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DEC 15 2009

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**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN THE MATTER OF:)
MEDICINE BOW FUEL & POWER, LLC) DOCKET NO. 09-2801
AIR PERMIT CT-5873)

**RESPONDENTS' PROPOSED ORDER GRANTING MEDICINE BOW FUEL &
POWER, LLC'S AND DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTIONS FOR SUMMARY JUDGMENT ON PROTESTANT'S REMAINING
CLAIMS I, II, III, V, AND VII**

COMES NOW the Respondent, Medicine Bow Fuel & Power, LLC, by and through its undersigned counsel, hereby submits the Respondents' Proposed Order Granting Medicine Bow Fuel & Power, LLC's and Department of Environmental Quality's Motions for Summary Judgment on Protestant's Remaining Claims I, II, III, V, and VII. A true and

accurate copy of said Proposed Order is attached hereto.

Dated this 15th day of December 2009.

MEDICINE BOW FUEL & POWER, LLC

Permittee

By: 

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CERTIFICATE OF SERVICE

I, John A. Coppede, hereby certify that on this 15th day of December 2009 a true and correct copy of RESPONDENT'S PROPOSED ORDER GRANTING MEDICINE BOW FUEL & POWER, LLC'S AND DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTIONS FOR SUMMARY JUDGMENT ON PROTESTANT'S REMAINING CLAIMS I, II, III, V, AND VII was served electronic mail to:

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CLAIMS I, II, III, V, AND VII**

This matter came before the Environmental Quality Council (EQC) on December 7, 2009, for oral argument on motions for summary judgment filed by all three parties. EQC members present at the December 7, 2009 motion hearing included: Dennis M. Boal, Chairman; F. David Searle, John N. Morris, Thomas Coverdale, Tim Flitner, Dr. Fred Ogden, and Catherine Guschewsky. Jim Ruby, Executive Secretary of the 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 protestant,

Sierra Club, appeared by and through counsel, Andrea Issod, Shannon Anderson, Daniel Galpern, and David A. Bahr. Medicine Bow Fuel & Power, LLC (MBFP) appeared by and through its counsel, Mary A. Throne and John A. Coppede. The Department of Environmental Quality, Air Quality Division (DEQ), appeared by and through its counsel, Senior Assistant Attorney General Nancy Vehr.

In Protestant's May 4, 2009 Protest and Petition for Hearing (Petition), Protestant identified eight (8) separate claims of alleged violation of the Wyoming Environmental Quality Act (Act) and the requirements of the Wyoming Air Quality Standards and Regulations (WAQSR). On November 2, 2009, the EQC dismissed claim VIII of the Petition which had alleged that the Wyoming DEQ failed to consider greenhouse gas emissions. On or about November 10, 2009, the Protestants voluntarily dismissed claims IV (coal cleaning) and VI (coal storage) of their Petition.

All three parties herein filed their Motions for Summary Judgment, with attachments, legal memoranda and responses regarding claims I, II, III, V, and VII of the May 4, 2009 Petition. 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 for its air quality, land quality, solid and hazardous waste management, or water quality divisions.” Wyo. Stat. § 35-11-112(a).

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 authorize or required by the Act." Wyo. Stat. § 35-11-112(a)(iv).

The Protestant disputed the director of DEQ's approval of MBFP's air quality permit CT-5873 for MBFP's industrial gasification and liquefaction project and requested a hearing before the EQC. Therefore, the EQC has jurisdiction herein to 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 pollutants in excess of the standards set by the DEQ. On December 31, 2007, MBFP submitted an air quality construction application to DEQ to construct a coal-to-liquids facility, including an industrial gasification and liquefaction plant and the surface facilities associated with an underground coal mine in Carbon County, Wyoming. On March 4, 2009, after nearly nineteen months of technical review, public comment and analysis by the DEQ, the director of DEQ determined that MBFP's application for construction of the project satisfied the applicable statutory and regulatory requirements and, therefore, approved MBFP's application to construct the project by issuing air quality permit CT-5873.

On or about May 4, 2009, Protestant filed a petition asserting eight (8) separate claims. As stated above only claims I, II, III, V, and VII were the subject of this hearing. Specifically, in Claim I of the Petition the Protestant alleged that DEQ failed to properly calculate the facility's potential to emit for sulfur dioxide (SO₂) and otherwise erred in determining that the facility's startup/shutdown emissions minimization plan (SSEM) was best available control technology (BACT) for controlling SO₂ flare emissions during startup/shutdown and malfunction events. In claim II Protestant alleged that DEQ improperly calculated or regulated fugitive emissions from equipment leaks and otherwise erred in determining that the facility's leak detection and repair program (LDAR) was BACT for such emissions. In claim III the Protestant alleged that DEQ improperly determined that the facility was a minor source for methanol. In claim V the Protestant alleged that DEQ improperly modeled for particulate matter to demonstrate the facility's compliance with the National Ambient Air Quality Standards and the Wyoming Air Quality Standards (NAAQS) and (WAAQS). In claim VII the Protestant alleged that the DEQ erred in using the PM₁₀ surrogate policy for regulating PM_{2.5} emissions.

III. ISSUES AND CONTENTIONS

The issues raised by all three parties in the December 7, 2009 motion hearing were the following: First, whether DEQ properly determined the PTE for SO₂ emissions and whether it was proper for DEQ to prescribe as BACT, a work practice standard, the startup/shutdown emissions minimization (SSEM) plan for controlling SO₂ flare emissions during startup/shutdown and malfunction events. Second, whether the DEQ

properly determined that the MBFP facility was minor for methanol and whether it was proper for DEQ to conclude that the leak detection and repair program (LDAR) was BACT for controlling fugitive equipment leaks. Third, whether MBFP properly modeled for fugitive particulate matter emissions. Fourth, whether DEQ properly relied on EPA guidance and policy to regulate PM_{2.5}.

DEQ and MBFP argued that DEQ properly calculated the facility's potential to emit for sulfur dioxide and that it was proper for DEQ to prescribe an SSEM plan for controlling SO₂ flare emissions as BACT.

They further argued that MBFP correctly calculated methanol emissions and therefore it was proper for DEQ to conclude that the facility was a minor source for those emissions. They further argue that DEQ properly concluded that the facility's LDAR program was BACT for fugitive emissions from equipment leaks.

DEQ and MBFP also argued that they properly modeled for fugitive particulate matter emissions to demonstrate compliance with the NAAQS and WAAQS. Finally, DEQ and MBFP argued that the EPA and DEQ have followed a long standing surrogate policy, which has been promulgated into federal law in Wyoming's State Implementation Plan (SIP) and Wyoming is in attainment for PM_{2.5}. They argued that DEQ therefore correctly analyzed PM_{2.5} using EPA's surrogate policy.

IV. FINDINGS OF FACT

1. On June 19, 2007, MBFP submitted its original permit application under Chapter 6 of the Wyoming Air Quality Standards and Regulations (WAQSR) for a

Prevention of Significant Deterioration (PSD) permit to construct commercial scale gasification and liquefaction facility (Facility) and the surface facilities associated with an underground coal mine in Carbon County, Wyoming, for the purpose of production of transportation fuels and other products. Schlichtemeier Aff. ¶ 14; Ex. 3 . The permit application was reviewed by the WDEQ which issued an analysis and draft permit on June 19, 2008. On February 8, 2007, the PSD Modeling protocols for the Facility were submitted to the DEQ/AQD. Schlichtemeier Aff. ¶ 13; Ex. 3. (Unless specified otherwise numerical citations refer to the DEQ's exhibits.)

2. On December 31, 2007, Medicine Bow submitted a revised air construction permit application (AP-5 873) to Wyoming DEQ, replacing the previous application in its entirety to change the type of transportation fuel to be produced. The permit application starts the BACT review process. The DEQ/AQD continued to review information and asked questions until assured that the application was technically complete. Schlichtemeier Aff. ¶ 15; Ex. 4.

3. The Facility is subject to PSD permitting requirements because it is one of the 28 listed major source types and will emit, or have the potential to emit, over 100 tons per year (TPY) of NO_x CO, VOC, and PM/PM₁₀. Schlichtemeier Aff. ¶ 12, 42; Ex. 11.

4. The PSD permit review for the Facility consisted of, among other things, BACT analyses and an ambient air quality analysis for the PSD pollutants. Schlichtemeier Aff. ¶ 42; Ex. 11. Other pollutants were analyzed pursuant to Wyoming's minor source permitting requirements. *Id.*

5. On January 10, 2008, the AQD requested Medicine Bow submit revised meteorological data processing needed for analyzing near-field impacts. Nall Aff. ¶12;Ex.28.

6. On February 13, 2008, URS submitted Application, revisions to the DEQ changing emission calculations and the near field air quality modeling analysis. Schlichtemeier Aff. ¶ 16; Ex. 6.

7. On March 3, 2008, URS responded to AQD's January 10, 2008 request. Nall Aff ¶13;Ex.29.

8. On March 10, 2008, the DEQ/AQD notified Medicine Bow that the Application was complete and that DEQ/AQD would proceed with its technical review. Schlichtemeier Aff. ¶ 17; Ex. 7.

9. On March 18, 2008, the DEQ requested Medicine Bow submit additional information regarding the near-field (AERMOD) impact analysis. Nall Aff. ¶ 14; Ex. 30.

10. On April 23, 2008, URS submitted additional information regarding coal mine emissions, near-field air dispersion modeling, startup/shutdown emissions and planned flaring operations. Schlichtemeier Aff. ¶ 19; Nall Aff. ¶ 15; Ex. 9.

11. On June 4, 2008, URS submitted additional information and revised application pages reflecting changes to the mercury emission rate calculation and equipment leak calculations. Schlichtemeier Aff. ¶ 20; Ex. 10.

12. On June 19, 2008, the DEQ/AQD completed its Application Analysis for the Facility, concluding that the Facility would comply with the WAQSR and proposed approval of the Application. Schlichtemeier Aff. ¶ 21; Ex. 11.

13. On July 3, 2008, the DEQ/AQD advertised its proposed decision, providing public comment through August 4, 2008. Schlichtemeier Aff. ¶ 23; Ex. 13.

14. A public hearing on the proposed decision was held on August 4, 2008. The DEQ/AQD received public comments about the proposed decision in writing and up through the close of the public hearing. Schlichtemeier Aff. ¶¶ 24, 27; Ex. 17; Ex. 31; Ex. 55.

15. On July 31, 2008, URS submitted additional application revision pages, and a CD containing an electronic version of the complete revised Application (less some figures that had previously been provided). Schlichtemeier Aff. ¶ 25; Ex. 14-15.

16. On July 31, 2008, DKRW provided comments and proposed additional permit conditions. Schlichtemeier Aff. ¶ 26; Ex. 16.

17. On August 15, 2008, the DEQ requested Medicine Bow address certain comments received during the public notice and hearing, including items regarding LDAR and section 112 applicability. Schlichtemeier Aff. ¶ 28; Ex. 17.

18. On September 5, 2008, the DEQ requested Medicine Bow address ozone impacts and normal startup emissions from the plant. Schlichtemeier Aff. ¶ 29; Ex. 18.

19. On September 30, 2008, Medicine Bow responded to the DEQ's August 15, 2008 request. Schlichtemeier Aff. ¶ 30; Ex. 19.

20. On October 3, 2008, the DEQ requested Medicine Bow address health risks associated with HAP emissions from the Facility. Nall Aff. ¶ 16; Ex. 32.

21. On October 14, 2008, Medicine Bow responded to the DEQ's September 5, 2008 request. Schlichtemeier Aff. ¶ 31; Ex. 20.

22. On November 5, 2008, Medicine Bow responded to the DEQ's October 3, 2008 request. Nall Aff. ¶ 17; Ex. 33.

23. On November 11, 2008, Medicine Bow provided additional information as a follow-up to their October 14, 2008 letter. Schlichtemeier Aff. ¶ 32; Ex. 21.

24. On December 29, 2008, the DEQ requested Medicine Bow address elemental mercury, visible emission limits for slag operations, and the Black Start Generators hours of operation. Schlichtemeier Aft ¶ 33; Ex. 22.

25. On December 30, 2008, Medicine Bow responded to the DEQ's December 29, 2008 request. Schlichtemeier Aff. ¶ 34; Ex. 23.

26. On February 3, 2009, Medicine Bow responded to a question regarding PM₁₀ emission calculations and BACT analysis. Schlichtemeier Aft ¶ 35; Ex. 24.

27. On March 4, 2009, the DEQ issued its response to comments and determination that the Application complied with all applicable WAQSR and that a permit would be issued to Medicine Bow allowing the construction of the Facility, and issued air quality construction permit CT-5873 to Medicine Bow for the Facility. Schlichtemeier Aff. ¶¶ 36-37; Ex. 25; Ex. 26.

28. The DEQ/AQD NSR staff spent over 807 hours reviewing, analyzing, and processing the Application. Schlichtemeier Aff ¶ 38; Ex. 27. The Medicine Bow Facility is located in Carbon County which has been designated as unclassifiable or in attainment for all National Ambient Air Quality Standards. 40 C.F.R. 81.351.

29. The review for SO₂ consisted of a BACT analysis and an ambient air quality analysis. Schlichtemeier Aff. at ¶¶ 22, 39-42; Ex. 11. The dispersion modeling for SO₂ impacts included all SO₂ sources from the proposed plant. Nall Aff. ¶ 18.

30. Modeled 3-hour and 24-hour emissions of SO₂ from the flares reflected worst-case hourly conditions. Nall Aff. ¶ 19; Ex. 11; Ex. 15; Ex. 25. The modeling results were less than the 3-hour and 24-hour WAAQS and NAAQS. Id; Ex. 11; Ex. 25.

31. When making a PSD applicability determination, the DEQ/AQD evaluates the facility's normal operations as represented in the permit application. Schlichtemeier Aff. ¶ 51; Ex. 2.

32. Temporary emissions and startup, shutdown, and malfunction emissions are not considered in determining PSD applicability.

33. Medicine Bow characterized warm startup/shutdown events as part of planned maintenance for normal operations and included in the Facility's PTE of 36.6 TPY 502. Schlichtemeier Aff. ¶ 52; Ex. 11; Ex. 15; Ex.21; Ex.25. Cold startup/shutdowns are not part of normal operations. Ex. 15, Ex. 21, Ex. 25

34. The Facility's design includes a multi-gasifier configuration. Ex. 21.

35. Permit CT-5873 limits the Facility's total SO₂ emissions to 36.6 TPY. Ex. 26.

36. Based on the type of event and frequency, emissions from Initial Startup (commissioning activities), Cold Startup/Shutdowns or malfunction events were excluded from the Facility's PTE. Schlichtemeier Aff. ¶ 52; Ex. 11; Ex. 15; Ex. 21; Ex. 25.

37. The DEQ does not address malfunctions in permitting because malfunctions are addressed according to Chapter 1, Section 5 of the WAQSR. Schlichtemeier Aff. ¶ 54; Ex. 25.

38. The flares function as a control device during startup/shutdowns and malfunction events. Ex. 15; Ex. 25 at DEQ000040.

39. The Permit contains operational requirements in Permit Conditions 22-25, designed to insure that the flares are operated efficiently to convert H₂S and COS to SO₂, as well as destruct other pollutants, including the requirement to comply with WAQSR, Ch. 5, Sec. 2(m). The Division will require monitoring of the sulfur content of process streams flared that can result in SO₂ emissions as part of the permit. Ex. 25, Ex. 26

40. The DEQ established the startup/shutdown emission minimization plan (SSEM Plan) as BACT to minimize the duration and extent of flare SO₂ emissions. Compliance with the SSEM plan is required under Condition No. 31 of the Permit. Ex. 11; Ex. 15; Ex. 21; Ex. 25; Ex. 26.

41. The DEQ did not establish flare SO₂ emission limits as BACT as there are no traditional EPA reference methods for monitoring compliance. Ex. 25; Ex. 41 at 73:5-77: 13.

42. The Sierra Club's expert did not do a BACT analysis for the flares. Ex. 41 at 69:20 - 71:3.

43. Facility commissioning activities are temporary, only occur once during Initial Facility startup, and were excluded from PTE. Schlichtemeier Aff ¶ 52; Ex. 15; Ex. 21; Ex. 25; Ex. 55 at DEQ001697.

44. SO₂ and NO_x are PM_{2.5} precursors. 73 Fed. Reg. 28341.

45. The PM_{2.5} precursor emissions of SO₂ and NO_x underwent direct review and have BACT emission limits established. Ex. 11 at DEQ0005 14-19; DEQ000528-29; Ex. 40 at 96:3-19.

46. EPA has not provided all of the tools needed for DEQ to implement analyze PM_{2.5}. Nall Aff. ¶ 21; Ex. 36; Ex. 37; Ex. 41 at 101:17-23; Ex. 42 at 180:3-182:16; 72 Fed. Reg. 54112; 73 Fed. Reg. 28321, 28323; 74 Fed. Reg. 12970.

47. EPA has not promulgated a final rule for stack testing emissions of PM_{2.5}. 74 Fed. Reg. 12970 (March 2009)

48. Since 1997, the DEQ/AQD has followed EPA's PM₁₀ Surrogate Policy to meet PSD permitting requirements. Schlichtemeier Aff. ¶ 55; Ex. 36; Ex. 37;

49. The DEQ modeled PM₁₀ to compare predicted impacts to the NAAQS, WAAQS and PSD increments. Nall Aff. ¶ 21; Ex. 11; Ex. 25. PM₁₀ was used as a surrogate for PM_{2.5}. Nall Aff. ¶21; Ex. 11; Ex. 25.

50. EPA did not submit any comments on PM_{2.5}. Schlichtemeier Aff. ¶ 56; Ex. 31.

51. Wyoming recommended that all areas within Wyoming be designated as attainment/unclassifiable for the 2006 PM_{2.5} 24-hour NAAQS. Ex. 38. EPA designated all areas within Wyoming as attainment or unclassifiable for the 2006 PM_{2.5} 24-hour NAAQS. 74 Fed. Reg. 58688.

52. Medicine Bow's expert analyzed the particulate emissions from the Facility's gas turbines and the material handling activities, concluding that it was reasonable for PM₁₀ to be used as a surrogate for PM_{2.5}, based on the size of the particulate and the fact the BACT would not change if the emissions were analyzed as PM 2.5. Ex. 35 at pp 29-35; MBFP Ex. G1.

53. Using PM₁₀ as a surrogate for this Facility was reasonable in light of the fact that most of the particulate generated will be from gas-fired turbines and fugitive emissions from haul roads. The particulate from the gas-fired turbines is more likely than not comprised of particulate matter smaller than PM_{2.5} and thus, as concluded by Ms. Winborn, "calculated PM emissions from turbines can be used to estimate PM₁₀ and PM_{2.5}." Winborn Report at 31, Ex. 1 to Winborn Aff., Ex. G.

54. The fugitive emissions from coal handling, including haul road emissions and the like, justify the use of the surrogacy policy. In the situation of the fugitive particulate emissions from coal handling, it is more likely that the majority of particulate is larger in size and that this $PM_{2.5}$ comprises a much smaller component of these total emissions. In this situation, PM_{10} emissions as a surrogate are likely to over-estimate the $PM_{2.5}$ emissions or more than account for them. MBFP Ex. G1, Winborn Report at 31-32.

55. The primary factor in assessing the reasonableness of using a surrogate is the degree to which the emission controls for PM_{10} would also control $PM_{2.5}$. In the case of the gas-fired turbines, due to the size of the particulate matter, good combustion practices in combinations with use of fuels that have a low particulate potential are the only available option, whether the emissions are characterized as PM_{10} or $PM_{2.5}$. Both baghouses and electrostatic precipitation were considered for control and found to be infeasible. Due to the small size of the particle, these controls could provide no additional reductions and as a result, the control technologies selected was the only possible alternative. MBFP, Ex. G1, Winborn Report at 32-33; *See also* Ex. 25, WDEQ Decision document.

56. The control options remain the same for reducing fugitive emissions from coal-handling activities whether the analysis is for PM_{10} or $PM_{2.5}$ as EPA's AP-42 document does not differentiate between controls for the varying sizes of particulate and

describes the use of watering and the use of chemical wetting agents as the method for controlling dust emissions. MBFP Ex. G1, Winborn Report at 33-34.

57. Permit Condition No. 47 requires application of water and chemical suppressants to all haul roads to control emissions of particulate or dust from the roads. Ex. 26

58. Calculating fugitive emissions from equipment components requires: 1) an equipment count; 2) information about the equipment and service type; 3) emission factors; and 4) control efficiency or effectiveness. Ex. 35 at pp. 13-15; Ex. 40 at 61:4 — 62:1; Ex. 40 at 9).

59. The primary source of volatile organic compounds (VOCs) and hazardous air pollutants (HAPs), as well as hydrogen sulfide, from the Facility will be leaking process equipment, located downstream from the coal preparation and gasification portions of the facility. Ex. 14, App. Section 4.7. The number of components at issue, comprised of pumps, valves, flanges and similar equipment, is approximately 4000. See Ex. 14, Appendix B to Application.

60. Medicine Bow provided an estimated equipment count by equipment and service type; Ex. 4 at DEQ000124, 000265-82; Ex. 19 at DEQ0029 18, 2926-27; Ex. 15 at DEQ000078-000054, 000078-000231 — 249.

61. Medicine Bow's estimated component count and stream process data were obtained from professional engineers based on the available design information. Vendors

for components have not been selected and screening values for the components are not available. Aff. of James Knox at ¶¶ 11-12, MBFP Ex. J.

62. Medicine Bow could not utilize the correlation equation approach for estimating emissions since screening values are not available for such calculations. Winborn Depo at 104-07, Sierra Club Ex 16.

63. Appendix B of the application contains detailed estimates of the fugitive emissions from equipment leaks, relying on EPA's emission factors for facilities in the Synthetic Organic Chemical Manufacturing Industry (SOCMI).

64. WDEQ's decision to allow Medicine Bow to estimate emissions relying on SOCMI average emission factors, rather than refinery factors was appropriate as the coal to liquids facility is a SOCMI Facility. Ex. 25 and Ex. 26, Condition 38

65. Medicine Bow is required to submit a final component count of the as-built Facility prior to startup. Ex. 25 at DEQ000045, 57-59.

66. Condition No. 2 of the Permit binds Medicine Bow to all the substantive commitments in the application. Ex. 26

67. Emission factors may be used as a method to estimate emissions. 74 Fed. Reg. 52723, 52724.

68. The Facility is subject to Subpart VVa of 40 CER part 60 (SOCMI). Ex. 11 at DEQ000525; Ex. 25 at DEQ0000S8; Ex. 26; Knox Aff. at ¶12, Ex. J; Winborn Report at 13, Ex. 1 to Winborn Aff, Ex. G.

69. The emission factors used by Medicine Bow, based on EPA's "Protocol for Equipment Leak Emission Estimates" (EPA-453/R-95-017) are widely used and recognized for such calculations. Ex. 15; Ex. 35 at 13, 15-16; Ex. 49.

70. Medicine Bow is required to annually provide actual verification of the equipment leak emissions based on the Facility's measured leak detection rates. Ex. 25 at DEQ000059; Ex. 26.

71. The emission estimates in the application are stated for both controlled and uncontrolled emissions from equipment leaks. The controlled emission estimates assume the implementation of a Leak Detection and Repair (LDAR) program. The original application assumed a leak detection level of 10,000 ppm from piping, meaning leaks would not be repaired until detected at this level. WDEQ required MBFP to base its estimates and control option on a leak detection level of 500 ppm for valves and connectors and 2000 ppm for pumps in VOC service. As a result of this reduction in leak detection levels, the estimate of HAPs emissions was also reduced. Medicine Bow's May 2008 revised equipment leak calculations were based on a leak definition of 500 ppm for valves and connectors and 2000 ppm for pumps which was also consistent with NSPS and NESHAP. Ex. 4 at DEQ000I24, 000265-282; Ex. 10; Ex. 11; Ex. 15; Ex. 25.

72. Under the draft permit issued, the total HAPs emissions estimate was 24.8 tons per year (tpy), below the 25 tpy major source threshold for total HAPs under 40 U.S.C. 112 and the WAQSR, but the individual emissions of methanol were 10.2 tpy making the facility a major source under the same provision for any HAP exceeding 10

tpy. Following the public comment period, WDEQ requested additional information from MBFP regarding the applicability of Section 112 of the CAA to which MBFP responded on September 30, 2008 with new calculations for methanol emissions, based on updated engineering design information from Davy Process Technology, the methanol synthesis vendor. With the design change, eight sampling points were replaced with closed loop sampling. With this approach, less methanol would be vented to the atmosphere since in a traditional sampling process (non-closed loop), the sampling line is purged to atmosphere prior to taking the sample, while in a closed-loop system, the sample is taken without venting to the atmosphere. The component count for sampling connections for methanol found on page B-42 of the application was thus reduced from 28 to 20. As a result of this change, the WDEQ agreed estimated methanol emissions were reduced from 10.3 tpy to 9.2 tpy. Ex. 15; Ex. 19; Ex. 25; Knox Aff. at ¶13, Ex. J.

73. Medicine Bow is required to annually calculate actual fugitive HAP emissions using the application methodology and the previous year's average measured leak detection rate. Ex. 25 at DEQ000059.

74. Fugitive emissions from equipment leaks can be controlled by implementing an LDAR program or by replacing leaking components or both. Ex. 49 at § 5.1; 72 Fed. Reg. 64860, 64864.

75. Use of leakless components by themselves may be constrained by material composition and process operation. Ex. 42 at 111:19 — 112:18.

76. Medicine Bow identified LDAR as “the only available control technology for comprehensively addressing equipment leak fugitive emissions is a structured Leak Detection and Repair (LDAR) program in which certain piping components and equipment are routinely inspected for leaks, and components found to be leaking in excess of stated thresholds are repaired in a timely manner.” MBFP Ex. G1, Winborn Report at 19-20; Ex. 4 at DEQ000151; Ex. 11 at DEQ000S25; Ex. 15 at DEQ000078-000082.

77. The selection of LDAR as the only viable control option is further supported by review of the EPA Reasonably Available Control Technology (RACT)/BACT/Lowest Achievable Emission Rate Clearinghouse database which demonstrated that “LDAR programs are established as BACT in many recent RBLC determinations.” Ex. 15, App. at Sec. 4.7; MBFP Ex. G1, Winborn Report at 19-20; MBFP Ex. E, Keyfauver Deposition at 72-74.

78. Sierra Club’s expert did not conduct a BACT analysis for fugitive equipment leaks for the facility; nor, did he review the RACT/BACT/LAER clearinghouse to research BACT for fugitive emissions of VOCs/HAPs from equipment leaks.

79. Medicine Bow’s LDAR program requires Medicine Bow to monitor components at set intervals to determine whether the component is leaking or not. Ex. 25 at DEQ000059, Ex. 26 at DEQ001415. If a component is leaking above the 500/2000

ppm threshold, Medicine Bow must repair or replace it within specified timeframes. Ex. 26; 72 Fed. Reg. at 64883-95.

80. In response to public comment, the WDEQ asked MBFP to consider even lower leak detection limits for its LDAR program. MBFP considered lower levels and concluded that they would not lead to lower emissions, based on EPA's consideration of lower leak standards and its conclusion that "data gathered from facilities making a first attempt at repair on valves with leaks above 100 or 200 ppm suggests that these attempts do not always reduce emissions." MBFP Ex. K; September 30, 2008 MBFP letter to WDEQ (quoting EPA Docket ID No. EPA-HQ-OAR-2006-0699-0094), MBFP Ex. G1, Winborn Report at 22. WDEQ did not require further reductions in leak detection levels. Ex. 25, Decision Document at IV.4.

81. Leakless components were not a practical control technology for all the facility's 4000 components. EPA considered and rejected leakless technology in developing the requirements for equipment leaks, "[w]e could not identify any new 'leakless' technologies that could be applied in all applications. Therefore, requiring 'leakless' equipment is not technically feasible. ..." MBFP Ex. G1, Winborn Report at 20-21 (quoting 72 Fed. Reg. 64864), MBFP Ex. E, Keyfauver Deposition at 72; lines 18-20.

82. In addition to inspection and repair requirements in the permit and additional recordkeeping and reporting requirements, the DEQ also increased the leak

monitoring frequency to every six months. Ex. 25 at DEQ000037; Ex. 26 at DEQ001415, Condition 21.

83. Medicine Bow's fugitive component emission calculations included information on stream composition, emission factors, emission factor source, percent control achieved through application of the LDAR program and estimated component count. Ex. 4 at DEQ000124, 000265-282; Ex. 10; Ex. 15 at DEQ000078-000054, 000078-000231 — 249; Ex. 19.

84. Protestant's expert did not perform any fugitive VOC or HAP emission calculations. Ex. 41 at 98:1-99:12.

85. Short term fugitive PM emission modeling continues to have uncertainties in performance, based on the AERMOD Implementation Guide. Nall Aff. at ¶¶ 22 - 23; Ex. 39 at p. 14.

86. The DEQ does not require permit applicants to conduct short-term fugitive PM emission modeling because of a high degree of uncertainty in modeling such impacts. Nall Aff. at ¶¶ 22-23; Ex. 46; Ex. 47; Ex. 48; Ex. 51; Ex. 52; Ex. 53; Ex. 54.

87. Medicine Bow modeled annual but not short-term (24-hour) fugitive PM₁₀ emissions. Ex. 15. Medicine Bow's modeling results demonstrated the Facility would comply with the annual PM₁₀ WAAQS and NAAQS. Ex. 11; Ex. 25.

88. The Sierra Club's expert did not conduct any short-term modeling of fugitive particulate matter.

V. CONCLUSIONS OF LAW

BACKGROUND

1. The Environmental Quality Council is charged with hearing the appeal of any challenge to the issuance of a permit. Wyo. Stat. 35-11-112.

2. The WDEQ is the agency charged under the CAA and the Act for administering air quality requirements in Wyoming and its interpretations of its regulations are entitled to deference.

3. Under the DEQ Rules of Practice and Procedure, the hearing is a contested case proceeding requiring each party to produce evidence to support its position consistent with the contested case requirements of the Wyoming Administrative Procedure Act.

4. Sierra Club bears the burden of demonstrating that the WDEQ decision to issue the Permit is contrary to the Act and the WAQSR.

5. Under the Wyoming APA, the person or entity seeking revocation of a permit or license bears the burden of establishing grounds for this drastic result. Wyo. Stat. § 16-3-113.

6. The actions of an agency are “presumed to be correct,” with the burden falling on the challenger or the appellant to demonstrate non-compliance with the law.

7. On a Motion for Summary Judgment under Rule 56, the movant has the burden of establishing a *prima facie* case based on admissible evidence. The burden then shifts to the opposing party to establish through “specific facts” that a material question

of fact remains. *Cornelius v. Powder River Energy*, 2007 WY 30, ¶ 10, 152 P.3d 387, 390 (Wyo. 2007).

8. The evidence opposing a prima facie case on a motion for summary judgment “must be competent and admissible, lest the rule permitting summary judgments be entirely eviscerated by plaintiffs proceeding to trial on the basis of mere conjecture or wishful speculation.” Speculation, conjecture, the suggestion of a possibility, guesses, or even probability are insufficient to establish an issue of material fact. *Jones v. Schabron*, 2005 WY 65 ¶ 11, 113 P.3d 34, 38 (2005) (citations omitted)

9. In a contested case proceeding under the Wyoming Administrative Procedure Act, all evidence is admissible except that which is irrelevant, immaterial, or unduly repetitious. *See* Wyo. Stat. 16-3-108(a). Hearsay is admissible in a contested case proceeding provided it is probative trustworthy and credible. *See State ex rel. Wyo. Worker’s Comp. Div. v. Rivera*, 796 P.2d 447, 451 (Wyo. 1990); *Storey v. Wyoming State Bd. Of Medical Examiners*, 721 P.2d 1013, 1018 (Wyo. 1986)

10. The Wyoming Environmental Quality Act (the Act) imposes on the Director of the WDEQ a duty to issue permits following proof the applicant has met the requirements of the Act and the relevant regulations. Wyo. Stat. 35-11-801(a).

11. Once the Director determines these standards have been met, the draft permit goes to public notice for 30 days of public comment and the opportunity for a hearing. WAQSR Ch. 6, Sec. 2(m).

12. Under the Act, no person can allow the discharge of any contaminants into the air without first complying with the requirements of the WAQSR or in this case, obtaining a permit to construct. Wyo. Stat. §§ 35-11-201.

13. The Wyoming Environmental Quality Act (the Act) and the Wyoming Air Quality Standards and Regulations (WAQSR) create the permitting framework in the state of Wyoming. Wyo. Stat. § 35-11-201 & 801; WAQSR Ch. 6

14. The construction permit requirements are found in Chapter 6 of the WAQSR, which is part of Wyoming's approved State Implementation Plan (SIP) under the federal Clean Air Act (CAA). 40 C.F.R. Part 52, Subpart ZZ.

15. Once issued, the permits remain in effect even if appealed to the Council. *In re Basin Electric*, EQC Dkt. No. 07-2801 (August 21, 2008 Order Denying Protestants Motion to Suspend).

16. Through its State Implementation Plan, the WDEQ is the agency charged with developing and enforcing the requirements of the federal Clean Air Act in Wyoming. The pre-construction permitting program is a key element in protecting air quality in Wyoming.

17. The CAA Amendments of 1977 established the Prevention of Significant Deterioration Program (PSD), designed to protect areas of the country where air quality was cleaner than the requirements of the NAAQS from significant deterioration while still allowing economic development and use of the air resource.

18. Wyoming's PSD program was first incorporated into Wyoming's SIP in 1979; 40 CFR § 52.2630. As such, the WDEQ has been evaluating, enforcing and issuing PSD permits since the program's inception.

19. The specific requirements of the PSD program are contained in Chapter 6, Section 4 of the WAQSR, and work in conjunction with the general requirements of Wyoming's overall pre-construction requirements of its New Source Review (NSR) program, found in Chapter 6, Section 2 of the WAQSR.

20. PSD permits are issued pursuant to the requirements of both sections of Chapter 6. Wyoming's NSR regulations were first approved by the EPA in 1972. 40 CFR §52.2620.

21. Sections 108 and 109 of the CAA , 42 U.S.C. § 7408 , require EPA to establish national ambient air quality standards for criteria air pollutants.

22. The criteria pollutants include ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide and lead.

23. Section 110 of the CAA, 42 U.S.C. § 7410, places primary responsibility for implementing the CAA on the states, requiring development of State Implementation Plans (SIPs) for the purpose of meeting and maintaining the NAAQS.

24. Under Section 109 of the CAA, the NAAQS are to be "ambient air quality standards the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

25. Recognizing some portions of the country had air quality superior to the NAAQS, Congress adopted the PSD provisions in part for “insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3). Congress’ intent, then, was not to prohibit all development, but to require development protective of air quality.

26. The Facility is a major source under Chapter 6, Section 4 of the Wyoming Air Quality Standards and Regulations (WAQSR) and thus, subject to the requirements of the Prevention of Significant Deterioration (PSD) program.

27. The PSD permitting program is a key feature of this program, authorizing the construction of “major sources,” such as the MBFP Facility, provided that such facilities utilize Best Available Control Technology (BACT) to control the emissions of pollutants from the Facility, meet the NAAQS, and will not exceed any applicable increment. 42 U.S.C. § 7475.

28. The definition of BACT is found in WAQSR, Ch. 6, Sec. 4(a) and states, in part:

[A]n emission limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under these Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application or production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

29. Increment is the maximum allowed increase in the concentration of a pollutant above a baseline ambient concentration. 40 C.F.R. 52.21; WAQSR Ch. 6, Sec. 4.

30. Under the WAQSR, Chapter 6, Section 2, minor sources of emissions must undergo a BACT review.

31. EPA's role is one of oversight of WDEQ rather than direct issuance of permits or regulation of individual permitting actions.

32. Unlike with operating permits issued under Title V, third parties have no ability to simply file objections to PSD permits with EPA and must seek available remedies through state court in accordance with state law.

33. Under Wyoming's applicable regulations, MBFP's Facility is considered a "major stationary source" since it has the potential to emit at least 100 tpy of a criteria pollutant and is a listed Facility.

34. In addition to determining the Facility, as a whole is "major," the regulations require the WDEQ to further consider whether the Facility is major for individual criteria pollutants, based on whether a Facility's potential to emit (PTE) of an individual pollutant meets the significance thresholds in the regulations.

CLAIM I

35. The significance threshold for SO₂ is 40 tpy. WAQSR Ch. 6, § 4(a).

36. Potential to Emit is defined in the WAQSR Ch. 6, § 4(a) as follows:

“Potential to emit” means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the affect it would have on emissions is enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

37. Under the WAQSR, whether a Facility is subject to PSD or not, for criteria pollutants the permit applicant must demonstrate it will use Best Available Control Technology (BACT), to limit the emissions of pollutants. WAQSR Ch. 6, Sec. 2; WAQSR Ch. 6, Sec. 4.

38. Consistent with its interpretation of the regulation and relevant EPA guidance, WDEQ does not include cold startup/shutdown and malfunction emissions in its PTE determination. Ex. 25, WDEQ Decision Document at III.1, DEQ 001434 ; WDEQ Aff. of Chad Schlichtemeier at 51-52.

39. The WDEQ’s interpretation of the definition of PTE is entitled to deference. *Printher v. Department of Administration and Information*, 866 P.2d at 1302 (court gives deference to an administrative agency’s construction of its rules unless clearly erroneous). Sierra Club’s interpretation of the regulation is based on inapplicable guidance and inapplicable caselaw.

40. Both Section 2 and Section 4 of Chapter 6 of WAQSR require an applicant to use Best Available Control Technology taking into account the technical practicability and economic reasonableness of reducing or eliminating emissions.

41. Whether the Facility is deemed “major” for SO₂ for purposes of PSD is irrelevant because the WDEQ has imposed BACT for the Facility’s sources of SO₂. Under the WAQSR, Chapter 6, Section 2, minor sources of emissions must undergo a BACT review.

42. The WDEQ was not required to establish a numerical emission limit for the flares at the Facility. Consistent with the definition of BACT found in Chapter 6, Section 4 of the WAQSR, the permit imposes a work practice standard on the emissions from the flares through the Startup, Shutdown Minimization Plan, included as an enforceable requirement of the permit.

43. Under WAQSR Chapter 6, Section 4, a work practice standard is appropriate in lieu of an emissions standard under the following circumstances:

If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, he may instead prescribe a design, equipment, work practice or operational standard or combination thereof to satisfy the requirement of Best Available Control Technology.

WAQSR Ch.6, § 4(a).

44. WDEQ has met its obligations to require BACT for SO₂ emissions from the flares, as well as other sources of emission, regardless of whether the facility is deemed a major or minor source of SO₂, the Permit requires BACT.

45. The WDEQ’s decision to exclude emissions of SO₂ from cold starts of the facility related to initial commissioning and non-routine maintenance, as well as emissions from malfunctions, was consistent with the definition of potential to emit in

WAQSR Ch. 6, Section 4(a) and its calculation of 36.6 tpy of SO₂ was proper. Any emissions greater than 36.6 tpy must be reported to WDEQ as “excess” emissions and may be subject to enforcement under the Act.

46. The facility is not a major source of SO₂ under WAQSR Ch. 6, Sec. 4, as its PTE does not exceed the 40 tpy significance level.

47. The DEQ properly regulated the emissions of SO₂ from the flares in Conditions 22-25 of the Permit and Condition 31 of the Permit, which incorporates the SSEM plan.

48. The SSEM plan represents BACT as the DEQ was not required to establish emission limits for the flares under the definition of BACT in WAQSR Ch. 6, Sec. 4.

CLAIMS II & III

49. A Facility may also be a major or minor source for Hazardous Air Pollutants (HAPs) under the Act, the WAQSR and Section 112 of the CAA.

50. A source is major for HAPs if it has “the potential to emit ten (10) tons per year of any single hazardous air pollutant or twenty-five (25) tons per year of any combination of hazardous air pollutants,” as defined in the CAA. Wyo. Stat. 35-11-203(a)(i)(B). The DEQ properly concluded, based on revised estimates of emissions of methanol, the Facility is a minor source of HAPs.

51. The MBFP’s methodology for calculating fugitive emissions from equipment leaks, as reviewed by WDEQ, was consistent the requirements of the CAA, as implemented in Wyoming.

52. The DEQ properly determined the Facility is a minor source for hazardous air pollutants within Section 112 of the CAA, as implemented in Wyoming.

53. The DEQ properly reviewed the BACT for fugitive emission from equipment leaks. LDAR represents BACT for the facility.

54. The Leak Detection and Repair Program is BACT for equipment leaks. The definition of BACT is found in WAQSR, Ch. 6, Sec. 4(a) and states, in part:

[A]n emission limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under these Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application or production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

WAQSR, Ch. 6, Sec. 4(a)

55. The application, the WDEQ Decision document, the expert report of Ms. Winborn and the deposition of Mr. Keyfauber all support the WDEQ's decision finding that LDAR is BACT to control fugitive emission leaks. This record is sufficient to support summary judgment for the respondents.

CLAIM V

56. Consistent with other permitting decisions, the WDEQ did not require inclusion of fugitive emissions in the modeling to demonstrate compliance with the short-term or 24-hr standard for particulate matter. Fugitive emissions were included in the

modeling to demonstrate compliance with the long-term standard for particulate matter. Short term modeling for fugitives was conducted for point sources of PM₁₀.

57. The Agency's position is based, in addition, on what is commonly referred to as the Simpson Amendment, § 234 of the Clean Air Act Amendments of 1990. (PL 101-549). The Amendment allows states to use other tools for assessing the impacts of fugitive emissions of particulate from coal mines, pending the development of a more accurate model for short-term emissions modeling.

58. WAQSR, Ch. 6, Sec. 2(c) does not require an applicant to model emissions to demonstrate a facility will not prevent or maintain ambient air quality standards.

59. WAQSR's decision not to require short-term modeling of fugitive PM₁₀ emissions from mining operations is consistent with Section 234 of the Clean Air Act Amendments of 1990 and its obligations under its SIP, given the inaccuracies of the short term model.

60. Monitoring in lieu of modeling is sufficient to demonstrate compliance with the short-term standard for PM₁₀.

61. The Sierra Club has no expert testimony to support this claim. Their expert admitted during his deposition that he is not a modeler and has not done any modeling for several years. In fact, the last time he conducted any modeling, he used the ISCST model, which is not the model used currently by the agency or at issue in this permitting action. MBFP Ex. L, Deposition of Ranajit Sahu at 100-101. R. Sahu's opinions do not

and cannot support this claim. Modeling was conducted by the permit consultant and WDEQ during its evaluation of the application, both well qualified modelers.

62. The record demonstrates that MBFP conducted fugitive PM₁₀ emission modeling in accordance with WDEQ's requirements. In doing its modeling, MBFP demonstrated to the WDEQ that MBFP would not cause or contribute to a NAAQS or a WASQS violation.

63. In doing this modeling, MBFP followed WDEQ's long-standing interpretation of its regulations allowing monitoring in lieu of short-term 24-hour modeling. The WDEQ applies this practice because of the uncertainties associated in EPA model performance for short-term (24-hour) modeling, which does not produce realistic predictions. WDEQ Aff. of James (Josh) Nall at ¶¶ 22-23.

64. Sierra Club has no evidence that MBFP's fugitive PM₁₀ emission modeling in any way failed to demonstrate its compliance with NAAQS and WASQS. Its own expert did not do any dispersion modeling in connection with his opinions in this case or any modeling for fugitive PM emissions. R. Sahu Depo. at 101:11-14; 20-25; and at 102:1, Ex. L.

65. The Sierra Club does not have any expert or other testimony to refute WDEQ's determination short-term modeling of fugitive emissions would lead to an inaccurate result and not a true picture of compliance with the short-term NAAQS for emissions of particulate matter. This interpretation is allowed under Section 234 of the CAA Amendments of 1990, cited in MBFP's Motion for Summary Judgment. Relying

on monitoring, Wyoming has fulfilled its SIP requirements to demonstrate compliance with the NAAQS.

CLAIM VII

66. The WDEQ did not require MBFP to evaluate separately PM_{2.5} emissions and instead used PM₁₀ as a surrogate for determining compliance and establishing emission controls. WDEQ's reliance on the surrogacy policy has been the agency practice since 1997 and its use is required as part of its State Implementation Plan. 73 Fed. Reg. 26019 (May 8, 2008).

67. Whatever the state of EPA rulemaking or guidance development, it is clear under EPA directives in place at the time this permit application was under review, there was no question the surrogacy policy was still appropriate in SIP states, such as Wyoming. 73 Fed. Reg. 26019 (May 8, 2008).

68. WDEQ's reliance on the surrogacy policy for particulate matter has been the agency practice since 1997 and its use is required as part of its State Implementation Plan. 73 Fed. Reg. 26019 (May 8, 2008).

69. The state of PM_{2.5} rulemaking and the ongoing use of the surrogacy policy are in flux at the federal level.

70. Permit CT-5873 requires adequate controls to insure compliance with the standards for PM_{2.5}

SUMMARY

71. The DEQ and Medicine Bow's Motions for Summary Judgment established a *prima facie* case for upholding the DEQ's decision to issue Permit CT-5873. The Sierra Club's Motion did not establish a *prima facie* case of DEQ error and its response did not come forward with specific facts to refute the *prima facie* case established in the Respondents' Motions for Summary Judgment.

72. The affidavit of Dr. Sahu, presented in opposition to summary judgment by Sierra Club, contained only speculative, unsupported and conclusory allegations. Therefore, it was insufficient to establish evidence in opposition to Respondents' Motions. The Sierra Club's citations to the deposition testimony and the administrative record failed to establish any question of material fact that could defeat Respondents' Motions for Summary Judgment.

73. The Sierra Club, as the party bearing the ultimate burden of persuasion to establish WDEQ erred in decision to issue Permit CT-5873, failed to bring forth any admissible evidence of WDEQ error. Therefore, under Rule 56, summary judgment for the Respondents' on all remaining claims is appropriate.

74. The Council determined during the pre-hearing that consideration of standing was not appropriate in this case.

75. DEQ met its duty under Section 801 of the Act to issue Permit CT-5873 based on finding compliance with the requirements of the Act and the WAQSR.

ORDER

IT IS THEREFORE ORDERED that:

The Department of Environmental Quality and Medicine Bow Fuel & Power's Motions for Summary Judgment on all remaining claims be, and the same hereby are, GRANTED.

IT IS FURTHER ORDERED that Protestant's Motion for Summary Judgment on all remaining claims be, and the same hereby, is DENIED.

IT IS FINALLY ORDERED that the Department of Environmental Quality's decision to issue Air Quality Permit CT 5873 as it relates to all claims and contentions in the Protestant's May 4, 2009 Protest and Petition for Hearing is affirmed.

Dated this _____ of January 2010.

Dennis M. Boal, Chairman
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