

STATE OF UTAH

Public Service Commission

In the Matter of the Voluntary Request of
Rocky Mountain Power for Approval of
Resource Decision to Construct Selective
Catalytic Reduction Systems on Jim Bridger
Units 3 and 4

Docket No. 12-035-92

SIERRA CLUB POST-HEARING BRIEF ADDRESSING EPA RULING

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I. INTRODUCTION

Pursuant to the direction of the Utah Public Service Commission (“Commission”) on March 7, 2013, Sierra Club hereby submits its post-hearing brief addressing the pending EPA ruling on Wyoming’s proposed Regional Haze State Implementation Plan (“SIP”) submittal.

On March 25, 2013, the litigants in the case *WildEarth Guardians v. Lisa Jackson*, Case 1:11-cv-00001-CMA-MEH executed a revised stipulation in which the parties agreed to extend the date for the EPA to issue its proposed and final rule satisfying federal regional haze requirements for the State of Wyoming. The proposed rule deadline will be extended from March 29, 2013 to May 23, 2013, and the final rule deadline will be extended from September 27, 2013 to November 21, 2013. As a result of this latest extension, Sierra Club and other parties were not able to review the proposed EPA rule prior to this briefing. Nevertheless, the continued uncertainty of EPA’s final ruling remains a critical issue in this proceeding. Sierra Club therefore addresses the implications of EPA’s pending rulemaking below.

II. ARGUMENT

As discussed in Sierra Club’s post-hearing legal brief, the Company is requesting preapproval to proceed with a massive capital project to comply with federal law before the specific federal requirement is finalized. Wyoming’s proposed 2015/2016 compliance dates will be irrelevant if EPA disapproves the proposed Wyoming Regional Haze SIP submittal. Given the most recent extension of EPA’s proposed rule, neither Rocky Mountain Power nor the Commission will know what the actual compliance emission limits and dates will be until after the Company proposes to begin construction of the selective catalytic reduction (“SCR”) systems. Without knowing the final environmental requirements for the Jim Bridger facility, the Commission cannot determine at this time whether the proposed resource decision is prudent, and therefore the Commission must deny Rocky Mountain Power’s application in this proceeding.

III. EPA DISAPPROVAL OF WYOMING'S REGIONAL HAZE SIP SUBMITTAL WOULD ELIMINATE THE STATE'S CURRENTLY PROPOSED REQUIREMENTS

Wyoming's current proposal to comply with the Regional Haze Rule contemplates the installation of SCR to meet a NO_x emission limit of 0.07 lb/mmBtu at Jim Bridger units 3 and 4 by 2015 and 2016, and the same at units 1 and 2 by 2021 and 2022.¹ The Company's proposal to move forward with construction of SCR at units 3 and 4 is premature because EPA has not issued a final rule approving the state plan, and the proposed 2015 and 2016 compliance dates will most likely not remain in place following EPA's final action. The Company's insistence that EPA's final action will leave the proposed compliance dates in place is mistaken.

Rocky Mountain Power nonetheless argues that three Wyoming authorities will require the Company to install SCR controls at Jim Bridger 3 and 4 by 2015 and 2016: (1) Wyoming's proposed Regional Haze SIP;² (2) the Company's BART Settlement Agreement with Wyoming Department of Environmental Quality ("DEQ");³ and, (3) the Wyoming Environmental Quality Council's ("EQC") order in Docket No. 10-2801 approving the BART Settlement Agreement.⁴ The Company stated: "Unless and until all three of these requirements are changed, the Company remains under an obligation to install the controls notwithstanding EPA's action."⁵ Sierra Club will address below why all three of the obligations cited by the Company will be eliminated if EPA disapproves the relevant portions of the proposed Wyoming SIP in November 2013. An EPA-issued FIP would override the proposed requirements contained in all three of those state authorities, and there are no other state-based

¹ Sierra Club Exhibit 33, BART Settlement Agreement, § 4(c) and (d); Sierra Club Exhibit 37, Excerpt from Wyoming Regional Haze SIP, Ch. 8.3.3.

² January 7, 2011; 309(g) Wyoming Regional Haze State Implementation Plan Submittal. Available at www.regulations.gov, Docket EPA-R08-OAR-2012-0026 (<http://www.regulations.gov/#!documentDetail;D=EPA-R08-OAR-2012-0026-0002>).

³ Sierra Club Exhibit 33, BART Settlement Agreement.

⁴ Sierra Club Exhibit 34, Environmental Quality Council Order.

⁵ Surrebuttal Testimony of Cathy S. Woollums, p.5, lines 110-112.

permitting or regulatory requirements that would require the installation of SCR on Jim Bridger units 3 and 4 by 2015 and 2016.⁶

A. Wyoming's Proposed Regional Haze SIP Submittal

All four Jim Bridger units are subject to BART under the Clean Air Act because those units commenced operation between 1962 and 1977 and cause air quality impacts on national parks and wilderness areas. EPA will likely require the same control technology on Jim Bridger units 1 and 2 as on 3 and 4 (i.e., SCR, by 2018).⁷ In fact, EPA would have no legal basis to extend BART compliance on units 1 and 2 past the statutory five-year compliance time.⁸ Sierra Club contends that EPA will disapprove the Wyoming proposal for all four Jim Bridger units because (1) the proposed NO_x emission limit of 0.07 lb/mmBtu is inconsistent with federal standards,⁹ and (2) Wyoming proposed to require SCR as part of its long-term strategy, rather than making the required determination that SCR is BART for Jim Bridger.¹⁰ EPA will therefore issue a federal implementation plan (“FIP”) and make a determination that SCR with a lower NO_x emissions limit is BART for all four units.

⁶ Wyoming Permit No. MD-6040, the BART permit for Jim Bridger, was modified pursuant to the BART Settlement Agreement and the EQC order. Sierra Club Exhibit 33, BART Settlement Agreement, § 5(b); Sierra Club Exhibit 34, Environmental Quality Council Order ¶ 4. Wyoming DEQ deleted the original requirements to install SCR at Jim Bridger from the permit. The currently applicable BART permit for Jim Bridger is permit No. MD-6040A2; that permit does not include any requirement to install SCR on any timeframe.

⁷ See 77 Fed. Reg. 33053, June 4, 2012.

⁸ 42 U.S.C. § 7491(b)(2)(A), (g)(4).

⁹ EPA has required NO_x emissions limits below 0.07 lb/mmBtu in several recent instances. *See, e.g.*, 77 Fed. Reg. 72,512, 72, 515 (Dec. 5, 2012) (FIP for Arizona, establishing a **0.055** lb/mmBtu NO_x emission limit for Cholla units 2, 3, and 4 and a **0.065** limit for Coronado units 1 and 2, and allowing five years for compliance); 76 Fed. Reg. 52,388, 52,390-91 (Aug. 22, 2011) (FIP for New Mexico, establishing a **0.05** lb/mmBtu NO_x emission limit for San Juan Generating Station units 1, 2, 3, and 4, and allowing five years for compliance).

¹⁰ The “long-term strategy” is a separate part of the regional haze program that is intended to ensure that a state makes reasonable progress toward visibility goals over 10-15 year periods. 42 U.S.C. § 7491(b)(2)(B). The BART requirements are source-specific technology and emission limit requirements that require installation as expeditiously as practicable, but not later than 5 years after the date of final EPA approval. § 7491(b)(2)(B). Wyoming's Regional Haze SIP submittal proposed BART determinations for Jim Bridger units 3 and 4 that assume a much weaker technology of low-NO_x burners with overfire air. *See* Table 6.4-1 and Chapter 8.3.3, January 7, 2011; 309(g) Wyoming Regional Haze State Implementation Plan Submittal.

The FIP will replace the Wyoming proposal with respect to the entire Jim Bridger facility, including Wyoming's proposed compliance dates of 2015 and 2016 for units 3 and 4. Therefore, the impetus of EPA's disapproval will be a more stringent plant-wide emission limit for each unit, but the result will include a deadline to install SCR at all four units of Jim Bridger within five years. The resulting FIP, with its lowered emission limits, will be more stringent than the current Wyoming proposal; EPA's decision to give units 3 and 4 a full five years for SCR installation would be incidental to the decision to lower the emission rate of harmful NOx pollutants and to require all four units to comply within the statutory deadline of five years.

The disapproved portions of Wyoming's proposed SIP will have no legal effect after EPA promulgates its FIP. The 2015 and 2016 deadlines to install SCR were proposed by Wyoming to implement *federal* requirements, and they will not survive federal disapproval. The primacy of federal requirements is apparent in the basic structure of the Clean Air Act; under the Act, the EPA sets uniform standards for air quality, and the states are responsible for translating these standards "into specific rules governing particular pollution sources." *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983) (citing *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975)). "EPA, however, is *the ultimate supervisor*, responsible for approving state plans and for stepping in, should a state fail to develop or to enforce an acceptable plan." *Id* (emphasis added); *see also Train*, 421 U.S. at 64 (explaining that the 1970 Clean Air Act amendments, which established the Act's regional haze requirements, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution"). In this way, Congress has "offer[ed] States the choice of regulating [pollution] according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992).

Docket EPA-R08-OAR-2012-0026 (available at <http://www.regulations.gov/#!documentDetail;D=EPA-R08-OAR-2012-0026-0002>).

The Clean Air Act's regional haze provisions are also intended to satisfy federal objectives. Under the Act, EPA must promulgate regulations to prevent regional haze in federal "Class I" areas (national parks and wilderness areas). 42 U.S.C. §§ 7491(b), 7492(e). Each state must then submit a SIP explaining how the state will implement these federal requirements. *Id.* § 7492(e)(2). In this case, Wyoming submitted to EPA a proposal explaining how it would implement federal regional haze requirements. The proposal is merely a planning document, not a formal state law or regulation, and it lacks any legal force until it is approved.¹¹ Moreover, as we have explained, it is very likely that in November 2013 EPA will disapprove Wyoming's proposed Regional Haze SIP submittal and adopt a FIP requiring all four units at Jim Bridger to install SCRs and satisfy an emission limit lower than 0.07 lb/mmBtu within five years from the date of EPA's final rule.

The Company's argument that Wyoming will somehow maintain the 2015 and 2016 deadlines in the current Wyoming plan as a more stringent deadline above and beyond the FIP is incorrect.¹² If EPA issues a FIP with respect to Jim Bridger, the state will have no legal basis to require the Company to implement any aspect of the disapproved provisions of the SIP. Under the Clean Air Act, a FIP displaces the disapproved SIP, and the FIP – not the invalidated proposal – is the sole benchmark for future compliance. *See* 42 U.S.C. § 7491(b)(2)(A) (EPA's regulations must require major stationary sources to procure, install, and operate BART as determined by the state *or* by EPA "in the case of a [FIP] promulgated under section 7410(c)"). Courts have accordingly held that a proposed SIP that is not approved by EPA has "no legal weight" and "is not a valid and enforceable part of [the state's]

¹¹ Wyoming's regional haze plan acknowledges that the SIP addresses *federal*, not state requirements. For example, the title page of the Wyoming proposal states that the SIP is "Addressing Regional Haze Requirements for Wyoming Mandatory *Federal* Class I Areas Under 40 CFR 51.309(g)" (emphasis added). Similarly, Wyoming Air Quality Standards and Regulations, Chapter 9, Section 2(a), which provides for the long-term visibility strategy underlying Wyoming's currently proposed SCR requirements, also makes clear that the strategy furthers "*the national goals* of preventing future, and remediating existing, visibility impairments in Class I areas."

¹² *See* Transcript, March 7, 2013, p.132, line 25 – p.133, line 4 (Woollums).

implementation plan.” *St. Bernard Citizens for Env'tl. Quality v. Chalmette Refining, L.L.C.*, 399 F. Supp. 2d 726, 734 (E.D. La. 2005) (citing *Duquesne Light*, 698 F.2d at 472). *See also Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1194 (9th Cir. 2012) (holding that, because EPA disapproved a portion of a SIP, it was left with no emissions limit for the source in question and “needed to fill this gap with the FIP”). For these reasons, an EPA decision to disapprove Wyoming’s proposed SIP and promulgate a FIP would prevent Wyoming’s proposed deadlines from attaining any legal force.

EPA’s final action on this matter is critical. EPA Region 8 is fully aware that the interplay between Wyoming’s SIP proposal and final EPA action is creating uncertainty in this docket, and Mr. Carl Daly, Director of the Air Program, could certainly provide this Commission with information to clarify the relationship between federal requirements and the state submittal. Mr. Daly can be reached by phone at 303-312-6416 and would likely welcome a call from the Commission to clarify the Regional Haze Rule’s impact on the Jim Bridger facility.

B. BART Settlement Agreement

The Company’s requirement under the BART Settlement Agreement to install SCR on units 3 and 4 by 2015 and 2016 will likewise cease to exist if EPA disapproves the portions of the Wyoming Regional Haze SIP relevant to Jim Bridger units 3 and 4. The BART Settlement Agreement directed Wyoming DEQ to “adopt the requirements of paragraphs 4(c) and 4(d) of this Settlement Agreement [i.e. installation of SCR and a 0.07 lb/mmBtu NOx emission limit on Jim Bridger units 1-4] into the Wyoming Regional Haze SIP as part of Wyoming’s Long-Term Strategy and/or Reasonable Progress Goals...”¹³ Wyoming followed that direction and in January 2011 submitted its proposed Regional Haze SIP to EPA with a long-term strategy component proposing SCR at Jim Bridger units 3 and 4 by 2015 and 2016, as well as SCR at Jim Bridger units 1 and 2 by 2021 and 2022. Chapter 8.3.3 of the January

¹³ Sierra Club Exhibit 33, BART Settlement Agreement, ¶ 5(b).

2011 Wyoming Regional Haze SIP submittal mirrors the language of Section 4(c) of the BART

Settlement Agreement:

With respect to Bridger Units 3 and 4, PacifiCorp shall: (i) install SCR; (ii) install alternative add-on NOx control systems; or (iii) otherwise reduce NOx emissions to achieve a 0.07 lb/MMBtu 30-day rolling average NOx emissions rate. These installations shall occur, and/or this emission rate will be achieved, on Unit 3 prior to December 31, 2015 and Unit 4 prior to December 31, 2016.¹⁴

Section 4(c) requires the installation of SCR by 2015 and 2016, but the Company fails to acknowledge that the provisions of Section 4(c) of the BART Settlement Agreement will be automatically eliminated if EPA disapproves those portions of the Wyoming Regional Haze SIP that apply to Jim Bridger units 3 and 4. Section 6 of the BART Settlement Agreement provides:

Conditions of Settlement: The Parties' duties rights and obligations of this Settlement Agreement are conditioned upon, and the Parties shall in good faith cooperate to achieve, the following: ... (d) **EPA must approve those portions of the Wyoming Regional Haze SIP that are consistent with the terms of this Settlement Agreement.** Provided, however, that unless EPA affirmatively disapproves such portions of the Wyoming Regional Haze SIP in a final rulemaking, the parties shall continue to abide by the terms of this Settlement Agreement.¹⁵

Section 6(d) clearly provides that the Company will be relieved of its obligation under the BART Settlement Agreement to install SCR at Jim Bridger units 3 and 4 by 2015 and 2016 if EPA affirmatively disapproves the relevant portion of the Wyoming Regional Haze SIP (i.e. Chapter 8.3.3). In such a case, the EPA's FIP requirements, including relevant deadlines, will replace the Wyoming proposal. There is no further action required by the Company or by Wyoming DEQ to remove those compliance dates.

The conditions of the BART Settlement Agreement contained in Section 6(d) are consistent with the structure of the Clean Air Act's regional haze program. As discussed above, the regional haze program is fundamentally a *federal* program implemented by the states with ultimate oversight by EPA.

¹⁴ Sierra Club Exhibit 37, p. 3; *see, also*, Sierra Club Exhibit 33, BART Settlement Agreement, §4(c).

¹⁵ Sierra Club Exhibit 33, BART Settlement Agreement.

In this case, it is very likely that EPA will adopt a FIP to replace the Wyoming proposal with respect to Jim Bridger units 3 and 4 because the 0.07 lb/mmBtu NO_x emission limit is too high. The BART Settlement Agreement contemplated this eventuality and provided an off-ramp for the Company if EPA disapproved the agreement.

Separate from the automatic off-ramp provided by Section 6 of the BART Settlement Agreement, there is also a process in Section 7 of the BART Settlement Agreement that allows parties to modify the agreement in response to changed circumstances. In her testimony, Ms. Woollums addressed the prospect of the Company and Wyoming DEQ discussing a permissive amendment to the BART Settlement Agreement.¹⁶ Ms. Woollums refers to Section 7 of the BART Settlement Agreement, titled “Changed Circumstances.”¹⁷ This provision would allow Wyoming DEQ and the Company to agree to modify the specific requirements of the BART Settlement Agreement if there was a change in federal or state requirements, or if there was a change in technology in the future. Sierra Club previously testified that EPA’s delay in issuing its final rule on the Wyoming Regional Haze SIP constituted a “changed circumstance” and that the Company should invoke Section 7 to request an extension of the compliance dates in the BART Settlement Agreement.¹⁸ Subsequent to the filing of Sierra Club’s testimony on February 1, 2013, Rocky Mountain Power apparently made this express request by letter to Wyoming DEQ on March 5, 2013.¹⁹ Wyoming DEQ declined this request in a letter dated March 6, 2013, citing its belief that “at this time” the delay in EPA’s rulemaking did not constitute a change in federal requirements with respect to emission controls or rates at Jim Bridger units 3 and 4.²⁰ This response from Wyoming DEQ limits the Company’s ability under Section 7 to permissively extend the 2015 and

¹⁶ Surrebuttal Testimony of Cathy S. Wollums, p.7, line 153 – p.8, line 161.

¹⁷ Sierra Club Exhibit 33, BART Settlement Agreement.

¹⁸ Sierra Club Surrebuttal Testimony of Jeremy Fisher, p.31, line 22 – p.32, line 9.

¹⁹ Supplemental Exhibit RMP_(CSW-4SR).

²⁰ Supplemental Exhibit RMP_(CSW-5SR).

2016 compliance dates pending EPA's final action. However, the automatic elimination of the 2015 and 2016 compliance dates under Section 6 would still occur if EPA affirmatively disapproves the relevant portions of the Wyoming Regional Haze SIP in November 2013.

Following EPA disapproval, Wyoming DEQ would not have any discretion to "implement its SIP as it currently stands"²¹ because the express terms of Section 6(d) of the BART Settlement Agreement would automatically relieve Rocky Mountain Power of the 2015 and 2016 dates contained in the BART Settlement Agreement. The Section 7 "changed circumstances" provision of the BART Settlement Agreement would be unnecessary if EPA issued a disapproval. It is only during the present period before EPA's final action that Section 7 would come into play. Unfortunately, neither this Commission nor the Company will know for certain what the final EPA rule will be until November 2013. However, as we have explained, it is quite likely that EPA will disapprove the 0.07 lb/mmBtu proposed emission limit at Jim Bridger units 3 and 4 and issue a FIP with a lower limit.²² Under this likely scenario, the proposed compliance dates of 2015 and 2016 would cease to apply, pursuant to Section 6 of the BART Settlement Agreement, and EPA's FIP will most likely follow the typical process of allowing a source five years to install SCR controls.

C. Environmental Quality Council Order

The final piece of Rocky Mountain Power's asserted state-based requirements is the order from the EQC in Docket No. 10-280. The EQC Order merely approved the BART Settlement Agreement and gave it the force of Wyoming law. As discussed above, if EPA disapproves the relevant portions of the Wyoming Regional Haze SIP submittal, then the express terms of the BART Settlement Agreement would eliminate the 2015 and 2016 compliance dates. The EQC retains jurisdiction over the BART

²¹ *Contra*, Transcript, March 7, 2013, p.133, lines 1-4 (Woollums).

²² *See supra* n.9.

Settlement Agreement for purposes of approving any modification under Section 7 of the settlement due to “changed circumstances,”²³ but that section would not be at issue if the automatic off-ramp of Section 6 was triggered. Therefore, if EPA disapproves the relevant portions of the Wyoming Regional Haze SIP submittal, no further action would be required by the EQC to eliminate the 2015 and 2016 compliance dates.

IV. CONCLUSION

For the foregoing reasons and for the reasons stated in our post-hearing legal brief, Sierra Club respectfully recommends that the Commission deny Rocky Mountain Power’s request for approval without prejudice and allow Rocky Mountain Power the opportunity to file a subsequent application that includes a full, plant-wide analysis of the least-cost, risk adjusted alternative to comply with EPA’s final BART determination for Bridger units 1, 2, 3, and 4.

DATED this 5th day of April, 2013.

Respectfully submitted,



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²³ Sierra Club Exhibit 34, Environmental Quality Council Order at ¶6.