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	)	

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

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, Senior 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. Respondent permittee Medicine Bow Fuel & Power, LLC (MBFP, also sometimes referred to as "DKRW" in the documents supporting the parties' filings) appeared by and through its counsel, Mary A. Throne and John A. Coppede. Respondent 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 alleged eight (8) separate claims of 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 alleged DEQ failed to consider greenhouse gas emissions. On November 10, 2009, Protestant voluntarily dismissed claims IV (coal cleaning) and VI (coal storage).

MBFP, DEQ and Protestant all filed motions for summary judgment, supported by evidentiary and other attachments and legal memoranda, and responses regarding remaining claims I, II, III, V and VII.. All parties in both written and oral argument argued that there were no material facts at issue. The EQC considered these filings and the entire record before it and heard argument on these motions. Accordingly, it finds as follows:

I. JURISDICTION

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

The issuance or denial of a permit is a final agency action by DEQ which is subject to review by the EQC. It 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).

Protestant disputed DEQ's approval of permit CT-5873 for MBFP's industrial gasification and liquefaction project and requested a hearing before the EQC. Therefore, the EQC has jurisdiction to decide this matter.

II. STATEMENT OF THE CASE

Pursuant to the Act 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 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 technical review, public comment, application amendments and analysis by DEQ, the Director of DEQ determined that MBFP's amended application satisfied the applicable statutory and regulatory requirements, approved the application and issued permit CT-5873.

On May 4, 2009, Protestant filed a petition asserting eight (8) separate claims. Claims I, II, III, V and VII were the subject of this hearing. Specifically, Claim I asserted that DEQ failed to properly calculate the facility's potential to emit (PTE) for sulfur dioxide (SO_2) and otherwise erred in determining that the facility's startup/shutdown emissions minimization plan (SSEM) was the best available control technology (BACT) for controlling SO_2 flare emissions during startup/shutdown and malfunction events. Claim II was 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. Claim III was that DEQ had improperly determined that the facility was a minor source for methanol and total hazardous air pollutants (HAPs). Claim V was that DEQ improperly modeled for particulate matter to demonstrate the facility's compliance with the National Ambient Air Quality Standards (NAAQS) and the Wyoming Air Quality Standards (WAAQS). Claim VII was that DEQ erred in using the PM_{10} surrogacy policy for regulating $PM_{2.5}$.

III. CLAIMS

The remaining claims listed in the Petition and the issues broached by all parties at the cross- summary judgment motions hearing were the following:

CLAIM I: Whether DEQ failed to consider significant sulfur dioxide emissions from flares in determining the source's potential to emit and failed to apply BACT to flares.

CLAIM II: Whether DEQ improperly quantified HAP emissions from fugitive component leaks, and failed to apply BACT to VOC emissions from fugitive component leaks.

CLAIM III: Whether DEQ erroneously concluded that MBFP is a minor source of methanol and failed to conduct a case-by-case MACT determination to control methanol and other HAP Emissions.

CLAIM V: Whether DEQ failed to model impacts of fugitive emissions of particulate matter.

CLAIM VII: Whether DEQ failed to regulate $PM_{2.5}$ emissions.

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 a 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. (Unless specified otherwise numerical citations refer to DEQ's exhibits submitted in support of its motion for summary judgment.)

2. The permit application was reviewed by the DEQ, 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 DEQ. Schlichtemeier Aff. ¶ 13; Ex. 3.

3. On December 31, 2007, MBFP submitted a revised air construction permit application (AP-5 873) to DEQ, replacing the previous application in its entirety and changing the type of transportation fuel to be produced by the Facility. The permit application started the BACT review process. DEQ continued to review information and

questioned the applicant until assured that the application was technically complete. Schlichtemeier Aff. ¶ 15; Ex. 4.

4. 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 NOx, CO, VOC, and PM/PM_{10}. Schlichtemeier Aff. ¶ 12, 42; Ex. 11.

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

6. On January 10, 2008, DEQ requested MBFP to submit revised meteorological data processing needed for analyzing near-field impacts. Nall Aff. ¶12;Ex.28.

7. On February 13, 2008, a contractor to MBFP, URS, submitted application revisions to DEQ, which changed emission calculations and amended the near-field air quality modeling analysis. Schlichtemeier Aff. ¶ 16; Ex. 6.

8. On March 3, 2008, URS responded to a January 10, 2008 request for information from DEQ. Nall Aff ¶13;Ex.29.

9. On March 10, 2008, DEQ notified MBFP that its application was complete and that DEQ would proceed with its formal technical review. Schlichtemeier Aff. ¶ 17; Ex. 7.

10. On March 18, 2008, DEQ requested MBFP to submit additional information regarding a near-field air quality impact analysis. Nall Aff. ¶ 14; Ex. 30.

11. On April 23, 2008, MBFP through 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.

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

13. On June 19, 2008, DEQ completed its application analysis, concluding that the Facility would comply with applicable WAQSR. DEQ proposed approval of the application. Schlichtemeier Aff. ¶ 21; Ex. 11.

14. On July 3, 2008, DEQ advertised its proposed decision, soliciting public comment through August 4, 2008. Schlichtemeier Aff. ¶ 23; Ex. 13.

15. A public hearing on the proposed permit decision was held on August 4, 2008. DEQ received public comment 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.

16. On July 31, 2008, MBFP through 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 to DEQ). Schlichtemeier Aff. ¶ 25; Ex. 14-15.

17. On July 31, 2008, MBFP itself provided comments to DEQ and proposed additional permit conditions. Schlichtemeier Aff. ¶ 26; Ex. 16.

18. On August 15, 2008, DEQ requested MBFP to address certain comments it had received during the comment period and/or at the public hearing, including items regarding the leak detection and repair program and the applicability of (federal) Clean Air Act Section 112. Schlichtemeier Aff. ¶ 28; Ex. 17.

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

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

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

22. On October 14, 2008, MBFP responded to DEQ's September 5, 2008 request. Schlichtemeier Aff. ¶ 31; Ex. 20.

23. On November 5, 2008, MBFP responded to DEQ's October 3, 2008 request. Nall Aff. ¶ 17; Ex. 33.

24. On November 11, 2008, MBFP provided DEQ with additional information as a follow-up to its October 14, 2008 letter to DEQ. Schlichtemeier Aff. ¶ 32; Ex. 21.

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

26. On December 30, 2008, MBFP responded to DEQ's December 29, 2008 request. Schlichtemeier Aff. ¶ 34; Ex. 23.

27. On February 3, 2009, MBFP responded to a question from DEQ regarding its PM_{10} emission calculations and BACT analysis. Schlichtemeier Aft ¶ 35; Ex. 24.

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

29. The Facility is located in Carbon County, which has been designated by the U.S. EPA as unclassifiable or in attainment for all National Ambient Air Quality Standards. 40 C.F.R. 81.351.

30. DEQ's review for the Facility's potential emissions of SO_2 included a BACT analysis and an ambient air quality analysis. Schlichtemeier Aff. at ¶¶ 22, 39-42; Ex. 11. The dispersion modeling for SO_2 impacts relied upon by DEQ included SO_2 sources from the proposed plant. Nall Aff. ¶ 18.

31. Modeled 3-hour and 24-hour emissions of SO_2 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.

32. In making its PSD applicability determination, DEQ evaluated the Facility's normal operations as described in the amended application. Schlichtemeier Aff. ¶ 51; Ex. 2.

33. Initial startup, cold shutdown, and malfunction emissions of SO_2 were excluded by DEQ in determining the Facility's PTE, although the emissions associated with normal operations, including startup and shutdown, were included by DEQ in its

determination that the facility's PTE for SO_2 was 36.6 tons per year. Schlichtemeier Aff. ¶ 51; Ex. 2.

34. MBFP described 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/shutdown events are not part of normal operations. Ex. 15, Ex. 21, Ex. 25.

35. Permit CT-5873 limits the Facility's total SO_2 emissions to 36.6 tpy. Ex. 26.

36. Based on the type and frequency of event, emissions from initial startup (commissioning activities), cold startup/shutdowns or malfunctions were excluded from the Facility's PTE. Schlichtemeier Aff. ¶ 52; Ex. 11; Ex. 15; Ex. 21; Ex. 25.

37. DEQ did not issue a permit which anticipated malfunctions in this process. Malfunctions are instead addressed under Ch. I, Sec. 5 of the WAQSR, Schlichtemeier Aff. ¶ 54; Ex. 25 and Tr. of Dec. 7, 2009 Motion Hearing, pp. 49-52.

38. DEQ identified the Facility's flares as a control device during startup/shutdowns and malfunction events. Ex. 15; Ex. 25.

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

40. Permit CT-5873 contains specific operational requirements, Conditions 22-25 are intended to insure that the flares are operated efficiently to convert H_2S and COS to SO_2, and to destroy other pollutants. The permit also includes a requirement to comply with WAQSR, Ch. 5, Sec. 2(m). The permit requires monitoring of the sulfur content of process streams flared that can result in SO_2 emissions. Ex. 25, Ex. 26.

41. DEQ accepted MBFP's startup/shutdown emission minimization plan (SSEM plan) as BACT, having determined that that plan would minimize the duration and extent of flare SO_2 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.

42. The DEQ did not establish flare SO_2 emission limits as BACT. There are no applicable EPA reference methods for monitoring compliance in this context. Ex. 25; Ex. 41 at 73:5-77: 13.

43. Facility commissioning activities are temporary, since they are expected to occur only once during initial facility startup, and thus were excluded from the PTE calculations . Schlichtemeier Aff ¶ 52; Ex. 15; Ex. 21; Ex. 25; Ex. 55.

44. SO_2 and NO_x are precursors of $PM_{2.5}$. 73 Fed. Reg. 28341.

45. $PM_{2.5}$ precursor emissions of SO_2 and NO_x underwent direct review by DEQ and have BACT emission limits established. Ex. 11; Ex. 40.

46. Since 1997, DEQ has followed EPA's PM_{10} Surrogacy Policy to meet PSD permitting requirements and it did so in its evaluation of this permit application. Schlichtemeier Aff. ¶ 55; Ex. 36; Ex.37.

47. Because of 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 SO_2. Schlichtemeier Aff. ¶ 52; Ex. 11; Ex. 15; Ex. 21; Ex. 25. Malfunction emissions are instead addressed under Ch. I, Sec. 5 of the WAQSR, Schlichtemeier Aff. ¶ 54; Ex. 25 and Tr. of Dec. 7, 2009 Motion Hearing, pp. 49-52.

48. DEQ identified the Facility's flares as a control device during startup/shutdowns and malfunction events. Ex. 15; Ex. 25 at DEQ000040.

49. Permit CT-5873 contains operational requirements, Conditions 22-25, which are intended to insure that the flares are operated efficiently to convert H_2S and COS to SO_2, and destruct other pollutants. The permit also includes a requirement to comply with WAQSR, Ch. 5, Sec. 2(m). DEQ also requires monitoring of the sulfur content of process streams flared that can result in SO_2 emissions as part of the permit. Ex. 25, Ex. 26.

50. DEQ determined that the startup/shutdown emission minimization plan (SSEM plan) as BACT having determined that that plan would minimize the duration and extent of flare SO_2 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.

51. The DEQ did not establish flare SO_2 emission limits as BACT in part because there are no applicable EPA reference methods for monitoring compliance in this context. Ex. 25; Ex. 41 at 73:5-77: 13.

52. Facility commissioning activities are temporary, since they are expected to occur only once during initial facility startup, and thus these were excluded from the PTE calculations relied upon by DEQ . Schlichtemeier Aff ¶ 52; Ex. 15; Ex. 21; Ex. 25; Ex. 55 at DEQ001697.

53. SO_2 and NO_x are precursors of $PM_{2.5}$. 73 Fed. Reg. 28341.

54. $PM_{2.5}$ precursor emissions of SO_2 and NO_x underwent direct review by DEQ and have BACT emission limits established. Ex.11 at DEQ0005 14-19; DEQ000528-29; Ex. 40 at 96:3-19.

55. PM_{10} modeling is used as a surrogate for $PM_{2.5}$ modeling. Since 1997, DEQ has followed EPA's PM_{10} Surrogacy Policy to meet PSD permitting requirements and it did so in its evaluation of this permit application. Schlichtemeier Aff. ¶ 55; Ex. 36; Ex. 37.

56. EPA has not provided all of the tools necessary for DEQ to implement an analysis of $PM_{2.5}$ except through the use of PM_{10} as a surrogate. 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.

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

58. In assessing this permit application, DEQ modeled PM_{10} to compare predicted impacts to the NAAQS, WAAQS and PSD increments. Nall Aff. ¶ 21; Ex. 11; Ex. 25. PM_{10} was used as a surrogate for $PM_{2.5}$. Nall Aff. ¶21; Ex. 11; Ex. 25.

60. EPA did not submit any comments on DEQ's treatment of $PM_{2.5}$ when it filed comments on the proposed permit. Schlichtemeier Aff. ¶ 56; Ex. 31.

61. In 2007, the State recommended that all areas within Wyoming be designated as attainment/unclassifiable for the 2006 $PM_{2.5}$ 24-hour standard (NAAQS) which took effect in 2006. Ex. 38.

62. EPA subsequently designated all areas within Wyoming as attainment or unclassifiable for the 2006 $PM_{2.5}$ 24-hour NAAQS. 74 Fed. Reg. 58688.

63. MBFP's expert did an analysis of the Facility's particulate emissions from gas turbines and material handling activities, and this was submitted to the EQC by MBFP in the context of these cross-motions. PM_{10} was used as a surrogate for $PM_{2.5}$, taking into consideration the size of the particulate and that the BACT would not change if the emissions were analyzed as $PM_{2.5}$. Ex. 35; MBFP Ex. G1. The EQC accepts the use of this approach and DEQ's assessment of PM emissions. Schlichtemeier Aff. ¶¶ 42, 55.

64. The EQC also accepts DEQ's use of PM_{10} as a surrogate for this Facility was correct. Most of the particulate attributable to this Facility 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 it is reasonable to conclude that calculated PM emissions from turbines can be used to estimate PM_{10} and $PM_{2.5}$. Winborn Report at 31, Ex. 1 to Winborn Aff., Ex. G.

65. The majority of fugitive emissions from haul roads and the like are larger in size and the use of the PM_{10} surrogate is likely to even over-estimate the $PM_{2.5}$ emissions from these sources. MBFP, EX. G1 Winborn Report at 31-32.

66. 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 $PM_{2.5}$. 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 therefore the control technologies selected and approved by

DEQ were correct.. MBFP, Ex. G1, Winborn Report at 32-33; Ex. 25, DEQ decision document.

67. In the case of the gas-fired turbines, in light of the size of the particulate matter, good combustion practices and the use of fuels with a low particulate potential are the only available option, regardless of whether emissions are characterized as PM_{10} or $PM_{2.5}$. MBFP, Ex. G1, Winborn Report at 32-33; Ex. 25, DEQ decision document.

68. Similarly, control options remain the same for reducing fugitive emissions from coal-handling activities whether the analysis is for PM_{10} or $PM_{2.5}$. 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.

69. 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

70. 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).

71. 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. Ex. 14, Appendix B to Application.

72. MBFP 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.

73. MBFP's estimated component count and stream process data were based on the available design information. Vendors for components have not been selected and screening values for specific components are not available. Aff. of James Knox at ¶¶ 11-12, MBFP Ex. J.

74. MBFP 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.

75. Relying on EPA's emission factors for facilities in the Synthetic Organic Chemical Manufacturing Industry (SOCMI), MBFP estimated the fugitive emissions from equipment leaks. Ex. 14, Appendix B to Application.

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

77. The emission factors used by MBFP, which were 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.

78.. DEQ accepted MBFP's estimate of emissions relying on SOCMI average emission factors, rather than refinery factors. This was appropriate as this coal-to-liquids operation is a SOCMI facility. Ex. 25 and Ex. 26, Condition 38.

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

80. 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.

81. MBFP is required to annually provide actual verification of the equipment leak emissions based on the Facility's measured leak detection rates. Ex. 25; Ex. 26.

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

83. Permit condition No. 2 requires MBFP to all the substantive commitments in its application, as amended. Ex. 26.

84. 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, assuming that these leaks would not be repaired until detected. DEQ 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 required by DEQ, the estimate of HAPs was also reduced. MBFP's revised equipment leak calculations were based on a leak definition of 500 ppm for valves and connectors and 2000 ppm for pumps which is consistent with NSPS and NESHAP. Ex. 4, Ex. 10; Ex. 11; Ex. 15; Ex. 25.

85. Under the draft permit issued for public comment, 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. Ex. 15; Ex. 19; Ex. 25; Knox Aff. at ¶13, Ex. J.

86. Following the public comment period, DEQ requested additional information from MBFP regarding the applicability of Section 112 of the CAA. MBFP responded September 30, 2008 with new calculations for methanol emissions, based on updated engineering design information from Davy Process Technology, the methanol synthesis vendor. Ex. 15; Ex. 19; Ex. 25; Knox Aff. at ¶13, Ex. J.

87. As a result of the required 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, DEQ agreed that estimated methanol emissions should be reduced from 10.3 tpy to 9.2 tpy. Ex. 15; Ex. 19; Ex. 25; Knox Aff. at ¶13,

Ex. J.

88. MBFP 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.

89. 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.

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

91. In response to public comment, DEQ asked MBFP to consider lower leak detection limits of 100 and 200 ppm for its LDAR program. MBFP considered these 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 DEQ (quoting EPA Docket ID No. EPA-HQ-OAR-2006-0699-0094), MBFP Ex. G1, Winborn Report at 22. DEQ did not require further reductions in leak detection levels. Ex. 25, decision document at IV.4.

92. MBFP identified, and DEQ accepted, LDAR (leak detection and repair) as "the only available control technology for comprehensively addressing equipment leak fugitive emissions is a structured 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; Ex. 11; Ex. 15.

93. Leakless components were not a practical control technology for all of this Facility's 4000 components. EPA has considered and rejected leakless technology in developing requirements for equipment leaks, and has concluded that it "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.

94. EPA information identifies the use of LDAR as the only viable control option for this Facility. Its database titled "Reasonably Available Control Technology (RACT)/BACT/Lowest Achievable Emission Rate Clearinghouse" indicates 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.

95. MBFP's LDAR program, as approved by DEQ, requires it to monitor components at set intervals to determine whether a component is leaking or not. Ex. 25 at DEQ000059, Ex. 26 at DEQ001415. If a component is leaking above the 500/2000 ppm threshold, MBFP must repair or replace it within specified timeframes. Ex. 26; 72 Fed. Reg. at 64883-95.

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

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

97. MBFP'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.

98. Under the AERMOD Implementation Guide, a 2008 EPA guidance document routinely used by air quality modelers, short-term fugitive PM emission modeling continues to have uncertainties in performance. Nall Aff. at ¶¶ 22 - 23; Ex. 39.

99. Because of a high degree of uncertainty in modeling the impacts of short-term fugitive PM emissions, DEQ did not require MBFP to conduct short-term fugitive PM emission modeling. Nall Aff. at ¶¶ 22-23; Ex. 46; Ex. 47; Ex. 48; Ex. 51; Ex. 52; Ex, 53; Ex. 54.

100. MBFP modeled annual but not short-term (24-hour) fugitive PM_{10} emissions. Ex. 15. Its modeling results demonstrated the Facility would comply with the annual PM_{10} WAAQS and NAAQS. Ex. 11; Ex. 25.

101. To the extent that any of the foregoing findings of fact may constitute conclusions of law, they are hereby incorporated as such.

V. CONCLUSIONS OF LAW

BACKGROUND

1. The EQC is charged with hearing the appeal of any challenge to the issuance of a permit required by the Act. Wyo. Stat. § 35-11-112 (a)(iv).

2. DEQ is the agency charged under the CAA and the Act for administering air quality requirements in Wyoming.

3. Under Act and DEQ's Rules of Practice and Procedure, a permit appeal is a contested case proceeding in keeping with the requirements of the Wyoming Administrative Procedure Act, Wyo. Stat. § 16-3-107 through 112 and the Wyoming Rules of Civil Procedure.

4. Under the Wyoming APA, the person or entity seeking revocation of a license (or permit) bears the burden of establishing grounds for this result. Wyo. Stat. § 16-3-113. *JM v. Dep't of Family Servs.*, 922 P,2d 219, 221 (Wyo. 1996). In this case, Protestants bore that burden.

5. All parties filed motions for summary judgment under Wyo. R. Civ. P. 56, asserting that there were no material issues of fact remaining to be resolved by the EQC and that only questions of law remained with respect to any of the remaining claims. (Tr. of Dec. 7, 2009 Motion Hearing, pp.20, 26, 27, 34- 38, 64, 65, 74 and 82).

6. Upon consideration of the pleadings, depositions, affidavits and other supporting material presented by the parties in conjunction with their cross-motions for summary judgment, the EQC finds that there are no genuine issues of material fact remaining to be resolved and that summary judgment is appropriate. The questions presented are ones of interpretation of applicable laws and regulations and it is apparent

that the Respondents are entitled to judgment as a matter of law. Wyo. R. of Civ. P. 65(c), *Bd. of County Comm'rs of County of Laramie v. City of Cheyenne*, 2004 WY ¶ 8, 85 P.3d 999, 1002-3 (Wyo. 2004).

7. The record before the EQC supports DEQ's decision to grant the permit application, as amended, and to issue Permit No. CT-5873 upon the terms and conditions DEQ selected. *Chavez v. State ex rel. Wyo. Workers' Safety and Comp. Div.*, 2009 WY 46, ¶ 10, 204 P.3d 967, 970 (Wyo. 2009).

8. On a summary judgment motion, 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).

9. 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).

10. In this type of proceeding under the Wyoming Administrative Procedure Act, all evidence is admissible except that which is irrelevant, immaterial, or unduly repetitious. Wyo. Stat. § 16-3-108(a). Hearsay is admissible if it satisfies the

requirements of § 16-3-108 and is probative, trustworthy, and credible. *State ex rel. Wyo. Worker's Comp. Div. v. Rivera,* 796 P.2d 447, 451 (Wyo. 1990); *Storey v. Wyo. State Bd. of Medical Examiners,* 721 P.2d 1013, 1018 (Wyo. 1986).

11. The Act imposes on the DEQ Director a duty to issue permits following proof that the applicant has met the requirements of the Act and the relevant regulations. Wyo. Stat. § 35-11-801(a). The proposed permit is advertised for public comment and, if requested, 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 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. Through its State Implementation Plan, the DEQ 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.

16. 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.

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

18. 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.

19. 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.

20. 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.

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

22. 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.

23. 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).

24. 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 was not to prohibit all development, but to require development protective of air quality.

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

26. 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.

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

> "Best available control technology" means an 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. 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 or Section 3 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.

28. 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.

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

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

31. Unlike 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.

32. Under Wyoming's applicable air quality 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.

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

CLAIM I

34. The significance threshold for SO_2 is 40 tpy. WAQSR Ch. 6, § 4(a).

35. The facility is not a major source of SO_2 under WAQSR Ch. 6, Sec. 4, as its PTE does not exceed the 40 tpy significance level. 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.

36. Both Sections 2 and 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.

37. Under Chapter 6 of the WAQSR, emission sources must undergo a BACT review. DEQ undertook this review and imposed BACT for the Facility's sources of SO_2.

38. "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.

39. Whether or not a Facility is subject to PSD, 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.

40. DEQ interpreted its own regulation and relevant EPA guidance as not requiring the inclusion of cold startup/shutdown and malfunction emissions in its PTE determination. Ex. 25, DEQ decision document at III.1; DEQ Aff. of Chad Schlichtemeier at 51-52. The EQC accepts this interpretation.

41. The Facility is not a major source of SO_2 under WAQSR Ch. 6, Sec. 4, as its PTE does not exceed the 40 tpy significance level.

42. Permit CT-5873 imposes a work practice standard on the emissions from the flares through a startup, shutdown minimization plan which was incorporated into the permit itself. DEQ was not required to establish a numerical emission limit for the flares at this Facility.

43. Under applicable regulations, a work practice standard is appropriate in lieu of an emissions standard under some circumstances. One is:

> 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. DEQ properly regulated the emissions of SO_2 from the flares in Conditions 22-25 of the permit and Condition 31 of the Permit, which incorporates the SSEM plan.

45. 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.

46. Excessive emissions from cold starts, non-routine-maintenance and malfunctions potentially subject the Permittee to enforcement action by the DEQ and the possibility of penalties for failure to limit emissions.

47. Protestant failed to show that DEQ's actions were contrary to the law or applicable DEQ rules and regulations or were arbitrary and capricious and that Protestant was entitled to judgment as a matter of law.

48. DEQ and MBFP showed that there were no material facts in controversy and that as a matter of law Respondents were entitled to summary judgment on this claim.

49. Chairman Boal moved to grant summary judgment in favor of Respondents. The motion was seconded by Councilman Coverdale.

Voting AYE: Coverdale, Guschewsky, Flitner, Searle, Morris.

Voting NAY: Ogden, Boal.

CLAIMS II & III

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

51. 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 the Facility is a minor source of HAPs.

52. The MBFP's methodology for calculating fugitive emissions from equipment leaks, as reviewed by DEQ, was consistent with the requirements of the CAA, as implemented in Wyoming.

53. DEQ properly determined the Facility will be a minor source for hazardous air pollutants within Section 112 of the CAA, as implemented in Wyoming.

54. DEQ properly reviewed the BACT proposed for fugitive emissions from equipment leaks. In regard to these pollutants, the Leak Detection and Repair Program approved by DEQ represents BACT for equipment leaks.

55. The amended application, the DEQ decision document, the expert report of Ms. Winborn and the deposition of Mr. Keyfauver support DEQ's determination that LDAR is BACT to control fugitive emission leaks. This record is sufficient to support summary judgment for the respondents.

56. Protestant failed to show that DEQ's actions were contrary to the law or applicable DEQ rules and regulations or were arbitrary and capricious and that Protestant was entitled to judgment as a matter of law.

57. DEQ and MBFP showed that there were no material facts in controversy and that as a matter of law Respondents were entitled to summary judgment on this claim.

58. On Claim II Chairman Boal moved to grant Summary Judgment to DEQ and Medicine Bow. The motion was seconded by Councilman Ogden.

Voting AYE: Coverdale, Guschewsky, Flitner, Searle, Morris.

Voting NAY: Ogden, Boal.

59. On Claim III Chairman Boal moved to grant Summary Judgment to DEQ and Medicine Bow. The motion was seconded by Councilman Flitner.

Voting AYE: Coverdale, Guschewsky, Flitner, Searle, Morris.

Voting NAY: Ogden, Boal.

CLAIM V

60. DEQ 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 PM_{10}.

61. The Simpson Amendment, § 234 of the Clean Air Act Amendments of 1990, 42 U.S.C. 7661, *et. seq.*, 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.

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

63. DEQ's decision not to require short-term modeling of fugitive PM_{10} emissions from mining operations is consistent with Section 234 of the Clean Air Act

Amendments of 1990 and its obligations under Wyoming's SIP, given the inaccuracies of the short term model.

64. The EQC accepts DEQ's determination that monitoring in lieu of modeling is sufficient to demonstrate compliance with the short-term standard for PM_{10}.

65. MBFP conducted fugitive PM_{10} emission modeling in accordance with DEQ's requirements. In doing its modeling, MBFP followed DEQ's long-standing interpretation of its regulations allowing monitoring in lieu of short-term 24-hour modeling. DEQ applies this practice because of the uncertainties associated in EPA model performance for short-term (24-hour) modeling, which does not produce realistic predictions. DEQ Aff. of James (Josh) Nall at ¶¶ 22-23. MBFP's modeling demonstrated to the DEQ that MBFP would not cause or contribute to a NAAQS or a WAAQS violation.

66. DEQ applies the practice of requiring monitoring in place of short term modeling because of the uncertainties associated in EPA model performance for short-term (24-hour) modeling, which does not produce realistic predictions. DEQ Aff. of James (Josh) Nall at ¶ ¶ 22-23.

67. DEQ's interpretation is allowed under Section 234 of the CAA Amendments of 1990, as cited in MBFP's motion for summary judgment. Relying on monitoring, Wyoming has fulfilled its SIP requirements to demonstrate compliance with the NAAQS.

68. Protestant failed to show that DEQ's actions were contrary to the law or applicable DEQ rules and regulations or were arbitrary and capricious and that Protestant was entitled to judgment as a matter of law.

69. DEQ and MBFP showed that there were no material facts in controversy and that as a matter of law Respondents were entitled to summary judgment on this claim.

70. On Claim V Chairman Boal moved to grant Summary Judgment to DEQ and Medicine Bow. The motion was seconded by Councilman Coverdale.

Voting AYE: Coverdale, Guschewsky, Flitner, Searle, Morris, Ogden, Boal.

Voting NAY: NONE.

CLAIM VII

71. The DEQ did not require MBFP to separately evaluate $PM_{2.5}$ emissions and instead used PM_{10} as a surrogate for determining compliance and establishing emission controls. DEQ's reliance on the surrogacy policy has been the agency practice since 1997 and its use is set forth as part of its State Implementation Plan (SIP). 73 Fed. Reg. 26019 (May 8, 2008).

72. At the time this permit application was under review, EPA directives in place clearly indicated that the surrogacy policy was still appropriate in SIP states, such as Wyoming. DEQ has used the surrogacy policy for particulate matter since 1997 and its use is required by its SIP. 73 Fed. Reg. 26019 (May 8, 2008).

73. The matter of rulemaking for $PM_{2.5}$ at the federal level is in flux. Until the EPA finalizes all aspects of rules pertaining to $PM_{2.5}$ the continued use of its surrogacy policy by DEQ is correct as a matter of law.

74. Permit CT-5873 establishes adequate controls to insure compliance with currently applicable standards for $PM_{2.5}$.

75. Protestant failed to show that DEQ's actions were contrary to the law or applicable DEQ rules and regulations or were arbitrary and capricious and that Protestant was entitled to judgment as a matter of law.

76. DEQ and MBFP showed that there were no material facts in controversy and that as a matter of law Respondents were entitled to summary judgment on this claim.

77. On Claim VII Councilman Coverdale moved to grant summary judgment to DEQ and MBFP. The motion was seconded by Chairman Boal.

Voting AYE: Coverdale, Guschewsky, Ogden, Searle, Morris.

Voting NAY: Flitner, Boal.

SUMMARY

78. DEQ's and MBFP's motions for summary judgment and supporting attachments established a *prima facie* case for upholding the DEQ's decision to issue Permit CT-5873. The Sierra Club's Motion and supporting attachments did not establish a *prima facie* case of DEQ error and its response did not come forward with specific facts to refute the case established in the Respondents' motions for summary judgment. By contrast, the pleadings, depositions, affidavits and other materials filed by the parties in conjunction with their cross-motions for summary judgment showed that there were no genuine issues of material fact remaining to be determined by the EQC and that the Respondents were entitled to summary judgment on Issues I, II, III, V and VII.

79. The EQC determined during the pre-hearing that further consideration of standing was not required as Protestant had standing to bring this appeal. (Prehearing Conference, Dec. 4, 2009).

80. DEQ met its duty under Wyo. Stat. § 35-11-801(a).in issuing Permit CT-5873 upon proof by the applicant that the procedures of the Act and the applicable rules and regulations promulgated thereunder had been complied with. In this case, the director issued the permit, and imposed conditions necessary to accomplish the purposes of the Act which were consistent with existing rules, regulations and standards.

81. For the foregoing reasons DEQ's decision to issue Permit CT-5873 should be affirmed.

ORDER

IT IS THEREFORE ORDERED that:

The Respondents' motions for summary judgment on Issues I, II, III, V and VII should be, and the same hereby are, GRANTED.

IT IS FURTHER ORDERED that Protestant's motion for summary judgment on Issues I, II, III, V and VII should 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 is affirmed.

Dated this 4th of February, 2010.

David Searle, Presiding Officer
Environmental Quality Council
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CERTIFICATE OF SERVICE

I, Joe Girardin, certify that at Cheyenne, Wyoming, on the 5th day of February, 2010, I served a copy of the foregoing **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** by electronic mail to the following:

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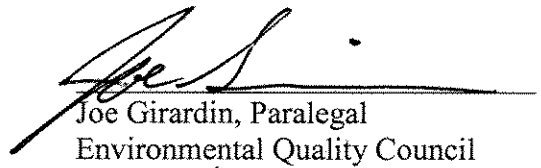

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