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Jim Ruby, Executive Secretary
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE) EQC DOCKET NO. 07-2801
DRY FORK STATION)
AIR PERMIT CT-4631)

ORDER GRANTING BASIN ELECTRIC COOPERATIVE'S AND DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTIONS FOR SUMMARY JUDGMENT REGARDING PROTESTANTS' CLAIM VII

THIS MATTER came before the Environmental Quality Council (EQC) on September 29, 2008, for oral argument on motions for summary judgment filed by all three parties. EQC members present at the September 29, 2008 motion hearing included Dennis M. Boal, Chairman, F. David Searle, Vice-Chair and Presiding Officer in this case, John N. Morris, Thomas Coverdale, Tim Flitner and Dr. Fred Ogden. Jim Ruby, Executive Secretary of EQC and Marion Yoder, Assistant Attorney General were also present. Deborah A. Baumer from the Office of Administrative Hearings served as the Hearing Examiner. The Protestants, Earthjustice, Powder River Resource Council, the Sierra Club and the Wyoming Outdoor Council appeared by and through counsel, Robin Cooley. Basin Electric Power Cooperative (Basin Electric) appeared by and through counsel, Patrick Day. The Department of Environmental Quality, Air Quality Division (DEQ) appeared by and through its counsel, Senior Assistant Attorney General Nancy Vehr and Luke Esch.

In Protestants November 1, 2007 Protest and Petition for Hearing (Petition), Protestants identified eight separate claims of violation of the Prevention of Significant Deterioration (PSD) permitting process. All three parties filed Motions for Summary Judgment, with attachments, legal memoranda and responses regarding Claim VII of the

November 1, 2007 Petition, as set forth in paragraphs 61-66. The EQC has considered the motions, written responses and argument of the parties, and finds as follows:

I. JURISDICTION

“The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007).

The issuance or denial of a permit is a final agency action by the Department for purpose of appeal. The council shall, “Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007).

The Protestants disputed the Director of DEQ’s approval of Basin Electric’s Air Quality Permit CT-4631 for the Dry Fork Station project and requested a hearing before the EQC. Therefore, the EQC has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Wyoming Environmental Quality Act (WEQA) and DEQ regulations, an air quality construction permit is needed before any person commences construction of any new facility or modifies any existing facility which may cause the issuance of air pollution in excess of the standards set by the DEQ. On November 10, 2005, Basin Electric submitted an air quality construction permit application to DEQ to construct a coal-fired power generating station, known as Dry Fork Station, near Gillette,

Wyoming. On October 15, 2007, after nearly two years of technical review and analysis by the Air Quality Division, the Director of DEQ determined that Basin Electric's application for construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and approved Basin Electric's application to construct Dry Fork Station by issuing Air Quality Permit CT-4631.

On November 1, 2007, Protestants filed a Petition asserting eight separate claims of violations of the PSD permitting process. Specifically, in Claim VII of the Petition, the Protestants alleged that DEQ failed to comply with PSD regulations by failing to include PM_{2.5} in its Best Available Control Technologies (BACT) analysis, failing to set an emission limit for PM_{2.5} and failing to ensure the Dry Fork Station power plant would not violate the PM_{2.5} national ambient air quality standards (NAAQS).

All three parties thereafter filed motions for summary judgment on Claim VII as set forth in paragraphs 61-66 of the Petition.

III. ISSUES AND CONTENTIONS

The issue raised by all three parties in this September 29, 2008 motion hearing is whether DEQ properly relied upon EPA guidance and policy to regulate PM_{2.5}.

The Protestants argued that DEQ erred by issuing the air quality permit to Basin Electric because DEQ failed to set an emissions limit for PM_{2.5} and erred by relying on EPA policy to use PM₁₀ as a surrogate for regulating PM_{2.5}.

DEQ and Basin Electric argued the EPA and DEQ have followed a long-standing surrogate policy and Wyoming is an attainment area for PM_{2.5}.

All parties moved for summary judgment on this issue. All parties agreed there were no genuine issues of material fact and argued for summary judgment as a matter of law.

IV. FINDINGS OF FACT

1. On November 10, 2005, Basin Electric submitted an air quality construction permit application to construct a coal-fired electric power generating plant, known as Dry Fork Station, near Gillette, Wyoming. *See* Schlichtemeier Aff., ¶ 15; Schlichtemeier Aff., Ex. D; DEQ Annex ¶ 1; Protestants' Response to DEQ Annex ¶ 1.

2. On October 15, 2007, the Director of DEQ determined that Basin Electric's application for construction of the Dry Fork Station satisfied the applicable statutory and regulatory requirements and issued Air Quality Permit CT-4631. By issuing the permit, the Director of DEQ determined the application satisfied both New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements. *See* Schlichtemeier Aff., ¶¶ 32-33, Ex. T and Ex. U.

3. In Air Quality Permit CT-4631, DEQ states the appeal rights available as follows:

Any appeal of this permit as a final agency action of the Department must be made to the Environmental Quality Council within sixty (60) days of permit issuance per Section 16, Chapter 1, General Rules of Practice and Procedure, Department of Environmental Quality.

See Air Quality Permit CT-4631.

4. In accordance with the appeal right guidance and the DEQ's Rules of Practice and Procedure, Protestants filed their Petition on November 1, 2007. The

Protestants asserted eight separate counts or claims of violations of the PSD permitting regulations. The case was thereafter referred to the EQC.

5. All three parties thereafter filed motions for summary judgment on the Protestants' Claim VII in its Petition. Protestants' asserted in Claim VII that DEQ failed to comply with PSD regulations by not including PM_{2.5} in its BACT analysis, failing to set an emission limit for PM_{2.5} and failing to ensure the Dry Fork Station would not violate the PM_{2.5} NAAQS.

6. The November 10, 2005 permit application was filed with DEQ pursuant to the Wyoming Environmental Quality Act (WEQA) and the Prevention of Significant Deterioration (PSD) program created by the federal Clean Air Act (CAA), as administered by the State of Wyoming, Department of Environmental Quality, Air Quality Division (DEQ/AQD), pursuant to Wyoming's state implementation plan (SIP) approved by the Environmental Protection Agency (EPA). The permit application included an ambient air impact analysis and BACT evaluation with a proposed emission limit for PM₁₀, as required by DEQ's PSD regulations and the CAA.

7. On October 15, 2007, after extensive review and comment, the Director of the DEQ and the Administrator of the AQD issued Air Quality Permit CT-4631 (Permit) to Basin Electric to construct the Dry Fork Station to be located approximately seven (7) miles north of Gillette, Wyoming. *See Schlichtemeier Aff.*, ¶ 33, Ex. U.

8. NAAQS are set at a level to protect the public health with a margin of safety. 42 U.S.C. § 7409(b)(1).

9. Wyoming has incorporated the 1997 PM_{2.5} NAAQS into the Wyoming Air Quality Division Standards and Regulations (WAQSR), but has not yet amended its rules

to reflect the PM_{2.5} NAAQS established by the EPA in 2006 notwithstanding DEQ is and has been in compliance with the 2006 PM_{2.5} NAAQS standards. WAQSR Ch. 2, §2(b).

10. In October 1997, after promulgating NAAQS for PM_{2.5}, the EPA issued guidance addressing the “Interim Implementation of New Source Review Requirements for PM_{2.5}” (EPA Surrogate Policy). *See* Schlichtemeier Aff., Ex. W, EPA, John S. Seitz, Memo., October 23, 1997. The EPA Surrogate Policy recognized that EPA’s promulgation of primary and secondary standards for PM_{2.5} marked the first time that the EPA had specifically regulated fine particles as a discrete indicator for particulate matter. Because of this, the EPA was concerned with “the lack of necessary tools to calculate emissions of PM_{2.5} and related precursors and project ambient air quality impacts so that sources and permitting authorities could adequately meet the New Source Review Workshop Manual (NSR Manual) requirements for PM_{2.5}.” *Id.*

11. The EPA Surrogate Policy allows states like Wyoming to use PM₁₀ as a surrogate for PM_{2.5} in meeting NSR Manual requirements under the CAA, including PSD permitting requirements. *Schlichtemeier Aff., Ex. W.*

12. Pursuant to this federal guidance for implementing the CAA, states around the country, including Wyoming, follow this policy, and virtually all states have continued to do so. 73 Fed. Reg. 28,321, 28,340-28,341.

13. Since 1997, the DEQ/AQD has followed and applied the EPA’s Surrogate Policy using PM₁₀ as a surrogate for PM_{2.5} in over ten (10) PSD permitting actions. *See* *Schlichtemeier Aff.*, ¶ 48.

14. PM₁₀, by definition, includes all particles smaller than 10 micrometers, including particles 2.5 micrometers and smaller.

15. In April 2005, the EPA re-affirmed continued use of the EPA Surrogate Policy. EPA, Stephen D. Page, "Implementation of New Source Review Requirements in PM_{2.5} Nonattainment Areas," April 5, 2005 (Ex. 9 to DEQ Motion) (Page Memorandum).

16. Although the Page Memorandum provided guidance on implementation of NSR Manual in PM_{2.5} nonattainment areas, the memo also advised states to continue to follow the EPA Surrogate Policy because "administration of a PM_{2.5} PSD program remains impractical" until promulgation of the PM_{2.5} Implementation Rule. DEQ Ex. 9 at pg. 4.

17. In September 2007, the EPA proposed a third set of PM_{2.5} rules, addressing, for the first time, PSD increments, significant impact levels (SILs), and significant monitoring concentrations (SMCs). 72 Fed. Reg. 54,112 (September 21, 2007).

18. As part of this rulemaking, the EPA authorized continued use of the EPA Surrogate Policy until such time as the EPA approved the state's revised SIP: "A State implementing a NSR program in an EPA approved State Implementation Plan (SIP) may continue to rely on the interim surrogate policy." *Id.* at 54,114.

19. Several months after the Dry Fork Station Permit was issued, the EPA finalized its second set of PM_{2.5} PSD implementation rules in May, 2008. 73 Fed. Reg. 28,321 (May 16, 2008). The preamble to this final rule reiterated and continued to authorize the use of the EPA Surrogate Policy until revised PSD program SIPs have been submitted. *Id.* at 28,341.

20. Not all the tools for implementing PM_{2.5} NSR Manual are available. Tools that are lacking include fugitive direct PM_{2.5} emission factors, and PM_{2.5}

measurement or modeling tools and guidance such as whether PM_{2.5} modeling for increment consumption or SILs includes the condensable fraction of PM_{2.5} and the contribution from secondary formation of PM_{2.5}. See January 17, 2008 Letter from DEQ to EPA Rule Docket EPA-HQ-OAR-2006-0605 (Ex. 15 to DEQ Motion).

21. Technical difficulties and uncertainties remain for implementing the PM_{2.5} new source review requirements including “artifact formation and other uncertainties associated with conducting Method 202” and additional validation testing for conditional test method 39 (CTM-039), which are both methods to measure PM_{2.5} emissions. 72 Fed. Reg. 20586, 20653 (April 25, 2007).

22. The DEQ’s PM₁₀ surrogate analysis for Basin Electric’s Permit included modeling of both filterable and condensable particulate matter for compliance with the PM₁₀ NAAQS and the maximum allowable increments of deterioration. See Schlichtemeier Aff., Ex. N at DEQ/AQD Bates Nos. 001443-1444, 001447, 001451-1459, 001469-75; Ex. T at DEQ/AQD Bates Nos. 004163, 004170-4171.

23. Basin Electric conducted an ambient air impact analysis and demonstrated that the Dry Fork Station’s impact on ambient air quality will be less than applicable SILs and therefore will not cause or contribute to any exceedance of any ambient air quality standard or PSD increment for PM₁₀, thereby satisfying the ambient air quality impact analysis requirement for PM_{2.5} under the EPA’s Surrogate Policy. Schlichtemeier Aff., Ex. N at DEQ/AQD Bates Nos. 001443-1444, 001459, 001483; Ex. T at DEQ/AQD Bates Nos. 004170-4171.

24. The DEQ’s review of Basin Electric’s modeling analysis concluded that the total PM₁₀ concentrations from Dry Fork Station were below the PM₁₀ NAAQS,

below the PSD increments for PM₁₀, and also less than the Class II SILs for PM₁₀ for both the 24-hour and annual averaging periods and therefore Dry Fork Station will not cause or contribute to any NAAQS or increment exceedance for PM₁₀, thus satisfying the PM_{2.5} ambient air quality impact analysis requirements pursuant to the EPA's Surrogate Policy. *Id.*

25. The DEQ/AQD's BACT analysis concluded that a baghouse and an emission limit of 0.012 lb/MMBTU for filterable PM_{2.5}/PM₁₀ represented BACT for the boiler. Schlichtemeier Aff., Ex. N at DEQ/AQD Bates No. 001444; Ex. T at DEQ/AQD Bates No. 004170; Snell Aff., ¶ 10 (attached to Basin Electric's Memo in Opposition).

26. Basin Electric's proposed control technology to achieve the PM_{2.5}/PM₁₀ BACT emission limit is the use of a RYTON or equivalent bag. Schlichtemeier Aff., Ex. N at DEQ/AQD Bates No. 001444; Ex. T at DEQ/AQD Bates No. 004170; Snell Aff., ¶ 9. The fabric filter selected for the Dry Fork Station is a state of the art fabric filter of the type suggested by Protestants' expert for controlling PM_{2.5} emissions. Sahu Depo. at 283-285 (excerpts attached as Sahu Depo to Basin Electric's Memo in Support of Motion for Summary Judgment (Basin Electric Brief). These bags are made of polyphenylene sulfide (PPS) with a polytetrafluoroethylene (PTFE) coating. PPS is a felted filter. PTFE is an expanded membrane that can be laminated with a variety of fibers such as PPS. This fabric is expected to achieve excellent particulate control with relatively low pressure drops, further enhancing the baghouse's ability to control PM_{2.5} emissions. Williams Aff., ¶ 13 (attached to Basin Electric Brief).

27. PM_{2.5} precursors nitrogen oxide (NO_x) and sulfur dioxide (SO₂) are already limited under the permit because they underwent individual BACT analyses and

have BACT emission limits established in the permit. *See* Schlichtemeier Aff., ¶ 14. The emission limits for NO_x and SO₂, set by DEQ in Basin Electric's Permit, are among the most stringent imposed in the country. Snell Aff., ¶¶ 11-13. The Permit limit for NO_x on a 12-month rolling average basis is the lowest in the country. Protestants' Answer to Interrogatory No. 20 (Ex. 8 to DEQ Motion).

28. Wyoming has PM_{2.5} ambient air monitors including the Triton Coal, Belle Ayr, and Black Thunder monitoring stations located within Campbell County, Wyoming. Dec. 11, 2007 letter from Wyoming to EPA, attachment 2 (Ex. 13 to DEQ Motion).

29. The PM_{2.5} monitoring data from these locations reflect PM_{2.5} levels in the 12-19 micrograms per cubic meter range. DEQ Ex. 13; Pearson Aff., ¶¶ 3-8 (attached to Basin Electric's Memo in Opposition).

30. PM_{2.5} impacts attributable to the Dry Fork Station will be well below the new PM_{2.5} NAAQS of 35 micrograms per cubic meter. In the permitting process, PM₁₀ emissions, which include all PM_{2.5} emissions as a subset of PM₁₀ emissions, were modeled to determine Dry Fork Station's impact on PM₁₀ levels in the ambient air. The modeling showed that the maximum impact from Dry Fork Station on the 24-hour ambient PM₁₀ concentration was 4.2 micrograms per cubic meter. *Basin Electric Dry Fork Station Air Construction Permit Application*, November 2005 at 7-15 (excerpt attached as Ex. 11 to Basin Electric Brief). PM₁₀ includes all particulate matter smaller than 10 microns in diameter, and thus includes all PM_{2.5}. Assuming that 100 percent of all PM₁₀ emitted from Dry Fork Station is actually comprised only of PM_{2.5}, and even assuming that, as a result, the entire impact of Dry Fork Station on ambient PM_{2.5} levels was 4.2 micrograms (the same as PM₁₀ impacts), that impact, combined with the levels

measured at the above monitoring stations, would be less than the PM_{2.5} 24-hour NAAQS of 35 micrograms per cubic meter (ranging from 16.2 to 23.2 micrograms per cubic meter). Pearson Aff., ¶¶ 3-8.

31. The EPA Region 8 submitted comments on Basin Electric's draft PSD permit but did not raise any concern with DEQ's reliance on the EPA Surrogate Policy. Schlichtemeier Aff., Ex. T at DEQ/AQD Bates Nos. 004154-4157.

32. All findings of fact set forth in the following conclusions of law section shall be considered a finding of fact and are fully incorporated into this paragraph.

V. CONCLUSIONS OF LAW

A. General Principles of Law

33. The EQC's jurisdiction is governed by the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-111 (LEXIS 2007).

34. Pursuant to the WEQA, the council **shall**, "Act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." Wyo. Stat. Ann. § 35-11-112(a) (LEXIS 2007) (emphasis added).

35. The Council **shall**, "Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." Wyo. Stat. Ann. § 35-11-112(a)(iv) (LEXIS 2007) (emphasis added).

36. All hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. § 35-11-101 through 1104 and the Wyoming Administrative Procedure Act. Department of Environmental Quality, Rules of Practice and Procedure, Chapter 1, Section 3 and Chapter 2 (DEQ's Rules).

37. Chapter II, Section 14 of the DEQ Rules of Practice & Procedure (DEQ RPP) makes the Wyoming Rules of Civil Procedure applicable to matters before the EQC. (DEQ RPP Ch. 2, § 14).

38. The Wyoming Rules of Civil Procedure provide that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WYO. R. CIV. P. 56(c).

39. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WYO. R. CIV. P. 56(b), (c).

40. Summary judgment procedures set out in WYO. R. CIV. P. 56 apply to administrative cases. *Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, ¶ 6; 152 P.3d 367, ¶ 6 (Wyo. 2007).

41. The purpose of summary judgment is to dispose of cases before trial that present no genuine issues of material fact. *Id.* 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.*

42. Where there are no genuine issues of material fact, summary judgment concerns application of the law. *Bd. of County Comm'rs of County of Laramie v. City of Cheyenne*, 2004 WY 16, ¶ 8; 85 P.3d 999, ¶ 8 (Wyo. 2004).

B. Principles of Law Regarding PM_{2.5} Analysis

43. The WEQA requires a permit to construct “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(c); WAQSR Ch. 6, § 2.

44. Before the DEQ may issue a permit, the applicant must prove to the DEQ Director’s satisfaction that the applicant has complied with the WEQA and regulations promulgated thereunder. WYO. STAT. ANN. § 35-11-801; WAQSR Ch. 6, § 2.

45. Under the CAA, EPA establishes national primary and secondary ambient air quality standards. 42 U.S.C. § 7409(a).

46. Individual states have the responsibility for assuring air quality within their geographic area will meet the national primary and secondary ambient air quality standards. 42 U.S.C. § 7407(a).

47. The Director of DEQ has authority to perform any and all acts necessary to administer the provisions of the WEQA and any rules, regulations, standards, or requirements established thereunder, and to exercise all incidental powers as necessary to carry out the purposes of the WEQA. WYO. STAT. § 35-11-109(a)(i). The Administrator of DEQ’s Air Quality Division has the “powers as shall be reasonably necessary and

incidental to the proper performance of the duties imposed” on the Air Quality Division by the WEQA. WYO. STAT. § 35-11-110(a)(x).

48. Since a PSD permit is issued for the purpose of implementing the federal CAA, as administered by the DEQ through Wyoming’s EPA approved SIP and the WEQA, the DEQ Director and AQD Administrator have the incidental powers necessary to follow and implement the EPA approved guidance, standards and practices. Such powers are necessary to implement the legislative intent behind the CAA and the objectives of the WEQA, which is likewise to protect the environment. WYO. STAT. § 35-11-102.

49. DEQ is authorized pursuant to the WEQA and Chapter 6, Section 2 of the WAQSR to use the EPA’s guidance on new source review PSD permitting issues. The United States Supreme Court has recognized that States regularly rely on guidance like the NSR Manual. *Alaska v. EPA*, 540 U.S. 461, 475-476 (2004).

50. Because the science underlying regulation of PM_{2.5} remains unresolved, the EPA has not yet issued all of the final rules establishing a regulatory framework for separately regulating PM_{2.5} without a surrogate policy. Basin Electric filed its permit application in November of 2005, just as the EPA’s first proposed rule for establishing a regulatory framework for the PM_{2.5} NAAQS was published. In September of 2007, the EPA proposed key elements for the PSD program for PM_{2.5}, including PM_{2.5} “increments,” SILs, and SMCs (Proposed Rule), 72 Fed. Reg. 54,112 (Sept. 21, 2007), but the EPA again reaffirmed in the Proposed Rule that “[a] State implementing a NSR program in an EPA approved State Implementation Plan (SIP) may continue to rely on the interim surrogate policy[.]” *Id.* at 54,114.

51. On May 16, 2008, more than seven months after Basin Electric's Permit was issued, the EPA promulgated a rule implementing other aspects of the NSR Manual program for PM_{2.5} (Final Rule). 73 Fed. Reg. 28,321. The rule provides that "States with SIP-approved PSD programs that require amendments to incorporate these final NSR rule changes for PM_{2.5}," like Wyoming, "will need time to accomplish these SIP amendments." *Id.* at 28,340. Accordingly, States with SIP-approved PSD programs must submit a revised PSD program for PM_{2.5} within three years. *Id.* at 28,341. During the SIP-development period, however, a "State may continue to implement a PM₁₀ program as a surrogate to meet the PSD program requirements for PM_{2.5} pursuant to the 1997 guidance mentioned previously [EPA Surrogate Policy]." *Id.*

52. In the preamble to the Final Rule for NSR implementation of PM_{2.5}, the EPA stated that it is "allowing SIP-approved States to continue with the existing PM₁₀ surrogate policy to meet the PSD requirements for PM_{2.5}." *Id.* As EPA explained,

to ensure consistent administration during the transition period, [EPA] ha[s] elected to maintain [its] existing PM₁₀ surrogate policy which only recommends as an interim measure that sources and reviewing authorities conduct the modeling necessary to show that PM₁₀ emissions will not cause a violation of the PM₁₀ NAAQS as a surrogate for demonstrating compliance with the PM_{2.5} NAAQS.

Id.

53. The EPA stated that "PM₁₀ will act as an adequate surrogate for PM_{2.5} in most respects, because all new major sources and major modifications that would trigger PSD requirements for PM_{2.5} would also trigger PM₁₀ requirements because PM_{2.5} is a subset of PM₁₀." *Id.* Additionally, "both of the precursors designated in the final rule—SO₂ and NO_x (presumptively)—are already regulated under State NSR Manual programs for other criteria pollutants. Thus, those precursors will be subject to NSR Manual

through those other programs.” *Id.* That is the case here. Further, as the EPA indicated earlier in the preamble to the Final Rule, it is continuing to study appropriate monitoring and measuring methods for condensable PM, another component of PM_{2.5} emissions, and in the meantime, the EPA has determined that PSD reviews need not account for those emissions.

54. The EPA’s Rule for PM_{2.5} is incomplete and contains only part of the requirements to implement an NSR Manual program for PM_{2.5}. Specifically, the preamble to the Final Rule states that:

[t]his final action on the bulk of the major NSR program for PM_{2.5} along with our proposed rule on increments, SILs, and SMC, when final, will represent the final elements necessary to implement a PM_{2.5} PSD program. When both rules are promulgated and in effect, the PM_{2.5} PSD program will no longer use a PM₁₀ program as a surrogate, as has been the practice under our existing guidance.

73 Fed. Reg. at 28,323.

C. Application of Principles of Law

55. There is no dispute over the facts material to the questions regarding PM_{2.5}. Pursuant to the EPA’s Surrogate Policy, DEQ did not do a separate ambient air impact analysis, a separate BACT analysis, or set a separate BACT emission limit for direct PM_{2.5} emissions because it relied upon the EPA’s Surrogate Policy and associated guidance, as it has done for the last 10 years.

56. Although some of the technical developments for calculating the emissions of PM_{2.5} have been resolved, a significant portion of the PM_{2.5} implementation rule, including increments, SILs, and SMC, has not yet been finalized.

57. This makes continued reliance on the surrogate policy reasonable. For example, a critical element for a PSD NAAQS modeling analysis is the adoption of SILs for PM_{2.5}. SILs set the threshold below which a PSD modeling analysis need only consider the ambient air impacts from the proposed source. If the predicted impacts from a source are below the SILs, no further modeling is required. If impacts are greater than the SILs, cumulative modeling of other sources must be done. SILs have not yet been established for PM_{2.5}.

58. In its air program, Wyoming has relied on PM₁₀ as a surrogate for PM_{2.5}. In the rules governing the best available retrofit technology, Wyoming's regulations note in the Section 9 definition for "visibility-impairing air pollutant" that "PM₁₀ will be used as the indicator for particulate matter" and that "[e]missions of PM₁₀ include the components of PM_{2.5} as a subset." WAQSR Ch. 6, § 9(b).

59. Reliance on the EPA's Surrogate Policy is appropriate in this case. PM_{2.5} emissions from the Dry Fork Station will fall below the applicable NAAQS for PM_{2.5}. BACT analysis and emission controls have been applied under this permit for PM_{2.5} precursors and controls effective for PM_{2.5} have been adopted as part of the BACT analysis for PM₁₀, as contemplated by the EPA Surrogate Policy. See, *In re Prairie State Generating Co.*, PSD App. No. 05-05, 13 E.A.D. ____ (EAB Aug. 24, 2006), slip op. at 127-128.

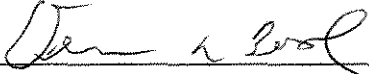
60. Based on all the foregoing findings of fact and conclusions of law, DEQ/AQD has complied with the EPA's guidance as well as its own PSD regulations using PM₁₀ as a surrogate, and Protestants have failed to demonstrate any error by DEQ.

ORDER

IT IS THEREFORE ORDERED that:

The Department of Environmental Quality and Basin Electric Power Cooperative's Motions for Summary Judgment in regard to the issue of use of PM₁₀ as a surrogate for PM_{2.5} is GRANTED. Protestants' Motion for Summary Judgment on this same issue is DENIED, and the Department of Environmental Quality's decision to issue the Air Quality Permit CT-4631 as it relates to the contentions set forth in Count VII of the November 1, 2007 Protest and Petition for Hearing is affirmed.

SO ORDERED this 2 day of ~~November~~ ^{December}, 2008.


Dennis M. Boal, Chairman
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CERTIFICATE OF SERVICE

I, Joe F. Girardin, certify that at Cheyenne, Wyoming, on the 8th day of December, 2008,
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