

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

OCT 17 2008

In the Matter of:)
Basin Electric Power Cooperative) Docket No. 07-2801
Dry Fork Station,)
Air Permit CT - 4631)

Jim Ruby, Executive Secretary
Environmental Quality Council

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Claim VII - PM_{2.5})

The Wyoming Department of Environmental Quality Air Quality Division (DEQ/AQD) by and through the Office of the Attorney General, and Basin Electric Power Cooperative, Inc. (Basin Electric) through its counsel, Holland & Hart LLP, respectfully submit the following PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above-captioned permit appeal directed to the cross-motions for summary judgment filed by all parties on Protestants' claims set forth in paragraphs 61-66 of their "Protest and Petition for Hearing."

I. INTRODUCTION

On November 10, 2005, Basin Electric submitted its air construction permit application to Wyoming DEQ to construct the Dry Fork Station. Schlichtemeier Aff., ¶ 15; Schlichtemeier Aff., Ex. D (Ex. 1 to DEQ's Motion for Partial Summary Judgment (DEQ Motion)).

On October 15, 2007, after extensive review and comment, the Director of the DEQ and the Administrator of the Air Quality Division issued Air Quality Permit CT-4631 (Permit) to Basin Electric Power Cooperative (Basin Electric) to construct the Dry Fork Station approximately seven (7) miles north of Gillette, Wyoming. Schlichtemeier Aff., ¶¶ 32-33, Ex. T and Ex. U.

On November 1, 2007, Sierra Club, Powder River Basin Resource Council, and Wyoming Outdoor Council (collectively Protestants) filed a petition for hearing before the Environmental Quality Council (EQC) in response to the permit granted to Basin Electric. (Protestant's Pet. for Hr'g at 1).

A hearing (Hearing) was held on motions for summary judgment filed by all parties on September 29, 2008 and completed on September 30, 2008, at the Wyoming Game and Fish Casper Regional Building, Pronghorn Room, 3030 Energy Lane, Suite 100, Casper, Wyoming. Protestants, Sierra Club, Powder River Basin Resource Council, and the Wyoming Outdoor Council were present and represented by their Attorneys, James S. Angell, Robin Cooley, Andrea L. Zaccardi of Earthjustice and Reed Zars. Respondent, Basin Electric, was present and represented by its Attorneys, Patrick R. Day and Mark R. Ruppert of Holland & Hart LLP. Respondent DEQ/AQD was present and represented by Assistant Attorneys General, Nancy E. Vehr and Luke J. Esch of the Wyoming Attorney General's Office. The Hearing was held before

Hearing Examiner Deborah A. Baumer, and EQC member and presiding officer F. David Searle, and EQC members Dr. Fred Ogden, Tim Flitner, Dennis M. Boal, John N. Morris, and Thomas Coverdale. The proceedings were recorded by court reporter Randy A. Hatlestad from Wyoming Reporting Service, Inc.

Protestants' allege that DEQ erred by issuing the Permit to Basin Electric because Protestants assert that 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 respond by arguing that DEQ may legally rely on the EPA's Surrogate Policy in evaluating PM_{2.5}. As there is no dispute as to the underlying facts, all parties in this appeal brought motions for summary judgment on the PM_{2.5} issue. The issue before the Council presents a question of law.

The Parties submitted written briefs and exhibits and presented oral arguments. The EQC then presented numerous questions on the issues to the parties, and then conducted a public deliberation and vote on the cross-motions. After such deliberation and vote, and based upon the motion, briefs and exhibits filed by DEQ and Basin Electric, the EQC hereby FINDS AND ORDERS as follows on Count VII of the Petition:

II. FINDINGS OF FACT

1. In November 2005, Basin Electric filed an application with DEQ for an air quality permit to construct a subcritical pulverized coal boiler to be used to generate electricity near Gillette, Wyoming, a project known as the "Dry Fork Station." *Schlichtemeier Aff.*, ¶ 15, Ex. D. The 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, Air Quality Division (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 Best Available Control Technology (BACT) evaluation with a proposed emission limit for PM₁₀, as required by DEQ's PSD regulations and the CAA.

2. 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.

3. National Ambient Air Quality Standards (NAAQS) are set at a level to protect the public health with a margin of safety. 42 U.S.C. § 7409(b)(1).

4. Wyoming has incorporated the 1997 PM_{2.5} NAAQS into the Wyoming Air Quality Standards and Regulations, but has not yet amended its rules to reflect the PM_{2.5} NAAQS established by EPA in 2006 notwithstanding DEQ is and has been in compliance with the 2006 PM_{2.5} NAAQS standards. WAQSR Ch. 2, §2(b).

5. In October 1997, after promulgating NAAQS for PM_{2.5}, 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 EPA had specifically regulated fine particles as a discrete indicator for particulate matter. Because of this, 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 c[ould] adequately meet the NSR [New Source Review Workshop Manual] requirements for PM_{2.5}.” *Id.*

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

7. 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.

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

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

10. In April 2005, 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).

11. Although the Page Memorandum provided guidance on implementation of NSR 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.

12. 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).

13. As part of this rulemaking, EPA authorized continued use of the EPA Surrogate Policy until such time as 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.

14. 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.

15. Not all the tools for implementing PM_{2.5} New Source Review (NSR) 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}. January 17, 2008 Letter from DEQ to EPA Rule Docket EPA-HQ-OAR-2006-0605 (Ex. 15 to DEQ Motion).

16. 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).

17. 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.

18. 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 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.

19. The DEQ’s review of Basin Electric’s modeling analysis concluded that the total PM₁₀ concentrations from Dry Fork 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 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 EPA’s Surrogate Policy. *Id.*

20. The DEQ/AQD’s BACT analysis concluded that a baghouse and an emission limit of 0.012 lb/MMBTU for filterable PM/PM₁₀ represented BACT for the boiler, one of the lowest emission limits in the country for PM. *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).

21. Basin Electric’s proposed control technology to achieve the PM/PM₁₀ BACT emission limit is 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).

22. 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).

23. 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).

24. 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).

25. 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's impact on PM₁₀ levels in the ambient air. The modeling showed that the maximum impact from Dry Fork 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 is actually comprised only of PM_{2.5}, and even assuming that, as a result, the entire impact of Dry Fork 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.

26. 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.

III. CONCLUSIONS OF LAW

1. 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).

2. 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).

3. 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).

4. 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.*

5. Where there are no genuine issues of material fact, summary judgment concerns strict 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).

6. There is no dispute over the facts material to the questions regarding PM_{2.5}. Pursuant to 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 EPA's Surrogate Policy and associated guidance, as it has done for the last 10 years.

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

8. 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).

9. 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 EQA. WYO. STAT. § 35-11-110(a)(x).

10. 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 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.

11. DEQ is authorized pursuant to the WEQA and Chapter 6, Section 2 of the WAQSR to use 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. *Alaska v. EPA*, 540 U.S. 461, 475-476 (2004).

12. Because the science underlying regulation of PM_{2.5} remains unresolved, 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 EPA's first proposed rule for establishing a regulatory framework for the PM_{2.5} NAAQS was published. In September of 2007, 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 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.

13. On May 16, 2008, more than seven months after Basin Electric’s permit was issued, EPA promulgated a rule implementing other aspects of the NSR 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.*

14. In the preamble to the Final Rule for NSR implementation of PM_{2.5}, 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.

15. 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 programs for other criteria pollutants. Thus, those precursors will be subject to NSR through those other programs.” *Id.* That is the case here. Further, as 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, EPA has determined that PSD reviews need not account for those emissions.

16. EPA’s Rule for PM_{2.5} is incomplete and contains only part of the requirements to implement an NSR 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.

17. 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.

18. 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}.

19. 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).

20. Reliance on 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.

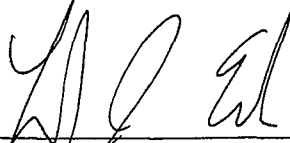
21. This is not the venue for litigating the legality of EPA's guidance – that lawsuit belongs in federal court, where the claim now resides. See *NRDC v. EPA*, Civil Action No. 08-1250 (D.C. Cir.) In the interim, DEQ may rely upon the EPA Surrogate Policy.

22. DEQ/AQD has complied with 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.

THEREFORE IT IS HEREBY ORDERED THAT:

The DEQ's decision to use PM₁₀ as a surrogate for PM_{2.5} was in accordance with the WEQA and the WAQSR and therefore the EQC grants DEQ's and Basin Electric's motions for summary judgment on the issue of PM_{2.5} and affirms the DEQ/AQD's decision to issue air quality permit No. CT-4631 to Basin Electric to construct the Dry Fork Station as it relates to Protestants' claims of error in Count VII of their Petition. Protestants' Motion on this issue is denied.

RESPECTFULLY SUBMITTED this 17 day of October, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2008, I served the foregoing by electronic service and by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

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