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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF	)	
MEDICINE BOW FUEL & POWER	)	Docket No. 09-2801
AIR PERMIT CT-5873	)	

DEQ'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS $PM_{2.5}$ AND CO_2 CLAIMS

Respondent Wyoming Department of Environmental Quality (DEQ) by and through its undersigned counsel and pursuant to WYO. R. CIV. P. 12(b)(6) and the Environmental Quality Council Rules, Chapter II, Sections 3 and 14, submits the following memorandum in support of its Motion to Dismiss Claims VII ($PM_{2.5}$) and VIII (carbon dioxide (CO_2) and other Greenhouse Gases), which is filed herewith.

I. INTRODUCTION

This case involves an appeal of DEQ air quality construction permit CT-5873 issued on March 5, 2009, by the DEQ to Medicine Bow Fuel & Power, LLC (Medicine Bow) to construct an underground coal mine (Saddleback Hills Mine) and industrial gasification and liquefaction plant (Medicine Bow IGL Plant) (collectively the Saddleback Hills Mine and Medicine Bow IGL Plant are referred to as the Medicine Bow

Facility) that will produce transportation fuels and other products, to be located in Carbon County, Wyoming.

The Sierra Club Wyoming Office and the Sierra Club National Headquarters (Protestants) allege in part that DEQ failed to regulate $PM_{2.5}$ emissions (Protestants' Protest and Petition for Hearing (Petition), Claim VII, ¶¶ 70 – 77, hereinafter referred to as $PM_{2.5}$ claims)[1] and failed to consider CO_2 and other greenhouse gas emissions (Petition, Claim VIII, ¶¶ 78 – 87, hereinafter referred to as CO_2 claims). These claims must be dismissed as a matter of law because federal law requires Wyoming use PM_{10} as a surrogate for $PM_{2.5}$ and because DEQ does not currently regulate CO_2.

The only relevant inquiry in this case is whether DEQ's decision to issue Permit CT-5873 for the Medicine Bow Facility was in accordance with the applicable statutory and regulatory requirements. In this case, Protestants' $PM_{2.5}$ claims fail as a matter of law because federal law, including Wyoming's State Implementation Plan (SIP) expressly requires that DEQ analyze $PM_{2.5}$ using PM_{10} as a surrogate. *See* 73 Fed. Reg. 26019 (May 8, 2008) (EPA's direct final rule approving Wyoming SIP) and accompanying WYOMING'S INTERSTATE TRANSPORT DECLARATION (Dec. 11, 2006) codified at 40 C.F.R. § 52.2620(e)(XVIII) (a copy is available at https://yosemite.epa.gov/R8/R8Sips.nsf/641057911f6bd13987256b5f0054f380/63ae83db

[1] $PM_{2.5}$ refers to "particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers." 1 WAQSR § 3(a). PM_{10} refers to "particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers," which would include particles 2.5 micrometers and smaller. *Id., see also* 6 WAQSR § 9(b) (for the definition of 'visibility-impairing air pollutants' PM_{10} emissions include $PM_{2.5}$ emissions).

83a6f2cf8725749400687029/$FILE/WY%20interstate%20transport%20SIP.pdf; *see also* 73 Fed. Reg. 28321 (May 16, 2008) (the Environmental Protection Agency's (EPA) $PM_{2.5}$ New Source Review (NSR) Implementation Rule). Protestants' $PM_{2.5}$ claims also fail because EPA's $PM_{2.5}$ NSR Implementation Rule authorizes SIP approved states such as Wyoming to continue using EPA's PM_{10} Surrogate Policy for analyzing $PM_{2.5}$ until the state has submitted its revised Prevention of Significant Deterioration (PSD) SIP. *See Id.* at 28341; *In re Basin Electric Power Cooperative 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, EQC Docket No. 07-2801, ¶¶ 51-52 (Dec. 08, 2008). Further, Protestants' CO_2 claims fail as a matter of law because CO_2 is not currently regulated or subject to regulation pursuant to the Clean Air Act (CAA), corresponding EPA regulations, the Wyoming Environmental Quality Act (WEQA) or Wyoming's Air Quality Standards and Regulations (WAQSR). *See In re Basin Electric*, EQC Docket No. 07-2801, Order Granting Respondent Department of Environmental Quality's Motion to Dismiss, ¶¶ 18-25 (Aug. 21, 2008) *on appeal Powder River Basin Res. Council v. Wyoming Dep't of Envtl. Quality,* Wyo. Sup. Ct. No. 09-0037; *see also Longleaf Energy Assoc., LLC v. Friends of the Chattahoochee, Inc.*, __ S.E.2d ___, 2009 WL 1929192 at *2-*5 (Ga.App. 2009) (discussing and analyzing federal and Georgia law). Consequently, and as a matter of law, it is impossible for Protestants to assert any legally cognizable claims that DEQ's decision did not comply with the statutory and regulatory requirements where neither the CAA and corresponding

EPA regulations, the WEQA, nor the WAQSR currently impose the legal obligations that Protestants allege regarding $PM_{2.5}$ and CO_2.

Therefore, for the reasons stated herein, and pursuant to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure and EQC Rules, Chapter II, Sections 3 and 14, Respondent DEQ moves to dismiss Claims VII ($PM_{2.5}$) and VIII (CO_2) set forth in Protestants' Petition. *See* Petition, pages 17-22 (hereinafter Pet. p. __).

II. BURDEN AND STANDARD OF PROOF

When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure, the material allegations of the complaint are accepted as true and the complaint should be dismissed if it clearly appears the complainant can prove no set of facts in support of his or her claims. *Wilson v. Bd. of County Comm'rs of County of Teton*, 2007 WY 42, ¶ 12, 153 P.3d 917, 921 (Wyo. 2007). Although dismissal is a drastic remedy which should be granted sparingly, a motion to dismiss "is the proper method for testing the legal sufficiency of the allegations and will be sustained when the complaint shows on its face that the plaintiff is not entitled to relief." *Feltner v. Casey Family Program*, 902 P.2d 206, 208 (Wyo. 1995), *quoting Mummery v. Polk,* 770 P.2d 241, 243 (Wyo. 1989). Under these applicable standards, Count VII of Protestants' Petition relating to $PM_{2.5}$ and Count VIII relating to CO_2 do not contain any allegations upon which this Council can grant relief and therefore must be dismissed under Rule 12(b)(6) of the Wyoming Rules of Civil Procedure.

III. BACKGROUND

A. Clean Air Act (CAA)

The CAA's goals of protecting and enhancing the nation's air quality and promoting public health, welfare and economic development by preventing and controlling air pollution are achieved through a cooperative federalism approach with the states. *See* 42 U.S.C. §§ 7401-7671q (2000); 40 C.F.R. parts 1 through 789 (2008) (EPA regulations); 40 C.F.R. part 52, subpart ZZ (Wyoming's EPA approved SIP); WYO. STAT. ANN. §§ 35-11-201 through 214 (Wyoming's air quality statutes); and WAQSR chs. 1-14 (Wyoming's air quality standards and regulations). The CAA authorizes states to assume primary regulatory authority for air quality if EPA has approved the state's SIP specifying the strategies the state will use to attain, maintain and enforce the NAAQS. *See* 42 U.S.C. § 7410(a). SIP-approved states have primary responsibility and authority for managing and protecting air quality within its state borders. *See* 42 U.S.C. § 7407(a). EPA has approved Wyoming's SIP. *See* 40 C.F.R. part 52, subpart ZZ (Wyoming's SIP). Therefore, the State exercises primary air quality regulatory authority ("primacy") through the DEQ, and the EPA maintains oversight.

B. Wyoming Environmental Quality Act (WEQA)

The State's air quality program was initiated in response to CAA requirements but the underlying foundation is the WEQA, establishing a statutory structure designed in part to enable the State to preserve, protect, use, develop, reclaim and enhance its air resources:

> Whereas pollution of the air … of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve, and enhance the air … of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air … resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air [.]

WYO. STAT. ANN. § 35-11-102. The WEQA simultaneously recognizes and gives effect to both public protection and economic development. In enacting the WEQA, the legislature included and designed the permitting system to provide the State with flexibility to address certain economic realities: "[t]he legislature knew that business and industry, essential to the state's economic health, had to be maintained." *State v. Platte Pipe Line Co.*, 649 P.2d 208, 212 (Wyo. 1982). The legislature also recognized environmental protection statutes such as the WEQA, which eliminate, reduce, and prevent pollution, have a goal of public protection. *Id.*

Therefore, in accordance with the CAA and the WEQA, the DEQ regulates Wyoming's air quality pursuant to a carefully crafted, intricately woven, federal and state statutory and regulatory system with many highly technical provisions. *See* WYO. STAT. ANN. §§ 35-11-109 (DEQ Director authority and duties include performing any and all acts necessary to administer the WEQA and any rules, regulations, standards or requirements established thereunder, and exercise all incidental powers to carry out the WEQA's purpose); *Id.* at 35-11-110 (Air Quality Division (AQD) Administrator

authority and duties include the "powers as shall be reasonably necessary and incidental to the proper performance of the duties imposed" by the WEQA); *Id.* at 35-11-201 through 214 (air quality statutes); WAQSR chs. 1-14 (air quality regulations); *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984) (CAA is "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue"). At the core of the CAA and the State's air quality program are ambient air quality standards.[2]

C. Ambient Air Quality Standards

Ambient air quality standards established at the federal level are referred to as "national ambient air quality standards" (NAAQS). *See* 42 U.S.C. § 7409. NAAQS set the maximum ambient air concentration for certain "criteria" pollutants at levels sufficient to protect public health (primary standards) and welfare (secondary standards) with a built in safety margin. *See* 42 U.S.C. §§ 7408-7409; 40 C.F.R. pt. 50. The DEQ is responsible for assuring Wyoming's air quality meets the NAAQS and therefore has incorporated the NAAQS and state specific ambient air quality standards into the State's air quality program. *See* 42 U.S.C. § 7407(a) (states are responsible for meeting NAAQS), 2 WAQSR §§ 1-11(Wyoming Ambient Air Quality Standards (WAAQS)). CO_2 and other GHGs are not currently regulated pursuant to either the NAAQS or WAAQS.

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[2] 'Ambient air' refers to "that portion of the atmosphere, external to buildings, to which the general public has access." 2 WAQSR § 1(a).

D. Ambient Air Quality Designations

Areas where ambient air quality meets the NAAQS for a particular pollutant are deemed in "attainment"; areas that cannot be classified on the basis of available information as meeting or not meeting the NAAQS are deemed "unclassifiable"; and areas that do not meet the NAAQS are designated as "nonattainment." *See* 42 U.S.C. § 7407(d)(1)(A). The PSD program only applies to areas that have been designated as attainment or unclassifiable. 42 U.S.C. § 7471. All areas within Wyoming are designated as attainment or unclassifiable, except for the City of Sheridan which has been designated as non-attainment for PM_{10}. 40 C.F.R. § 81.351.[3] The Medicine Bow Facility is located in Carbon County which has been designated as unclassifiable or in attainment for all NAAQS. *Id.*

E. Area Classifications

In addition to designating areas, areas are classified as either Class I (national parks and wilderness areas greater than 5,000 acres and certain state or tribal designated areas), Class II (most other areas), or Class III. *See* 42 U.S.C. §§ 7472, 7474; 40 C.F.R. § 81.436 (mandatory federal Class I areas in Wyoming). The maximum allowable increases (increment) available have been established for each classification for certain pollutants, with the least amount of increment available in Class I areas and the most available in Class III areas. 42 U.S.C. § 7473.

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[3] The State recently recommended that EPA designate Sublette County as an ozone non-attainment area. *See* Letter from Wyoming Gov. Freudenthal to Carol Rushin, EPA Region VIII (March 12, 2009). A copy of Wyoming's letter is available at http://deq.state.wy.us/aqd/Ozone/Gov%20Ozone%20to%20EPA%20(Rushin)_Final_3-12-09.pdf. EPA's decision is pending.

F. New Source Review and Prevention of Significant Deterioration Construction Permitting Program

In 1977, Congress adopted the PSD program for major sources in areas designated as "attainment" or "unclassifiable" to insure that ambient air quality in those areas does not deteriorate to unacceptable levels. *See* 42 U.S.C. §§ 7471, 7473. The PSD program requires major sources undergo a detailed review and analysis to assure that the NAAQS are maintained, clean air is protected, appropriate emission controls are applied, and economic development opportunities are maximized consistent with the protection of clean air, and permitting decisions are made after careful evaluation and public participation. *See* 42 U.S.C. §§ 7470, 7475. Essentially, the PSD program balances "economic growth" with "the preservation of existing clean air resources." *See* 42 U.S.C. § 7470(3); *see also Id.* §§ 7470-79, *Alabama Power Co. v. Costle*, 636 F.2d 323, 346-52 (D.C. Cir. 1979) (describing history and background of PSD program).

One of EPA's SIP requirements, and one of the primary means for attaining, maintaining, and protecting the NAAQS, the WAAQS, and the State's air quality in general, is the DEQ/AQD's air quality new source construction review and permitting program. *See* 40 C.F.R. part 52, subpart ZZ (Wyoming SIP); WYO. STAT. ANN. § 35-11-801(c) (permit required); *Id.* at -201 (prohibiting pollution which violates rules, regulations and standards); 6 WAQSR §§ 2, 4 (construction and PSD permitting). The DEQ's air quality permitting program has permitting requirements applicable to all new sources (6 WAQSR § 2), and specific requirements for major sources commonly referred to as PSD requirements (6 WAQSR § 4).

The DEQ's EPA-approved PSD program, requires in part, that an applicant demonstrate, to the satisfaction of the DEQ Director and AQD Administrator, that the facility will install and operate pollution controls determined through the best available control technology (BACT) process to control emissions of regulated pollutants, and that construction of the proposed facility will not "cause or contribute" to an exceedance of any ambient air quality standard or increment violation. 6 WAQSR §§ 2, 4; *see also* 42 U.S.C. § 7475.

G. Best Available Control Technology (BACT)

The DEQ's PSD permitting process requires BACT for each pollutant subject to regulation:

> (c) No approval to construct or modify shall be granted unless the applicant shows, to the satisfaction of the Administrator of the Division of Air Quality that:
> ...
> (v) The proposed facility will utilize the Best Available Control Technology with consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility [.]

6 WAQSR § 2 (2008); *see also* 42 U.S.C. § 7475(a)(4) (federal PSD BACT requirement).

BACT is defined as:

> [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 [WAQSR] or regulation under the Federal Clean Air Act, which would be emitted from or which results for [sic] 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. 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. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results. Application of BACT shall not result in emissions in excess of those allowed under Chapter 5, Section 2 [New Source Performance Standards (NSPS)] or Section 3 [National Emission Standards for Hazardous Air Pollutants (NESHAP)] of these regulations and any other new source performance standard or national emission standards for hazardous air pollutants promulgated by the EPA but not yet adopted by the State of Wyoming.

6 WAQSR § 4(a); *see also* 42 U.S.C. § 7479(3)(CAA BACT definition), 40 C.F.R. §§ 52.21(b)(12) (EPA's BACT definition applicable to federally issued PSD permits) and 51.166(b)(12) (EPA's BACT definition applicable to SIP-approved areas).

The DEQ's BACT determinations, generally conducted using EPA's five-step top-down approach, are made on a case-by-case site-specific basis for each pollutant and each emission unit from the proposed source. The BACT process requires consideration of control technologies available for the source proposed by the applicant. Although BACT is a process, the end result of the BACT analysis is a numerical emission limit or control technology requirement that is appropriate for and specific to the particular source.

H. EPA's PM_{10} Surrogate Policy

In October 1997, after promulgating a national ambient air quality standard for $PM_{2.5}$, the EPA issued guidance addressing the "Interim Implementation of New Source Review Requirements for $PM_{2.5}$." (PM_{10} Surrogate Policy), EPA, John S. Seitz, Memo., October 23, 1997 (Seitz Memo) (a copy of the Seitz Memo is available at http://www.epa.gov/ttn/caaa/t1/memoranda/pm25.pdf).[4] EPA's PM_{10} Surrogate Policy allowed states to use PM_{10} as a surrogate for $PM_{2.5}$ in meeting NSR requirements under the CAA, including PSD permitting requirements. *Id.*

In April 2005, EPA re-affirmed continued use of the PM_{10} Surrogate Policy. *See* EPA, Stephen D. Page, *Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas*, April 5, 2005 (Page Memo) (a copy of the Page Memo is available at http://www.epa.gov/ttn/caaa/t1/memoranda/m16633memo.pdf). Although the Page Memo provided guidance on NSR implementation in $PM_{2.5}$ nonattainment areas, the memo also advised states to continue following the PM_{10} Surrogate Policy because

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[4] The DEQ respectfully requests this Council take judicial notice of the agency policies and public records referenced in this Memorandum. The Council may take judicial notice of certain documents, such as agency policy and public records, without converting a Rule 12(b)(6) motion into a Rule 56 motion. *See Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008) (public records); *Hamilton v. Paulson*, 542 F.Supp. 2d 37, 52 at n. 15 (D.D.C. 2008) (documents maintained on agency website are subject to judicial notice). The DEQ is authorized pursuant to the WEQA and WAQSR Ch. 6, § 2 to use EPA guidance "on new source review PSD permitting issues." *See In re Basin Electric Power Cooperative*, EQC Docket No. 07-2801, Order Granting Basin Electric Cooperative's and Department of Environmental Quality's Motions for Summary Judgment Regarding Protestants' Claim VII, ¶ 49 (Dec. 8, 2008); *see also Alaska v. EPA*, 540 U.S. 461, 475-476 (2004) (recognizing that permitting agencies commonly use EPA guidance in PSD permitting actions).

"administration of a PM-2.5 PSD program remains impractical" until promulgation of the $PM_{2.5}$ Implementation Rule. *Id.* at 4.

In September 2007, the EPA issued proposed $PM_{2.5}$ rules addressing PSD increments, significant impact levels (SILs), and significant monitoring concentrations (SMCs). 72 Fed. Reg. 54112 (September 21, 2007). As part of this rulemaking, EPA proposed allowing continued use of the PM_{10} 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 54114; *see also Longleaf,* 2009 WL 1929192 at *6 - 7 (Ga. App. 2009) (upholding Georgia's use of PM_{10} Surrogate Policy for PSD permit issued in May 2007).

Several months later, in May 2008, EPA finalized the $PM_{2.5}$ NSR Implementation Rule. 73 Fed. Reg. 28321 (May 16, 2008). The final rule codified continued use of the PM_{10} Surrogate Policy until revised PSD program SIPs have been submitted. *Id.* at 28341. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1222-23 (D.C.Cir. 1996) (in some instances, preamble statements may constitute binding, final agency action).

IV. DEQ'S USE OF PM_{10} AS A SURROGATE FOR $PM_{2.5}$ WAS AUTHORIZED BY LAW

Claim VII of Protestants' Petition requests this Council vacate and remand Permit CT-5873 based on Protestants' allegations that it was "unlawful" for the DEQ to use and follow EPA's $PM_{2.5}$ NSR Implementation Rule and PM_{10} Surrogate Policy for analyzing $PM_{2.5}$. *See* Pet. pp. 17-19. However, Protestants' $PM_{2.5}$ claims fail as a matter of law

because federal law, including Wyoming's SIP expressly requires that DEQ analyze $PM_{2.5}$ using PM_{10} as a surrogate. *See* 73 Fed. Reg. 26019 (May 8, 2008) and accompanying WYOMING'S INTERSTATE TRANSPORT DECLARATION (Dec. 11, 2006) codified at 40 C.F.R. § 52.2620(e)(XVIII). Further, EPA's $PM_{2.5}$ New Source Review Implementation Rule expressly provides that SIP-approved states may follow EPA's PM_{10} Surrogate Policy for analyzing $PM_{2.5}$ until such state's SIP has been revised. *See* $PM_{2.5}$ NSR Implementation Rule, 73 Fed. Reg. 28321 (May 16, 2008); *In re Basin Electric Power Cooperative*, Order at ¶ 51. Thus, Protestants' claims that DEQ acted unlawfully, by following the law, necessarily fail. Protestants' claims and requested relief are based on what Protestants want the law to be, rather than what the law actually is. Because there is no legal basis to support Protestants' $PM_{2.5}$ claims, this Council should dismiss such claims.

A. Wyoming's SIP Requires DEQ Analyze $PM_{2.5}$ Using PM_{10} as a Surrogate

Wyoming's Interstate Transport Declaration, approved and promulgated by the Environmental Protection Agency (EPA) as part of DEQ's State Implementation Plan (SIP) and codified at 40 C.F.R. § 52.2620(e)(XVIII), mandates as a matter of law that "Wyoming will implement the current rules in accordance with EPA's interim guidance using PM10 as a surrogate for PM2.5 in the PSD program." *See* 73 Fed. Reg. 26019 (May 8, 2008) and accompanying WYOMING'S INTERSTATE TRANSPORT DECLARATION (Dec. 11, 2006); *see also* 54 Fed. Reg. 27880 (July 3, 1989) (SIP approving Wyoming's use of EPA modeling guidance for PSD program). Therefore, Wyoming's SIP is current

federal law requiring the DEQ to use PM_{10} as a surrogate for $PM_{2.5}$ in the PSD program. *See* 42 U.S.C. § 7413(a) and (b) (enforceable by EPA); *Id.* at § 7604 (enforceable through a citizen suit); *see also Latino Issues Forum v. EPA*, 558 F.3d 936, 938 (9th Cir. 2009) (EPA approved SIP provisions are federally enforceable); *Kentucky Res. Council, Inc. v. EPA*, 467 F.3d 986, 988 (6th Cir. 2006) (EPA approved SIP is federally enforceable).

Despite Wyoming's SIP, which incorporates EPA's PM_{10} Surrogate Policy, and is enforceable as a matter of federal law, Protestants allege that the DEQ should have conducted a $PM_{2.5}$ BACT analysis, set $PM_{2.5}$ emission limits, and conducted $PM_{2.5}$ NAAQS and increment analyses. (Pet. pp. 17-19). Protestants' allegations are premised on their position that EPA's PM_{10} Surrogate Policy and $PM_{2.5}$ NSR Implementation Rule are "unlawful." *See NRDC v. EPA,* D.C. Cir. Ct. of Appeals, No. 08-1250 (Petition for Review of EPA's $PM_{2.5}$ NSR Implementation Rule). However, Wyoming's SIP, which has been codified as federal law, currently requires DEQ use PM_{10} as a surrogate for $PM_{2.5}$ in the PSD program.

B. EPA'S $PM_{2.5}$ New Source Review Implementation Rule Authorizes SIP Approved States such as Wyoming to Analyze $PM_{2.5}$ Using PM_{10} as a Surrogate

EPA's final rule entitled *Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)*, 73 Fed. Reg. 28321 (May 16, 2008) ($PM_{2.5}$ NSR Implementation Rule) expressly provides that SIP-approved states may continue to use EPA's PM_{10} Surrogate Policy for analyzing $PM_{2.5}$ until such state has submitted its revised PSD SIP:

> to ensure consistent administration during the transition period, [EPA] ha[s] elected to maintain [its] existing PM_{10} surrogate policy which only recommends as an interim measure that sources and reviewing authorities conduct the modeling necessary to show that PM_{10} emissions will not cause a violation of the PM_{10} NAAQS as a surrogate for demonstrating compliance with the $PM_{2.5}$ NAAQS [.]

Id. at 28341; *see also In re Basin Electric Power Cooperative*, Order at ¶¶ 51-52 (concluding that the $PM_{2.5}$ NSR Implementation Rule authorizes states to continue using the PM_{10} Surrogate Policy during the three year revised $PM_{2.5}$ PSD SIP submittal time period).

Wyoming's current rules reflect the 1997 $PM_{2.5}$ NAAQS and have not yet been amended to reflect the 2006 $PM_{2.5}$ NAAQS. This does not mean that DEQ has ignored the 2006 standards. To the contrary, DEQ is following EPA's prescribed $PM_{2.5}$ SIP development process having recommended to EPA that every region in Wyoming be designated as attainment/unclassifiable for the 24-hour $PM_{2.5}$ NAAQS. *See* Letter from Wyoming Gov. Freudenthal to Mr. Robbie Roberts EPA Region VIII (Dec. 11, 2007) (recommending entire state be designated as attainment/unclassifiable) (a copy of Wyoming's letter is available at http://epa.gov/ttn/naaqs/pm/designations/2006standards/rec/letters/08_WY_rec.pdf); Letter from Carol Rushin EPA Region VIII to Wyoming Gov. Freudenthal (Aug. 18, 2008) (agreeing that Wyoming is in attainment) (a copy of EPA's letter is available at http://www.epa.gov/pmdesignations/2006standards/rec/letters/08_WY_EPAMOD.pdf). In September 2008, EPA placed its responses to state designation recommendations on public notice, indicating it would make final

designation determinations for the 2006 $PM_{2.5}$ NAAQS by December, 2008. *See* 73 Fed. Reg. 51259 (Sept. 2, 2008). To date, EPA has not promulgated final $PM_{2.5}$ NAAQS designations.

It follows that when Medicine Bow submitted its PSD permit application to DEQ in 2007 and when the DEQ issued Permit CT-5873 in March 2009, there were no EPA or DEQ rules or SIP requirements that required $PM_{2.5}$ modeling. In fact, in March 2009, EPA rules and Wyoming's SIP actually required use of EPA's PM_{10} Surrogate Policy for analyzing $PM_{2.5}$. *See* 73 Fed. Reg. 28321 (EPA's $PM_{2.5}$ NSR Implementation Rule); 40 C.F.R. § 52.2620(e)(XVIII) (Wyoming's SIP).

On April 24, 2009, almost two months after Permit CT-5873 was issued, the EPA granted a petition for reconsideration of specific provisions of the $PM_{2.5}$ NSR Implementation Rule and temporarily stayed the "grandfathering provision" concerning continued use of the PM_{10} Surrogate Policy for the federal and delegated PSD programs (40 C.F.R. § 52.21(i)(l)(xi)) not SIP-approved PSD programs, pending EPA's decision on reconsideration. *See* 74 Fed. Reg. 26098 (June 1, 2009); *see also* 74 Fed. Reg. 36427 (July 23, 2009) (proposing to extend the administrative stay for "grandfathering" under the Federal PSD program by an additional nine months); *see also NRDC v. EPA*, D.C. Cir. Ct. of Appeals, No. 08-1250, Order (June 2, 2009) (challenging legality of EPA's $PM_{2.5}$ NSR Implementation Rule and continuing stay of proceedings pending the outcome of EPA's reconsideration decision). Even if the EPA or the Court of Appeals decides to prohibit SIP approved states' continued use of EPA's PM_{10} Surrogate Policy,

DEQ's final permitting decision could not be reversed based on retroactive application of such new law. *See Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002) (EPA nonattainment determination does not apply retroactively); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Because EPA's $PM_{2.5}$ NSR Implementation Rule expressly provides that SIP-approved states may continue to use EPA's PM_{10} Surrogate Policy for analyzing $PM_{2.5}$ until such state has submitted its revised PSD SIP, Protestants' $PM_{2.5}$ claims fail as a matter of law and must be dismissed.

V. CO_2 IS NOT CURRENTLY REGULATED OR SUBJECT TO REGULATION

Claim VIII of Protestants' Petition requests this Council vacate and remand Permit CT-5873 based on Protestants' allegations that DEQ should have required a CO_2 Best Available Control Technology (BACT) analysis and established CO_2 emission limits. However, Protestants claims fail because CO_2 is not currently regulated or "subject to regulation" under the CAA and corresponding EPA regulations, the WEQA or the WAQSR, and therefore it is not currently subject to BACT. Thus, Protestants' claims fail as a matter of law. Protestants' claims and requested relief are based on what Protestants want the law to be, rather than what the law actually is. Because there is no legal basis to support Protestants' CO_2 claims, this Council should dismiss such claims.

Although CO_2 is an air pollutant,[5] CO_2 is not a currently regulated pollutant or a pollutant "subject to regulation" under the CAA, EPA regulations, the WEQA, or the WAQSR. The DEQ has no rules, regulations, or standards requiring limitations or

[5] *See* discussion *infra* at Section V.A.1.

consideration of CO_2 as part of any PSD review or BACT determination. By excluding CO_2 from the BACT analysis, the DEQ could not and did not violate PSD permitting requirements. Therefore, Protestants' CO_2 claims should be dismissed as a matter of law.

Requiring DEQ to analyze CO_2 and impose CO_2 BACT:

> would impose a regulatory burden on [Wyoming] never imposed elsewhere. It would compel the [DEQ] to limit CO_2 emissions in air quality permits, even though no CAA provision or [Wyoming] statute or regulation actually controls or limits CO_2 emissions, and even though [ ] no federal or state court has ever previously ordered controls or limits on CO_2 emissions pursuant to the CAA. It would preempt ongoing Congressional and EPA efforts to formulate a CO_2 emissions policy for all the states, and require the DEQ to invent in a vacuum CO_2 emission controls for permits. If accepted, it would engulf a wide range of potential CO_2 emitters in [Wyoming – and Wyoming alone] – in a flood of litigation over permits, and impose far-reaching economic hardship on the State.

Longleaf, 2009 WL 1929192 at *3.

A. CO_2 is not Currently Regulated under Federal or Wyoming Law

1. CO_2 is an "Air Pollutant"

In *Massachusetts v. EPA*, the United States Supreme Court held that CO_2 met the definition of "air pollutant" under the CAA, and that the EPA had the authority, but was not required to regulate emissions of such gases from new motor vehicles unless EPA made an endangerment finding. 549 U.S. 497, 527-530, 532-535 (2007). The Court did not rule that PSD requirements apply to CO_2 or that CO_2 was "subject to regulation." The Court remanded the case to EPA to determine whether such emissions from new

motor vehicles contribute to global climate change and therefore endanger public health and welfare. *Id.* at 534.

Following remand, the EPA has taken several actions addressing CO_2. First, on July 30, 2008, EPA published an Advanced Notice of Public Rulemaking (ANPR) on *Regulating Greenhouse Gas Emissions under the Clean Air Act*. 73 Fed. Reg. 44354. The ANPR presented information relevant to, and solicited public comment on, issues regarding the potential regulation of CO_2 under the CAA, including EPA's response to *Massachusetts*. If CO_2 was currently regulated under the CAA, there would be no need for EPA to seek comment on issues regarding potential regulation.

Second, on April 29, 2009, the EPA proposed to find that greenhouse gases endanger public health and welfare within the meaning of § 202(a) of the CAA governing motor vehicle emissions. *See* 74 Fed. Reg. 18886 (April 24, 2009). Once again, the EPA noted that CO_2 is not yet a regulated pollutant for PSD purposes: "At this time, a final positive endangerment finding would not make the air pollutant found to cause or contribute to air pollution that endangers a regulated pollutant" under the CAA's PSD program. *Id.* at 18905 fn 29. Such a disclaimer would not have been necessary if CO_2 was already a regulated pollutant under the PSD program.

EPA's regulatory actions on remand which use disclaimer language or language describing "potential" regulation, reinforce the DEQ's arguments that CO_2 is not currently regulated under the CAA for PSD permitting purposes. An air pollutant that

may be regulated at some future point does not make the pollutant "subject to regulation" now.

In addition, the Georgia Court of Appeals recently analyzed the *Massachusetts v. EPA* case noting that the Supreme Court only found that CO_2 was as an "air pollutant" that EPA had the authority to regulate, but until EPA has adopted regulations "actually controlling or limiting CO_2 emissions," CO_2 was not a "regulated NSR pollutant." *Longleaf*, 2009 WL 1929192 at *3-4. The Georgia court also noted that EPA's proposed "endangerment finding" (74 Fed. Reg. 18886) and the Johnson Memo, support the Court's, and the Georgia Environmental Protection Division's, interpretation that "a PSD permit issued under the NSR program does not require use of BACT to control CO_2 emissions. *Longleaf*, 2009 WL 1929192 at *4.

The DEQ could not and did not violate PSD permitting requirements despite CO_2 being an air pollutant because it is not a currently regulated air pollutant. Therefore, Protestants' CO_2 claims should be dismissed as a matter of law.

2. CO_2 is not a Regulated NSR Pollutant

In 2002, EPA amended its PSD regulations and clarified that BACT is required for each regulated NSR pollutant that a major source would have the potential to emit in significant amounts and also defined the term "regulated NSR pollutant." 67 Fed. Reg. 80186 (Dec. 31, 2002) codified at 40 C.F.R. §§ 52.21(b)(50) (federal PSD rules), 51.165(a)(I)(xxxvii) (nonattainment area NSR rules), 51.166(b)(49) (attainment area PSD rules); *see also New York v. EPA,* 413 F.3d 3 (D.C. Cir. 2006) (upholding, vacating and

remanding portions of the rules). The preamble lists all the air pollutants currently regulated under the CAA and subject to PSD review and permitting requirements. *See* 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002). The list of air pollutants "currently regulated" under the CAA does not include CO_2 or any other air pollutant that was not already subject to a regulation requiring actual control of emissions. *Id.*

In December 2006, the DEQ amended the State's PSD regulations, including defining "regulated NSR pollutant" similarly to the EPA's definition:

> (i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the EPA Administrator (e.g., volatile organic compounds are precursors for ozone);
>
> (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Federal Clean Air Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by Title VI of the Federal Clean Air Act; or
>
> (iv) Any pollutant that otherwise is subject to regulation under the Federal Clean Air Act; except that any or all hazardous air pollutants either listed in section 112 of the Federal Clean Air Act or added to the list pursuant to section 112(b)(2) of the Federal Clean Air Act, which have not been delisted pursuant to section 112(b)(3) of the Federal Clean Air Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Federal Clean Air Act.

6 WAQSR § 4(a); *see also* 40 C.F.R. §§ 52.21(b)(50) and 51.166(b)(49).

The DEQ's rulemaking clarified which pollutants are regulated under the WEQA and WAQSR for PSD purposes, limiting BACT to pollutants for which standards have been set or emission controls required. There are no NAAQS or WAAQS established for CO_2. *See* 42 U.S.C. §§ 7408-09, 40 C.F.R. part 50, WAQSR Ch. 2 §§ 1-11. CO_2 is not subject to any NSPS. *See* 40 C.F.R. part 60, WAQSR Ch. 5 § 2. There are no standards established by Title VI of the CAA for CO_2. *See* 42 U.S.C. §§ 7671-7671q.

The doctrine of *ejusdem generis* also supports DEQ's position that CO_2 is not currently "subject to regulation." Under this doctrine, general words and activities, that follow specific words and activities, are construed consistent with and limited by the content and meaning of the specifically enumerated words and activities. *See Laughter v. Bd. of County Comm'rs for Sweetwater County*, 2005 WY 54, ¶ 39, 110 P.3d 875, 887 (Wyo. 2005). *Ejusdem generis* recognizes that where the legislature uses a catch-all phrase, the intent is to include things "similar to those specifically listed." *Sponsel v. Park County*, 2006 WY 6, ¶ 16, 126 P.3d 105, 109-110 (Wyo. 2006). Applying this doctrine to the fourth and final category of pollutants described generally as pollutants "otherwise subject to regulation" means that such pollutants must be construed consistent with the three preceding specific categories – pollutants that are subject to regulation by actual controls or emission limits. *See Longleaf*, 2009 WL 1929192 at *4.

Simply put, the DEQ has not adopted any standards or emission control requirements for CO_2. Because CO_2 is not subject to any air quality standard or regulation that requires actual control of such emissions – CO_2 is not a "regulated NSR

pollutant." Given that the DEQ does not currently regulate CO_2, Protestants' CO_2 claims fail and should be dismissed.

B. CO_2 is not Subject to Regulation Pursuant to Title IV of the CAA

Title IV of the 1990 CAA Amendments directed the EPA to establish an Acid Rain Program to reduce the adverse effects of acid deposition resulting from the release of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) emissions. Pub. L. 101-549 § 401(b). Simultaneously, Congress also enacted § 821 entitled "Information Gathering on Greenhouse Gases Contributing to Global Climate Change," which called for the EPA to require acid rain sources to monitor, collect and report CO_2 emission data. 42 U.S.C. § 7651k (historical and statutory notes). In 1993, when EPA promulgated regulations to implement the acid rain program, it also promulgated requirements governing the gathering of CO_2 monitoring information. *See* 58 Fed. Reg. 3590 (Jan. 11, 1993) (codified at 40 C.F.R. parts 72, 73, 75, 77 and 78). The DEQ has adopted and incorporated by reference the EPA's Acid Rain Program regulations. WAQSR Ch. 11 §§ 1-2.

Although the Acid Rain Program regulations and requirements include CO_2 monitoring requirements, the Acid Rain Program never has, and currently does not, impose any emission controls on CO_2. *See* 40 C.F.R. part 75 (monitoring requirements for CO_2 as a diluents gas and for data collection purposes). Gathering information about CO_2 emissions does not constitute regulation of CO_2 for PSD BACT purposes nor make CO_2 a "regulated NSR pollutant" or "subject to regulation." Information gathering,

monitoring and data collection provisions in and of themselves do not subject CO_2 to regulation because such provisions do not control CO_2 emissions. *See Alabama Power Co.*, 636 F.2d at 370 (pollutant may be a CAA "air pollutant" but not "subject to regulation" for BACT purposes until an emission control standard has been promulgated).

Because § 821 of Public Law No. 101-549 and the corresponding EPA Acid Rain Program regulations and requirements do not prohibit, limit or otherwise establish CO_2 emission control requirements, CO_2 is currently not an air pollutant "subject to regulation" under the CAA. The mere act of gathering information does not make a pollutant regulated. If it did, the DEQ or other permitting authority would be left with the bizarre result of having to impose emission control limits before ever having had the opportunity to evaluate whether and how a particular pollutant's emissions should be regulated and controlled. *See* WYO. STAT. ANN. § 35-11-202 (process for establishing WAQSR).

On April 10, 2009, EPA proposed rules on *Mandatory Reporting of Greenhouse Gases*. 74 Fed. Reg. 16448. The EPA noted in its proposal, "a regulation requiring the reporting of GHG [greenhouse gas] emissions and emissions-related data under CAA sections 114 and 208 does not trigger the need for EPA to develop or revise regulations under any other section of the CAA, including the PSD program." *Id.* at 16456, fn 8. The EPA also noted it would be seeking public comment, in a separate proceeding, on the issue of whether CAA monitoring regulations <u>should trigger</u> the PSD program. *Id.* If

monitoring regulations, such as § 821, already triggered PSD, there would be no need for the EPA to seek comment on whether such regulations should trigger PSD requirements.

C. CO_2 is not "Subject to Regulation" Pursuant to *In re Deseret Power Electric Cooperative*

In re Deseret Power Electric Cooperative involved the EPA's Environmental Appeals Board (EAB) review of a PSD permit issued under federal law by EPA Region VIII to Deseret for a new waste-coal-fired electric generating unit at Deseret's existing Bonanza Power Plant in Utah. 14 E.A.D. ___, 2008 WL 5572891 (E.A.B. Nov. 13, 2008). In *Deseret*, the Sierra Club alleged in part that CO_2 was "subject to regulation," therefore EPA should have applied BACT to limit CO_2 emissions. The EPA argued it had discretion to interpret the phrase "subject to regulation" because the phrase was ambiguous. In rejecting the Sierra Club's argument, the EAB found that the CAA was ambiguous and therefore EPA had discretion to interpret the phrase "subject to regulation" and EPA's interpretation would control.

Although EPA had argued that its discretion was limited by its historical interpretation that "subject to regulation" described pollutants that were subject to a statutory or regulatory provision that required actual control of emissions, the EAB determined that EPA's administrative record did not support the EPA's view. *Id.* at 37. Therefore, the EAB remanded the permit to EPA to develop an adequate administrative record and for reconsideration on whether or not to impose a CO_2 BACT limit. *Id.* at 63. The EAB further suggested that because of the importance of the issue, EPA address the phrase "subject to regulation" in the context of an action of nationwide scope. *Id.* at 64.

Shortly after the *Deseret* decision, EPA Administrator Johnson issued a memorandum (Johnson Memo) to resolve any ambiguity over, and setting forth the EPA's interpretation of "regulated NSR pollutant" to "exclude pollutants for which the EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by the EPA under the Clean Air Act that requires actual control of emissions of that pollutant."[6] 73 Fed. Reg. 80300 (Dec. 31, 2008) (a copy of the Johnson Memo is available at http://www.epa.gov/region07/programs/artd/air/nsr/nsrmemos/co2_psd.pdf).

Several weeks after the Johnson Memo was issued, the Sierra Club filed a request for reconsideration with EPA and a Petition for Review. *See Sierra Club v. EPA*, D.C. Cir. Case No. 09-1018. On February 17, 2009, the EPA initiated the administrative reconsideration process, but declined to stay the effectiveness of the Johnson Memo. Letter from EPA Administrator Jackson to Mr. David Bookbinder, Sierra Club (Feb. 17, 2009) (a copy of this Letter is available at http://www.epa.gov/nsr/documents/20090217LPJlettertosierraclub.pdf). Therefore, the Johnson Memo remains in effect as the EPA's current policy interpretation.

Despite intense political debates and flurry of national litigation, federal administrative actions and pending actions surrounding *Deseret* and the Johnson Memo,

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[6] Although the Johnson Memo applied to the EPA and EPA delegated state permitting actions, the EPA noted that SIP approved states may also interpret state regulations using the language set forth in 40 C.F.R. §§ 52.21(b)(50) or 51.166(b)(49) in a similar manner as the EPA. *Johnson Memo* at 3, fn 1.

CO_2 is still not a regulated pollutant at this time. The DEQ acted in accordance with the law by not requiring a CO_2 BACT analysis.

D. CO_2 is not "Subject to Regulation" Pursuant to EPA's Delaware SIP Approval

Protestants also allege that CO_2 is "subject to regulation" because the State of Delaware adopted a state regulation that establishes CO_2 emission limits for stationary generators and EPA approved Delaware's request to revise its SIP to include the regulation. Pet. ¶ 84. Protestants' allegation is an incorrect interpretation of law.

On April 29, 2008, EPA Region III approved Delaware's SIP revision incorporating a Delaware state regulation that established CO_2 emission limits for stationary generators in Delaware. 73 Fed. Reg. 23101 codified at 40 C.F.R. § 52.420(c); Delaware Department of Natural Resources and Environmental Control (DNREC) Regulation No. 1144 (Jan. 11, 2006) (a copy of this regulation is available at http://yosemite.epa.gov/r3/r3sips.nsf/9eeb842c677f8f5d85256cfd004c3498/3d5af73c50d5322f8525744300687690/$FILE/de_regulation_1144.pdf. In approving Delaware's SIP revision, the EPA stated that its SIP approval "merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law." 73 Fed. Reg. 23101. Delaware's regulation itself limits applicability to "stationary generators in the State of Delaware." DNREC Reg. No. 1144 § 1.1. The

express language of both the Delaware regulation and EPA's SIP approval clearly limit applicability to "the State of Delaware."[7]

As discussed in Section IV.A *supra*, SIP approval results in federal enforceability for the affected provisions. SIP approval of a specific state provision is applicable only to sources located within the specific state. *See e.g.* 40 C.F.R. part 52, subpart ZZ (Wyoming's SIP is applicable to Wyoming). As a result of SIP approval, the specific state provisions also become enforceable in federal court. *See* 42 U.S.C. §§ 7413, 7604. SIP approval of a specific state provision applicable only to sources located within the specific state does not morph such a federally enforceable law into a law applicable to sources located in the other fifty states, territories or tribal areas. *See Vermont v. Thomas*, 850 F.2d 99, 102-104 (2d Cir. 1988) (without EPA rulemaking, state proposed interstate measures are not subject to federal enforcement under the Act). Adopting Protestants' interpretation results in the absurd – any single state being able to force all 49 other states to implement that individual state's rules and requirements. *See* 42 U.S.C. § 7413 (EPA enforcement for state failure to implement SIP).

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[7] Delaware itself acknowledged "CO_2 is not a federally regulated pollutant, but the Environmental Protection Agency's (EPA) decision to not regulate CO_2 does not prohibit Delaware from regulating its [CO_2] emissions … The broad definition of "air contaminants" in the Delaware statute allows the Department to control pollutants which may not be controlled federally, such as CO_2, which, in this singular instance, makes Delaware laws more stringent than federal laws. The fact that EPA has not chosen to address CO_2 does not impact the Delaware statute." Delaware Air Quality Management Response to Comments, Doc. No. EPA-R03-OAR-2007-1188-0002.7 (Dec. 6, 2005) (a copy of the regulation is available at http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648039d1bd).

EPA does not adopt Protestants' interpretation. On December 18, 2008, then Administrator Johnson expressed EPA's conclusion that "EPA does not interpret section 52.21 (b)(50) of the regulations to make CO_2 'subject to regulation under the Act' for the nationwide PSD program based solely on the regulation of a pollutant by a single state in a SIP approved by EPA. Johnson Memo at 15; *see also Connecticut v. EPA*, 656 F.2d 902, 909-910 (2d Cir. 1981) (recognizing interstate protection of air quality standards is limited to federally mandated standards not more stringent individual state standards).

VI. CONCLUSION

Protestants' $PM_{2.5}$ and CO_2 claims must be dismissed as a matter of law because federal law requires Wyoming use PM_{10} as a surrogate for $PM_{2.5}$ and because DEQ does not currently regulate CO_2. Consequently, and as a matter of law, it is impossible for Protestants to assert any legally cognizable claims that DEQ's decision did not comply with the statutory and regulatory requirements where neither the CAA and corresponding EPA regulations, the WEQA, nor the WAQSR currently impose the legal obligations that Protestants allege regarding $PM_{2.5}$ and CO_2. Therefore, Protestants' Petition should be dismissed as to Claims VII ($PM_{2.5}$) and VIII (CO_2).

DATED this 3rd day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing DEQ'S MOTION TO DISMISS $PM_{2.5}$ AND CO_2 CLAIMS through United States mail, postage prepaid on this 3rd day of August, 2009 addressed to the following:

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