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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

**DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE OPPOSING SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT**

Respondent Wyoming Department of Environmental Quality (DEQ), through its undersigned counsel, and pursuant to WYO. R. CIV. P. Rules 7(b)(1) and 56 and the Environmental Quality Council Rules, Chapter II, Sections 3 and 14, submits the following Response Opposing Sierra Club's Motion for Summary Judgment:

## I. INTRODUCTION

Sierra Club seeks a declaration that they have standing to "pursue any subsequent appeal of the Council's decision." (Sierra Club Mot. at 9). Sierra Club also contends that the DEQ erred as a matter of law by: 1) relying upon EPA's $PM_{10}$ Surrogate Policy provision in Wyoming's State Implementation Plan (SIP); 2) failing to include certain sulfur dioxide ($SO_2$) flare emissions in determining the Medicine Bow Facility's (Facility) potential to emit (PTE) and conduct a best available control technology (BACT) for the flares instead of startup/shutdown operations; 3) determining that the

Facility was a minor source of hazardous air pollutants (HAP); 4) determining that BACT for fugitive volatile organic compound (VOC) and HAP component emissions was a leak detection and repair (LDAR) program; and 5) modeling annual, but not short term, fugitive $PM_{10}$ emissions. (*Id.*).[1]

Sierra Club misstates the applicable law. Further, Sierra Club is flat-out wrong in asserting that the DEQ did not analyze $SO_2$ flare emissions, fugitive VOC and HAP emissions, other HAP emissions, $PM_{10}$ emissions, or conduct BACT analyses. Finally, although Sierra Club strongly disagrees with EPA's $PM_{10}$ Surrogate Policy for analyzing $PM_{2.5}$ emissions, Sierra Club admits the DEQ used $PM_{10}$ as a surrogate for $PM_{2.5}$. Sierra Club's arguments all boil down to policy disagreements with Wyoming's DEQ, not errors of law. Sierra Club's arguments are not supported by the facts in this case or by Wyoming law. Therefore, Sierra Club's Motion for Summary Judgment should be denied.[2]

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[1] Sierra Club also insinuates that the DEQ issued a "sham" permit. (Sierra Club Mot. at 35). Given the civil and criminal enforcement implications associated with such an allegation, making this unsubstantiated allegation goes beyond the bounds of zealous advocacy.

[2] The DEQ hereby incorporates by reference its Memorandum, affidavits and exhibits submitted in support of its Motion for Summary Judgment filed on November 16, 2009.

## II. ARGUMENTS

### 1. SIERRA CLUB'S MOTION FOR A DECLARATION OF STANDING INTRUDES ON THE POWER OF THE JUDICIARY AND WOULD RESULT IN AN ADVISORY OPINION BY THE EQC.

"Standing" is a jurisdictional issue that may be raised at anytime. *Hicks v. Dowd*, 2007 WY 74, ¶ 18, 157 P.3d 914, 918 (Wyo. 2007). To obtain judicial review of an administrative action, Sierra Club must have standing under the Wyoming Administrative Procedure Act (WAPA) and the Wyoming Environmental Quality Act (WEQA). WYO. STAT. ANN. §§ 16-3-114(a), 35-11-101 through -1904.

Sierra Club claims it is "entitled to proceed before this Council without making a showing of standing" and is only "offering [standing] evidence" to get information in the record in case of appeal. (Sierra Club Mot. at 7-9). Instead of proceeding with that objective, Sierra Club seeks a determination from this Council that the evidence it has submitted is sufficient for purposes of judicial review. (*Id.* at 8). The Council cannot make such a determination without usurping judicial branch powers. *See* WYO. CONST. art. 2, § 1; *see also* WYO. CONST. art. 3, 4 and 5; WYO. STAT. ANN. § 9-2-1704(d)(xiv); WYO. STAT. ANN. § 35-11-112. Therefore, Sierra Club's Motion for a standing declaration is constitutionally improper and must be denied.

In addition to usurping judicial branch powers, Sierra Club's request is also purely hypothetical. Neither the DEQ nor Medicine Bow have moved for dismissal on the basis that Sierra Club lacks standing. Although the DEQ or Medicine Bow may at some point challenge the sufficiency of Sierra Club's standing evidence, neither party has done so yet. Granting Sierra Club's request would result in the EQC issuing an advisory opinion.

Issuing advisory opinions is not within the EQC's authority. *See* WYO. STAT. ANN. § 35-11-112; *see also Voss v. Goodman*, 2009 WY 40, ¶ 5, 203 P.3d 415, 418 (Wyo. 2009). Therefore, Sierra Club's Motion for a standing declaration fails and must be denied.

## 2. THE DEQ PROPERLY CALCULATED THE FACILITY'S $SO_2$ PTE AND ESTABLISHED BACT FOR STARTUP/SHUTDOWN.

Sierra Club mistakenly alleges that the PTE must include startup/shutdown and malfunction emissions that are not part of normal operations. (Sierra Club Mot. at 20-32). Sierra Club compounds this error with another mistaken allegation that the DEQ did not conduct a BACT analysis for the Facility's $SO_2$ emissions. (*Id*). Sierra Club's errors appear to be the result of having mixed excess emission enforcement concepts with permitted emission limit principles. (*Id.* at 21). Rather than mix these distinct concepts, the DEQ held true to its permit regulations and appropriately determined PTE. The DEQ correctly applied the law to these undisputed facts, setting the Facility's $SO_2$ PTE emission limit at 36.6 TPY. Therefore, the Council should deny Sierra Club's Motion and grant the DEQ's Motion for Summary Judgment on this issue.

"The rules of statutory interpretation also apply to the interpretation of administrative rules and regulations." *Powder River Coal Co. v. Wyoming State Bd. of Equalization*, 2002 WY 5, ¶ 6, 38 P.3d 423, 426 (Wyo. 2002). Courts are guided by the "full text of the [regulation], paying attention to its internal structure and the functional relation between the parts and the whole[.]" *Hede v. Gilstrap,* 2005 WY 24, ¶ 6, 107 P.3d 158, 163 (Wyo. 2005). "[A]ll portions of [the regulation] must be read *in pari materia,* and every word, clause and sentence of it must be considered so that no part will

be inoperative or superfluous." *In the Interest of KP v. State,* 2004 WY 165, ¶ 22, 102 P.3d 217, 224 (Wyo. 2004). "[A regulation] should not be construed to render any portion of it meaningless . . . or in a manner producing absurd results." *Id.*

Statutory interpretation is a question of law. *Exxon Mobil Corp. v. Wyo. Dep't of Rev.*, 2009 WY 139, ¶ 11, ___P.3d ___ (Wyo. 2009). The Wyoming Supreme Court has established a set of statutory interpretation guidelines:

> First, we determine if the statute is ambiguous or unambiguous. A statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability. Unless another meaning is clearly intended, words and phrases shall be taken in their ordinary and usual sense. Conversely a statute is ambiguous only if it is found to be vague or uncertain and subject to varying interpretations. [citations omitted]. If a statute is clear and unambiguous, we give effect to the plain language of the statute. *State ex rel. Wyo. Dept. of Revenue v. Union Pacific R.R. Co.,* 2003 WY 54, ¶ 12, 67 P.3d 1176, 1182 (Wyo. 2003). To determine whether a statute is ambiguous, we are not limited to the words found in that single statutory provision, but may consider all parts of the statutes on the same subject. *Mathewson v. City of Cheyenne,* 2003 WY 10, ¶ 6, 61 P.3d 1229, 1232 (Wyo. 2003). If a statute is ambiguous, we may resort to principles of statutory construction to determine the intent of the legislature. [citation omitted].

*Id.* If a rule is ambiguous, deference is given to the agency's construction unless that construction is clearly erroneous or inconsistent with the plain meaning of the rules. *See Buehner Block Co. v. Wyo. Dep't of Revenue,* 2006 WY 90, ¶ 11, 139 P.3d 1150, 1153 (Wyo. 2006); *Pinther v. Wyoming Dep't of Admin. and Info.*, 866 P.2d 1300, 1302 (Wyo. 1994).

"Major stationary sources" include sources "which emit, or have the potential to emit" 100 TPY or more of specific pollutants. 6 WAQSR § 4(a). It is undisputed that the Facility is a major stationary source. (*See* Ex. 15 at DEQ 000078-000023). "Potential to emit" means "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design[.]" (*Id.*). Medicine Bow's Application and subsequent submittals described the Facility's normal operations. (*See* Ex. 15 at DEQ000078-000030 through -000044; Ex. 21). Based on Medicine Bow's characterization of normal operations, the DEQ determined that the Facility's normal operations included flare emissions generated as a result of warm startup/shutdowns, and set the Facility's $SO_2$ PTE at 36.6 TPY. (*See* Ex. 25; Ex. 26 at DEQ 001409 (Condition No. 2) and DEQ 001419 (Table II)).

The DEQ's long-standing practice has been to make applicability determinations based on emissions occurring during the facility's routine operations, not initial startup (commissioning activities). (*See* Ex. 25 at DEQ000039; *see also* (DEQ's Memo in Support of Mot. at 15) (excluding cold startup/shutdowns from normal operations due to their infrequency)). This is consistent with the DEQ regulations defining "initial startup" to exclude operations for checking functional operation of the machinery, but include operations when the source begins to produce its end product. 1 WAQSR § 3(a); *see also* 6 WAQSR § 2(j). The regulations' plain language recognizes that initial startup is not part of normal operations and supports the DEQ's decision to exclude initial startup emissions from PTE.

Sierra Club cites EPA's comment letter as supporting Sierra Club's argument that initial startup emissions needed to be included in the PTE, yet all that the EPA requested was for the DEQ to further explain why the proposed facility was not a major source of $SO_2$ emissions when there appeared to be $SO_2$ emissions during startups. (Sierra Club. Mot. at 26; *see also* Ex. 31). The DEQ complied with EPA's request and obtained additional information from Medicine Bow. (Exs. 18, 20, 21, 25). There are no additional communications from EPA regarding $SO_2$ emissions. Therefore, it is reasonable to conclude that the DEQ satisfied the EPA's request for additional analysis and explanation. *See Alaska v. EPA*, 540 U.S. 461, 480 (2004) (upholding EPA's stop construction orders issued within two months after permit was issued by state permitting agency).

Sierra Club also argues that the DEQ regulations defining "actual emissions" and "projected actual emissions" require startup/shutdown and malfunction emissions to be included in the PTE. (Sierra Club Mot. at 24-25). The plain language of these regulations defeats Sierra Club's argument.

"Actual emissions" mean "the actual rate of emissions." 6 WAQSR § 4(a). For existing sources, "actual emissions" equals the "average rate, in tons per year [TPY], at which the unit actually emitted the pollutant during a consecutive 24-month period . . . and which is representative of normal source operation." *Id.* The DEQ may presume that allowable emissions are equivalent to actual emissions. *Id.* For new sources, actual emissions equal the PTE. *Id.* Applying this definition, the Facility's permitted allowable $SO_2$ emissions of 36.6 TPY is also equivalent to actual emissions which also equal the

PTE. Therefore, the PTE equals the Facility's 36.6 TPY allowable $SO_2$ emission limit. (*See* Ex. 26 at DEQ 001409 (Condition 2) and DEQ 001419 (Table II)). Thus, the plain language of the regulation supports the DEQ's determination. This Council should defer to the DEQ's reading of its own regulations, not Sierra Club's construction. *See Pinther*, 866 P.2d at 1302 (deference to agency construction of its rules).

Malfunctions, by definition cannot be part of a facility's operation or design. *See* 1 WAQSR § 5. That is because malfunctions are unplanned, not routine events. *Id.* The DEQ addresses malfunction emissions pursuant to Chapter 1, Section 5 of the WAQSR, not through permitting. If malfunctions are foreseeable, the emissions would not satisfy the requirements of Chapter 1, Section 5, and instead would need to be treated as part of normal operations. *Id.* Medicine Bow did not represent the malfunction emissions reported in their application as being part of normal operations. (*See* Ex. 15 at DEQ000078-000023). Therefore, those malfunction emissions were not included in the PTE. Because malfunctions, by definition, are not foreseeable, they cannot be included in the PTE. (*See also* DEQ's Memo. at 15-16).

Sierra Club cites various EPA guidance and EAB decisions as support for their argument that startup and malfunction events must be included in PTE. (Sierra Club Mot. at 23-27). The cited guidance and decisions interpret EPA rules and regulations, not the WAQSR. Furthermore, some of the cited guidance and cases involved permit conditions automatically exempting excess emissions during startup and shutdowns. Permit CT-5873 does not automatically exempt any excess emissions. (*See* Ex. 26). Instead, the Permit limits $SO_2$ emissions to 36.6 TPY. (*Id.* at DEQ 001409 (Condition 2)

and DEQ 001419 (Table II)). Accordingly, reference to these guidance documents and decisions are irrelevant to this issue and misleading.

Sierra Club also cites a recent decision by the EPA Administrator regarding an objection to a BP Title V operating permit for a facility in Indiana. (Sierra Club Mot. at 27-28). EPA ordered Indiana to either set an emission limit or follow another approach to exclude startup/shutdown emissions from BP's PTE. (Sierra Club Ex. 11). The particular circumstances underlying EPA's Order are factually and legally distinguishable from this case. First, the BP facility is an existing, not a brand new facility. (*See* Sierra Club Ex. 11 at 3-4). Second, BP's application only included flare emissions associated with pilot and purge gases, whereas Medicine Bow also included flare emissions from normal operations, including warm startup/shutdowns. (*Compare Id.* at 6-7 *with* Exs. 11, 25 and 26). Third, it is unclear what, if any, $SO_2$ NAAQS modeling was performed for the BP facility, whereas the worst case $SO_2$ emissions modeling for the Medicine Bow Facility showed impacts less than the NAAQS. (Ex. 11). Finally, the EPA indicated that Indiana could prohibit flare emissions or "follow any other approach to address flaring emissions" during startup/shutdown, whereas Medicine Bow and the DEQ limited flaring emissions during the Facility's normal operations (warm startup/shutdowns) to 3.6 TPY and determined the SSEM plan was BACT during startup/shutdown operations. (*Compare* Sierra Club Ex. 11 at p. 19 *with* Exs. 25 and 26).

Sierra Club also contends that the SSEM Plan is not BACT. (Sierra Club Mot. at 28 – 32). Sierra Club, selectively quoting from Mr. Keyfauver's deposition, alleges that the DEQ admits "there was no BACT analysis for $SO_2$ from the flares." (*Id.* at 28).

However, that is not what the DEQ or Mr. Keyfauver contend. (*See* Ex. 57 - Keyfauver Depo. at 45:8 – 46:1, 46:18 – 51:15). Medicine Bow represented, and the DEQ recognized, that the flares are control devices designed to combust syngas that would otherwise vent directly to the atmosphere during periods of startup/shutdown. (*See* Ex. 15 at DEQ 000078 – 000031, -000039, -000042, -000054, -000083, -000092; Exs. 25, 26). The DEQ also recognized that it could not establish flare emission limits because:

> emission limits would not be practically enforceable as these units cannot be tested using traditional EPA reference methods to determine compliance with emission limits. However, the Division considered the SSM plan to represent BACT for the flares during startup/shutdown operations. DKRW has also indicated that the SSM for the facility will continuously be evaluated for improvements to minimize emissions. It should be noted that any revisions to the SSM plan by DKRW are subject to approval by the Division.

(Ex. 25 at DEQ000053; *see also* Ex. 11 at DEQ000528-31). Although Sierra Club argues that an emission limit should have been established for the flares, the DEQ established BACT emission limits for $SO_2$ emission sources and work practice standards as BACT for $SO_2$ emissions during startup/shutdowns. (*Id.*). The DEQ's BACT analysis and determination complied with the WAQSR and was reasonable.

Sierra Club's arguments regarding the Facility's $SO_2$ PTE, flare emissions and the DEQ's resulting BACT determination for startup/shutdowns are based on a flawed and improper reading of the WAQSR, EPA guidance and cases. Reading the plain language of the WAQSR in their entirety supports the DEQ's position. The DEQ exercised its discretionary judgment and applied the regulations to the scientific and technical data contained in Medicine Bow's Application. Based on the reasonable exercise of DEQ's

judgment and application of its regulations, Sierra Club's Motion should be denied. *See Buehner Block Co. v. Wyo. Dep't of Revenue*, 2006 WY 90, ¶ 11, 139 P.3d 1150, 1153 (Wyo. 2006) (deference to agency interpretation).

### 3. THE DEQ COMPLIED WITH WYOMING'S SIP BY FOLLOWING EPA'S $PM_{10}$ SURROGATE POLICY FOR ADDRESSING $PM_{2.5}$

Sierra Club alleges it was unreasonable for the DEQ to use EPA's $PM_{10}$ Surrogate Policy to analyze $PM_{2.5}$ emissions. (Sierra Club Mot. at 9 – 20). Further, Sierra Club alleges that because it views the DEQ's permitting action as non-final agency action, applying *Trimble* to analyze the reasonableness would not result in retroactive application of the law. (*Id.*). As explained in the DEQ's Motion for Summary Judgment, the DEQ is authorized by law to use $PM_{10}$ as a surrogate for $PM_{2.5}$. (DEQ Motion at 18 – 27). Because Wyoming's SIP requires the DEQ to follow EPA's $PM_{10}$ Surrogate Policy, the DEQ was not required to demonstrate reasonableness before using it. (*Id.*) It was also reasonable for the DEQ to use EPA's $PM_{10}$ Surrogate Policy because the EPA has not yet provided all the necessary tools for the DEQ to implement EPA's $PM_{2.5}$ NSR rule. (*Id.*) Finally, it was reasonable for the DEQ to rely on the EQC's decision in the *Basin Dry Fork* case upholding the DEQ's use and application of EPA's $PM_{10}$ Surrogate Policy.[3]

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[3] *See In re Basin Dry Fork*, EQC Docket No. 07-2801, *Order Granting Basin Electric Cooperative's and Depart of Environmental Quality's Motions for Summary Judgment Regarding Protestants' Claim VII* (Dec. 8, 2008) at ¶¶ 55-60; *see also Montana-Dakota Util. Co. v. Pub. Serv. Comm'n*, 746 P.2d 1272, 1275 (Wyo. 1987) (agency made law through adjudication using prior contested cases as precedent); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974) (rule of law developed in agency adjudication applies to future conduct of persons subject to agency's jurisdiction).

None of the cases that Sierra Club cited for the proposition that use of a surrogate is routinely rejected deal with the application of a surrogate policy in a permitting situation. *See* (Sierra Club Mot. at 12-14). Instead, the cited cases involved EPA rulemaking – a situation quite different from case by case adjudication.

Furthermore, the communication exchange between EPA and Mr. Paul Cort, while interesting, appears to deal with an agency's discretionary decision whether to apply policy. This line of correspondence does not apply to Wyoming where the DEQ must apply EPA's $PM_{10}$ Surrogate Policy, and certainly creates no legal obligations.

Applying *Trimble* to this permitting action would result in a retroactive application of guidance. The DEQ issued Permit CT-5873 on March 4, 2009. (Ex. 26). EPA did not issue the *Trimble* Order until August, 2009. Although Sierra Club argues that Permit CT-5873 is not yet a final agency action, the WEQA and WAQSR provide otherwise. The WEQA requires air pollution sources to obtain permits and directs the DEQ to issue such permits. WYO. STAT. ANN. § 35-11-201 and – 801; *see also* 6 WAQSR §§ 2 and 4. Approving and granting an air quality permit is final action by the DEQ pursuant to specific statutory and regulatory authority. The EQC's authority is derived from a different WEQA provision. *See* WYO. STAT. ANN. § 35-11-112. Because *Trimble* was decided six months after the DEQ issued Permit CT-5873, the final agency action in this case, applying *Trimble* would be a retroactive application of guidance. Just as retroactive application of the law is not favored, retroactive application of recently adopted EPA policy should also be disfavored. *See Wilson v. Town of Alpine*, 2005 WY 57, ¶ 13, 111 P.3d 290, 293 (Wyo. 2005).

Sierra Club provides a citation to Mr. Keyfauver's deposition as authority that he could not provide a reason why DEQ could not adopt a PSD program (Sierra Club Mot. at 19). However, the cited exchange relates to Mr. Keyfauver's background as a Senior Permit Engineer with primary responsibility for review of the permit. (Ex. 57 - Keyfauver Depo. at 6:15-25). Later, Sierra Club again partially quotes Mr. Keyfauver, leaving out the numerous objections to this line of questions. (*See* Ex. 57 - Keyfauver Depo. at 89:24 – 92:24). Rather than rely on Sierra Club's truncated representation of Mr. Keyfauver's testimony, the DEQ respectfully requests the Council review his testimony in its entirety.

## 4. THE DEQ'S DETERMINATIONS THAT THE FACILITY IS A MINOR SOURCE OF HAPS AND THAT LDAR IS BACT WERE REASONABLE AND SUPPORTED BY THE RECORD

Sierra Club alleges that Medicine Bow is not a minor source of HAPs and the LDAR program is not BACT for fugitive VOC and HAP emissions. (Sierra Club Mot. at 32-47). Although Medicine Bow initially estimated fugitive methanol HAP emissions greater than 10 TPY, its original estimate was based on less stringent leak detection levels and component counts. *See* Ex. 4. After Medicine Bow lowered the leak detection levels and redesigned some of the component sampling connections, it estimated methanol HAP emissions at less than 10 TPY. (*See* Ex. 10, Ex. 11 at DEQ000512, Ex. 19 at DEQ002918, 002926-27, Ex. 15 at DEQ000078-000054, 000078-000231 – 249; Ex. 19 at DEQ002918, 002926-27; Ex. 25 at DEQ000036-37 and 000057).

Medicine Bow's Memorandum describes and justifies the process and methodology that Medicine Bow used to calculate VOC and HAP emissions and

conclude LDAR was BACT. (Medicine Bow Mot. at 19 – 26). In addition to analyzing fugitive VOC and HAP emissions from components, the DEQ also evaluated the possibility of flare HAP emissions, concluding there were none. *See* Ex. 57 (Keyfauver Depo. at 84:24 – 89:9).

Sierra Club alleges that the DEQ accepted Medicine Bow's assumptions without question. However, as reflected in the stream of correspondence cited in Mr. Schlichtemeier's affidavit, and as reflected in Mr. Keyfauver's actual deposition testimony, the DEQ carefully analyzed Medicine Bow's representations and added permit conditions requiring verification. (*See* Ex. 57 - Keyfauver Depo. at 61:16 – 62:17). The bottom line is that the DEQ has required Medicine Bow to verify its estimated emissions twice: 1) before initial startup based on actual component counts and 2) after initial startup based on actual emission calculations after the Facility is built. (*See* Ex. 25 at DEQ000045, 57-59; Ex. 26).

As thoroughly discussed in both the DEQ and Medicine Bow Motions for Summary Judgment, Medicine Bow proposed LDAR as BACT for fugitive component emissions. (*See* DEQ Mot. at 32 – 34; Medicine Bow Mot. at 23 – 26). Although LDAR was the only available BACT control option for fugitive component leaks, the DEQ reviewed Medicine Bow's initial proposed leak detection levels and requested Medicine Bow lower the levels to 500 ppm for valves and 2000 ppm for pumps. (Ex. 4 at DEQ000151; Ex. 11 at DEQ000525; Ex. 15 at DEQ000078-000082). Following public comment, the DEQ asked Medicine Bow to consider even lower levels. (Ex. 17). Medicine Bow concluded that lower leak detection levels would not reduce emissions.

(Ex. 19). Medicine Bow's LDAR program satisfies BACT. The DEQ's analysis was far from "rubber stamping." The DEQ applied its scientific expertise and technical judgment to analyze and prescribe permit conditions. Therefore, Sierra Club's claim fails and their Motion should be denied.

## 5. THE DEQ PROPERLY MODELED FUGITIVE $PM_{10}$ EMISSIONS

Sierra Club alleges that the Medicine Bow did not demonstrate compliance with the 24 hour $PM_{10}$ NAAQS or WAAQS because short-term fugitive PM emissions were not modeled. (Sierra Club Mot. at 47 – 56). The DEQ, EPA and Congress have long recognized that short term fugitive particulate emission modeling is not a viable tool to estimate impacts in Wyoming. (*See* Section 234 of the Clean Air Act of 1990; Ex. 46 at DEQ004889 and 004916; Ex. 47 at DEQ004927, 004931, 004938-39, 004947-48, and Exs. 51 – 54); *see also* (DEQ Memo. at 36 – 39). Medicine Bow's ambient impact analysis demonstrated compliance with the particulate matter ambient standards. (Ex. 15 at DEQ000078-000099 through -125). The DEQ also analyzed particulate matter impacts and concluded that impacts from the Facility's emissions were less than the ambient standards. (Ex. 11 at DEQ000533 – 546; Ex. 25 at DEQ000043). Furthermore, Medicine Bow and the DEQ were aware that the permit for the Carbon Basin Mines includes provisions for an ambient particulate monitoring network. (*See* Ex. 15 at DEQ000078 – 000105; Ex. 58 at Conditions 16 and 17). Medicine Bow and the DEQ considered and evaluated the impact of fugitive $PM_{10}$ emissions on the ambient standards. The DEQ's conclusion that Medicine Bow had demonstrated compliance with the 24 hour $PM_{10}$ NAAQS and WAAQS was proper and supported by the facts and law.

Therefore, Sierra Club's Motion should be denied and summary judgment should be granted to the DEQ and Medicine Bow.

Sierra Club argues that the 1994 EPA-DEQ Memorandum of Agreement (MOA) is irrelevant and inconsistent with law. (Sierra Club Mot. at 52 – 56). Sierra Club's dislike for the MOA does not make it unlawful. In fact, the MOA was published and summarized in the Federal Register. *See* 60 Fed. Reg. 47290 (Sept. 12, 1995).

The DEQ has not ignored the Facility's fugitive $PM_{10}$ emissions or impacts analysis. To the contrary, the DEQ has exercised its experience and judgment to evaluate such emissions and impacts in a meaningful way. In lieu of short-term fugitive $PM_{10}$ modeling, continued NAAQS and WAAQS compliance will be evaluated via ambient particulate monitoring. (*See* Ex. 58 at Conditions 16 and 17).

The DEQ excludes fugitive sources from 24 hour particulate modeling because the currently available tools to estimate fugitive emissions, and the current models themselves, introduce an unacceptable level of certainty and do not produce realistic impact predictions.[4] Sierra Club has produced no evidence that the DEQ's judgment that the Facility will comply with the 24 hour $PM_{10}$ NAAQS and WAAQS was incorrect. Therefore, Sierra Club's Motion should be denied and the DEQ's Motion should be granted.

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[4] *See* § 234 of the Clean Air Act Amendments of 1990; *see also* (Ex. 11 at DEQ000542, 000545-46; Ex. 25 at DEQ000043; Ex. 39 at 14; Exs. 46, 47, 51, 53, 54); Nall Aff. at ¶¶ 22-23.

## III. CONCLUSION

On these issues, there are no genuine issues of material fact and judgment may be rendered as a matter of law. Applying the law to the facts leads to one conclusion – the DEQ's permitting action was rational and complied with the law. Therefore, the DEQ requests the Council deny Sierra Club's Motion for Summary Judgment and grant the DEQ's and Medicine Bow's Motions for Summary Judgment.

DATED this 30th day of November, 2009.

FOR RESPONDENT DEQ:

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## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE OPPOSING SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT through United States mail, postage prepaid on this 30th day of November, 2009 addressed to the following:

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