, the Executive Secretary properly did not require that consider IGCC process technology in its analysis of BACT for the proposed Unit 3, as such would be a fundamental redefining of the design of the source.

EPA's Environmental Appeals Board has consistently affirmed EPA's policy that the BACT requirement not be used to redefine the basic design or scope of a proposed project. See In Re Knauf Fiber Glass, GMBH, 8 E.A.D. 121, 140 (EAB 1998); also see In the Matter of: Old Dominion Electric Cooperative Clover, Virginia, 3 E.A.D. 779, 793 n.38 (Adm'r 1992); and see

In the Matter of: Pennsauken County, New Jersey, Resource Recovery Facility, 2 E.A.D. 667, 673 (Adm'r 1988). The NSR Manual recognizes that in order for the necessary case-by-case determination required by the BACT regulation to occur, the proposed source in any given case must be clearly defined. In this case, the source as proposed by the applicant is a pulverized coal-fired unit.

While EPA guidance does not preclude permitting authorities from exercising some discretion in this area, and some states have exercised this discretion to require that IGCC be considered as part of the BACT analysis.[2] On the other hand, in choosing not to use the BACT rule in such a manner, the Executive Secretary was in line with the EPA as well as permitting authorities in other states to consider the issue.[3]

9. Requiring Applicant to Redefine Source Would Violate State Law in Absence of Rulemaking

For the Executive Secretary to diverge from the stringency of the equivalent federal BACT rule would require compliance with U.C.A. § 19-6-106, and the rulemaking requirements as set forth in subparagraph (2) of that statute. The Board has not undertaken any such rulemaking on this question.

CONCLUSION

Based upon the foregoing, the Executive Secretary submits to the Board that both of these claims should be dismissed as a matter of law.

Respectfully submitted this 26th day of February, 2007.

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[2] Illinois, Montana and New Jersey are three states whose regulatory authorities have required consideration of IGCC as part of BACT.

[3] Wisconsin, Wyoming, and Kentucky are among those states who have determined not to include IGCC in the BACT analysis for a coal-fired power plant on the rationale that selection of IGCC as BACT would redefine the design of the proposed coal-fired plants. See Wisconsin Electric at 2005 WL 3450602. In Wisconsin, a review board held that IGCC does not qualify because IGCC cannot be applied to the installation as proposed "[r]ather IGCC is an altogether different method of generating electricity that would involve the wholesale substitution of one type of physical plant for another." Wisconsin Electric Power Co., 2005 WL 3450602 (Wisc. Div. Hrg. App. Feb. 3, 2005). An Environmental Appeals Board in Hawaii also concluded that regulations for determining BACT "do not mandate that the permitting authority redefine the source in order to reduce emissions." See In the Matter of Hawaiian Commercial & Sugar Co., PSD Appeal No. 92-1, 4 E.A.D. 95, 99-100, 1992 WL 191948 (July 20, 1992).

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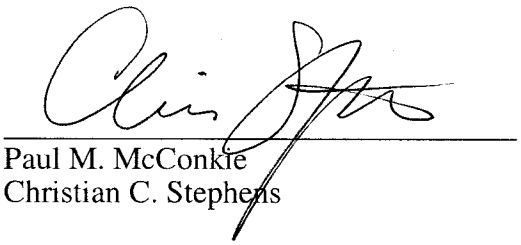

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