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BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

MEDICINE BOW FUEL & POWER'S RESPONSE IN OPPOSITION TO SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Medicine Bow Fuel & Power, LLC (MBFP), by and through its undersigned attorneys, and hereby submits its Response in Opposition to Sierra Club's Motion for Summary Judgment:

I. INTRODUCTION

At every point in their lengthy motion for summary judgment, the Sierra Club distorts the cited authorities in a failed effort to find support for their meritless claims. The Sierra Club tries to argue for laws and regulations that they would prefer, rather than basing their arguments on the law as it exists. Nowhere in their brief do they bring forth

any evidence, as they must do on a motion for summary judgment, to prove the Wyoming Department of Environmental Quality (WDEQ) in any way erred in its decision to issue Air Permit CT-5873 (Permit) for MBFP's industrial gasification and liquefaction plant and coal mine (Facility). Nowhere in their brief do they refute the detailed analysis in the administrative record supporting permit issuance, including the permit application, the draft permit analysis, the final decision and the correspondence. They have ***no admissible evidence*** in the form of affidavits or testimony from their likely witness to support their positions---perhaps because they have none. The only cited testimony is from one WDEQ witness and MBFP's expert that when read in context, more than supports the WDEQ's decision in this matter. Lacking evidence or law to support their Petition, the Sierra Club resorts to attacking the credibility and even the integrity of WDEQ, suggesting the agency somehow did not do its job in this case. The Sierra Club is the party that has not done its job or met its burden in this appeal and for these reasons, the Council should deny the Sierra Club's motion and grant the Respondents' Motions for Summary Judgment.

II. STATUTORY AND REGULATORY FRAMEWORK UNDER THE CLEAN AIR ACT AND THE WYOMING ENVIRONMENTAL QUALITY ACT

MBFP's Motion for Summary Judgment sets forth the statutory framework of both the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.,* and the Wyoming Environmental Quality Act (the Act); Wyo. Stat. 35-11-101 *et seq.* However, it is necessary to revisit the summary again here due to the Sierra Club's mischaracterization of the Prevention of Significant Deterioration (PSD) program of the CAA and Wyoming's implementation of

those requirements. First the Sierra Club begins their brief with a reminder that the pollutants regulated by the Permit have the potential to impact human health and the environment. What the Sierra Club neglects to state is that compliance with the permitting requirements of the Act is deemed to be protective of human health and the environment. In other words, although the Sierra Club may desire the law to do more, the WDEQ and this Council cannot ask any permit applicant to do something other than what the law requires to protect human health and the environment. The WDEQ and by extension, this Council must deal with the regulatory framework as it exists, not as the Sierra Club would prefer it to be. The standards promulgated pursuant to the CAA, as implemented by the states, are intended to protect human health and the environment. Thus, while the Sierra Club may support different emission controls or a different way for WDEQ to conduct its business, WDEQ can only act within its legal authority.

As a first step, the Sierra Club understates the important role played by the National Ambient Air Quality Standards (NAAQS) by claiming they are set only "at levels intended to prevent serious injury to human health and welfare." Sierra Club Motion at 3. The CAA requires substantially more of the primary NAAQS than suggested by the Sierra Club. Under Section 109 of the CAA, the NAAQS must 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) (emphasis added). After shortchanging the purpose of the NAAQS, the Sierra Club goes on to exaggerate the purpose of the PSD Amendments of 1977, claiming Congress adopted them because

the NAAQS "alone are insufficient to fully protect public health" and "in order to maintain air quality in areas that were still unspoiled by air pollution." Sierra Club Motion at 4. Recognizing some portions of the country had air quality superior to the NAAQS, Congress adopted the PSD provisions in part for "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). Congress' intent, then, was not to prohibit all development, but to require development protective of air quality.

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. 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, § 4(b).

The CAA sets the standards, but provides "that air pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3). States fulfill this purpose through the adoption of State Implementation Plans (SIPs). 42 U.S.C. 7410; *Train v. NRDC,* 421 U.S. 60, 79 (1975) (states have freedom to adopt a mix of emission limitations to meet federal requirements). As stated in MBFP's Summary Judgment brief, Wyoming has a SIP authorizing it to implement the PSD permitting program in Wyoming. Under Section 113(a) of the CAA SIPs are enforceable as federal law, once approved by the

Environmental Protection Agency (EPA). 42 U.S.C. § 7413(a). EPA's role then becomes one of oversight, rather than direct issuance of permits or regulation of individual permitting actions. If EPA is dissatisfied with the manner in which a state is implementing its program, including PSD permitting programs, it can seek revocation of a SIP. 42 U.S.C. § 7410(k)(5). If EPA has major objections to a specific permit, it has the authority to take the drastic step of objecting to a permit. *Alaska v. EPA,* 540 U.S. 461 (2004). Unlike with operating permits issued under Title V, third parties have no ability to simply file objections to Wyoming PSD permits with EPA and must seek available remedies through state court in accordance with Wyoming law.

The Act and the Wyoming Air Quality Standards and Regulations (WAQSR) create the permitting framework in the state of Wyoming. Section 801 of the Act imposes on the Director of the WDEQ a duty to issue permits following proof the applicant has met the requirements of the Act and the relevant regulations. Wyo. Stat. § 35-11-801(a). Once issued, the permits remain in effect even if appealed to the Council. *In re Basin Electric,* EQC Dkt. No. 07-2801 (August 21, 2008 Order Denying Protestants Motion to Suspend). This result is in contrast to the status of an applicant for a coal mining permit under Article 4 of the Act. Wyo. Stat. § 35-11-406. In that instance, there is no public comment hearing as with air permits under WAQSR Ch. 6, Sec. 2(m), but rather objections to the ***application*** move to a contested case hearing in front of the Council, unless an informal conference is held before the hearing where parties agree not to go to hearing. In a coal hearing, the protestant is commenting on an application and the permit itself will not issue until the objection is resolved.

Air permits are on a much different procedural footing in that they can be ***appealed*** to the Council, only ***following*** issuance. Although the appeal is an evidentiary proceeding conducted *de novo*, according to the Council's ruling in *Basin,* the burden remains on the challenger—the Sierra Club—to provide evidence, not speculation or conjecture, that the WDEQ erred in its decision. The Council is not sitting as the agency to issue or not issue the permit, although it has authority to modify permits. Wyo. Stat. § 35-11-112(c). Rather, it is implementing the administrative remedy provided under the Act that must be exhausted by the Sierra Club before they can seek judicial review of WDEQ's permitting decision. If the Sierra Club were to lose here and appeal this matter to the courts, the Council would not be the party defending the decision. *See, e.g., Antelope Valley Imp & Serv. Dist. v. State Bd. of Equalization,* 12 P.3d 668 (Wyo. 2000). The WDEQ and MBFP would be defending the Permit and WDEQ's interpretation of its own regulations would be entitled to deference by the courts. The same deference to WDEQ's interpretations should apply here. *See Printher v. Department of Administration and Information*, 866 P.2d 1300, 1302 (Wyo. 1994).

III. STANDARD FOR SUMMARY JUDGMENT

Chapter II, Section 14 of the DEQ Rules of Practice & Procedure (DEQ RPP) makes the Wyoming Rules of Civil Procedure applicable to matters before the EQC. (DEQ RPP Ch. 2, § 14). The Wyoming Rules of Civil Procedure provide that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." Wyo. R. Civ. P. 56(c). Summary judgment procedures set out in Wyo. R. Civ. P. 56 apply to administrative cases. *Rollins* v. *Wyoming Tribune Eagle,* 2007 WY 28, ¶ 6; 152 P.3d 367, ¶ 6 (Wyo. 2007).

The purpose of summary judgment is to dispose of cases before trial that present no genuine issues of material fact. *Id.* A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense. *Id.* Where there are no genuine issues of material fact, summary judgment concerns strict application of the law. *Bd. of County Comm'rs of County of Laramie v. City of Cheyenne,* 2004 WY 16, ¶ 8; 85 P.3d 999, ¶ 8 (Wyo. 2004). The movant for summary judgment bears the "initial burden of establishing a *prima facie* case by admissible evidence. If that is done, the burden then shifts to the opposing party to present specific facts showing that there remain genuine issues of material fact." *Cornelius v. Powder River Energy,* 2007 WY 30, ¶ 10, 152 P.3d 387, 390 (Wyo. 2007). 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 is insufficient to establish an issue of material fact. *Jones v. Schabron,* 2005 WY 65 ¶ 11, 113 P.3d 34, 38 (2005) (citations omitted) When reviewing a summary judgment, the court considers the record in a perspective most favorable to the party opposing the motion and gives that party the benefit of all favorable inferences which may be fairly drawn from the record. *Loredo v. Solvay America*, 2009 WY 43 (Wyo.

2009). If the "evidence is subject to conflicting interpretations, or reasonable minds might differ as to its significance, summary judgment is improper." *Fegler v. Brodie*, 574 P.2d 751, 753 Wyo. 1978).

"The fact that both parties have moved for summary judgment does not mean that there is no genuine issue fact." *Seay v. Vialpando*, 567 P.2d 285, 287 (Wyo. 1977). Thus, a court "must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2720 (1998).

A. Sierra Club's Allegations are Not Supported by the Admissible Evidence Required by Rule 56

As discussed in detail below, the Sierra Club's Motion must fail because, as the movant, the Sierra Club has the burden of demonstrating with admissible evidence, including affidavits, documents and depositions that they can make a *prima facie* case. Their Motion, however, is based on speculation, conjecture and citations to depositions that fail to support their position.

Throughout the Motion, Sierra Club improperly suggests that Mr. Keyfauver's deposition testimony speaks for the WDEQ. Mr. Keyfauver testified as to his role in reviewing the Permit Application. The Sierra Club has failed to provide any reason why Mr. Keyfauver's testimony is in any event binding on the WDEQ since Mr. Keyfauver did not testify as a Rule 30(b) (6) witness for the WDEQ. See deposition Notice of

Andrew Keyfauver, a copy of which is attached hereto as **Exhibit M**[1]. Wyo. R. Civ. P. 30(b)(6) provides in relevant part:

> In its notice or subpoena, a party may name as the deponent …. a governmental agency, and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more . . . persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

The Sierra Club's failure to take such a deposition is significant because the testimony of a Rule 30(b)(6) designee is deemed to be the testimony of the organization, and thus the purpose of the Rule 30(b)(6) is to obtain "'testimony that will bind the [organization].'" *State Farm Mutual Automobile Insurance Co. v. New Horizon, Inc*., 250 F.R.D. 203, 212 (E.D. Pa. 2008) (*quoting Resolution Trust Corporation v. Farmer*, No. 92-3310, 1994 WL 317458 at *1 (E.D. Pa. June 24, 1994); *see also Rosenruist-Gestao E Servicos LDA v. Virgen Enterprises Limited*, 511 F.3d 437, 445 (4th Cir. 2007) (no distinction between Rule 30(b)(6) designee and the designee's organization). Despite not having taken a 30(b)(6) deposition of WDEQ, Sierra Club now wishes to treat Mr. Keyfauver as the person most knowledgeable about any subject Sierra Club inquired about during Mr. Keyfauver's deposition and now seeks to have his testimony binding on the DEQ. Sierra Club, however, has not offered any legal basis or authority why Mr. Keyfauver's testimony is binding on the WDEQ.

In addition to the misuse of Mr. Keyfauver's testimony, the Sierra Club repeatedly misstates his testimony to suit their purposes. There are similar misrepresentations of the

[1] MBFP is continuing with lettering from its Summary Judgment brief. This brief also relies on the exhibits of other parties, rather than resubmitting them here.

testimony of Katrina Winborn, the designated expert for MBFP. Upon closer review of the depositions, it is apparent the testimony supports the decision of the WDEQ. In other instances, the Sierra Club relies on citations to complex technical documents without testimony to support their interpretations. These references also fail to qualify as competent admissible evidence to support a summary judgment decision.

When reviewed in detail, the Sierra Club's Motion fails to meet the basic requirement of a summary judgment motion to establish a *prima facie* case in support of their claims. Without admissible evidence to support their claims, the motion must fail.

B. Sierra Club's Reliance on Decisions of the Environmental Appeals Board and EPA Guidance is Misplaced

If the Council were to conclude the case presents no genuine issues of material fact, it would be left to consider questions of law. For legal support, the Sierra Club relies heavily on EPA guidance documents and decisions of the Environmental Appeals Board (EAB). In a blatant misrepresentation of the case cited, the Sierra Club claims "State courts often look to decisions from the EAB for guidance, affording the EPA's highest decision-making authority significant deference. *See, e.g., United States v. S. Indiana Gas & Elec. Co.,* 245 F. Supp. 2d 994, 1009 (S.D. Ind. 2003)." Sierra Club Motion at 25, n. 8. First of all, the cited case is from a federal court, not a state court. Second, and more significantly, the case does not support the proposition of "significant deference" to EAB decisions, whether from state or federal courts. The court in the Southern District of Indiana, while it quotes an EAB case, concludes EPA's interpretation

of its regulation is entitled to deference. No mention is made of deference to the EAB. *Id.*

The EAB decisions are not binding on this Council as it considers the Sierra Club's appeal. The EAB reviews petitions for review of PSD permitting decisions under 40 C.F.R. § 124.19. Those reviews are on the record, not evidentiary proceedings. The Council should also be cautious in relying on the Sierra Club's application of the EAB decisions to the case at hand since as with their use of the factual record, the Sierra Club citations to EAB decisions do not support the allegations made in this appeal.

Similarly, EPA Guidance and the decisions of the EPA Administrator in cases objecting to Title V permits are not binding on the Council. Again, the Council should be skeptical of the Sierra Club's application of these documents. As discussed below, the Sierra Club frequently cites these documents as support for the claims here when they have no relevance or are factually distinguishable. The Sierra Club's Motion is as weak on the law, as it is on the facts.

IV. ARGUMENT

A. The Sierra Club Does Not Have Standing to Challenge the Medicine Bow Air Permit

In anticipation for perhaps seeking judicial review of any adverse decision, the Sierra Club has requested the Council to declare the club does have standing. The Council cannot predetermine for the District Court whether an entity meets the requirements of standing. It is, however, proper for this Council, acting in its quasi-judicial capacity, to consider whether Sierra Club is an "aggrieved party," as defined in

the Act, with a sufficient 'damages' resulting from its "unique position" to pursue this appeal. Wyo. Stat. § 35-11-103(a)(vii).

DEQ's Rules of Practice and Procedure allow any "Protestant" to file an appeal before the Environmental Quality Council ("EQC"). "Protestant" is defined as "any person . . . requesting a hearing before the Council and who is objecting to an action of the WDEQ and desiring affirmative relief." Chpt. 1 § 2(a)(ii). While the Sierra Club believes its status as a Protestant allows them to escape the minimum created by the jurisprudential rule of standing, petitioners cannot evade the mandate that judicial and quasi-judicial bodies decide only justiciable controversies by focusing narrowly on the Council's definition of "protestant." *See State ex. rel. Bayou Liquors, Inc. v. City of Casper,* 906 P.2d 1046, 1048 (Wyo. 1995). This interpretation would allow the Council's rules to reduce the minimum beyond that required by the Wyoming Supreme Court for both judicial and quasi-judicial proceedings. *Id.* In *Bayou Liquors,* the Court explained the concept of standing:

> The doctrine of standing is a jurisprudential rule of jurisdictional magnitude. At its most elementary level, the standing doctrine holds that a decision-making body should refrain from considering issues in which the litigants have little or no interest in vigorously advocating. Accordingly, the doctrine of standing focuses upon whether a litigant is properly situated to assert an issue for judicial or quasi-judicial determination. A litigant is said to have standing when he has a "personal stake in the outcome of the controversy." This personal stake requirement has been described in Wyoming as a "tangible interest" at stake.

Focusing on the definition of "protestant" alone ignores the statutory requirement of the Act allowing only "aggrieved" parties to seek judicial review of Council decisions. An "aggrieved party" is any "person named or admitted as a party … to any proceeding

under this act because of damages that person may sustain or be claiming because of his unique position in any proceeding held under this act." Wyo. Stat. § 35-11-103(a)(vi). Arguably, to qualify as a party to a proceeding under the Act—such as this appeal—the Protestant must also demonstrate damages resulting from their "unique position" to challenge a permit decision. To obtain judicial review of the Council's decision, the Sierra Club must establish its status as an "aggrieved party" and as a result, it should first be established here to allow the Sierra Club to proceed.

The Sierra Club focuses only on standing under the Wyoming Administrative Procedure Act ("WAPA"). Wyo. Stat. § 16-3-114(a). For purposes of the WAPA, the Sierra Club is correct in stating that in order to challenge a final agency action under the WAPA, a person must demonstrate that he or she is "aggrieved or adversely affected in fact" by that action. *Id.* Further, the Sierra Club is correct in noting that only one member of an association or organization needs have standing to establish standing for the entire organization. *See* Wyo. Stat. § 16-3-101(b)(vii); *Northfolk Citizens for Responsible Dev. v. Park County Bd. of County Comm'rs*, 189 P.3d 260, 262 (Wyo. 2008). For purposes of this Motion, it is not necessary to analyze in detail whether the standing requirement of the Act is more demanding than the one found in the APA. On its face, the Act's definition of an "aggrieved party" seems to require a more specific direct interest in the matter than the WAPA. The standing caselaw under WAPA, which is nonetheless the relevant authority for considering the Act's standing requirements, suggests the Sierra Club does not qualify as an "aggrieved party" for purpose of this appeal.

An aggrieved or adversely affected person is one who has a legally recognizable interest which will be affected by the agency action. *Hoke v.* Moyer, 865 P.2d 624, 628 (Wyo. 1993); *Jacobs v. State ex rel. Wyoming Workers' Safety & Comp. Div*., 100 P.3d 848 (Wyo. 2004). A party is not considered aggrieved by an agency action when there is only a remote possibility of injury. *Sinclair Oil Corp. v. Wyoming Public Service Comm'n*, 63 P.3d 887 (Wyo. 2003); *Matter of Various Water Rights in Lake DeSmet Reservoir*, 623 P.2d 764 (Wyo. 1981). That is, a party must show injury or potential injury by alleging a perceptible – not just speculative – harm resulting from the issuance of a DEQ Permit. *Fosters, Inc. v. City of Laramie*, 718 P.2d 868, 872 (Wyo. 1986). The person must demonstrate that the final agency action injured the person's interest in a perceptible, immediate, substantial, and pecuniary manner. *Jacobs*, 100 P.3d 848. Indeed, "[p]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action . . . ." *Sinclair Oil Corp. v. Wyoming Public Service Comm'n.*, 63 P.3d 887, 895 (Wyo. 2003) (*citing Foster's Inc.*, at 872-73).

To establish standing, the Sierra club relies on two supporting Affidavits from its members, one from Dr. Jason Lillegraven and one from Martha Martinez Del Rio, who was not disclosed as a potential witness to counsel for Medicine Bowl Fuel & Power, LLC or the State of Wyoming.[2] Quite simply, neither of these Affidavits demonstrates a

[2] MBFP reserves the right to move to exclude Ms. Del Rio's testimony if she is called since the Sierra Club failed to disclose her as a possible witness during discovery.

perceptible, immediate, substantial or pecuniary injury; rather, the Affidavits merely state speculative concerns and beliefs in which the Affiants imagine future circumstances in which they could conceivably be affected by the Medicine Bow coal-to-liquids facility. Indeed, the Sierra Club appears to base its standing to challenge a DEQ air permit by alleging that two of their members, whom are both geographically removed from the proposed site of the coal-to-liquids facility, have speculative concerns about their health, the use and enjoyment of their own lands, and their enjoyment of public lands near and downwind from the facility. However, these same Sierra Club members do not indicate how they are currently being harmed by the issuance of the permit. Further, the Sierra Club inexplicably alleges standing based on the fact that the issuance of the WDEQ air permit "would" disrupt the landscape and the natural wildlife corridors in the area. These are areas outside the jurisdiction of the WDEQ in issuing air permits and thus, these alleged harms cannot establish standing to challenge an air permit. In short, the Sierra Club grounds its standing in only the hypothetical and conceivable – that two geographically removed members—residents of Albany County-- have speculative concerns about the coal-to-liquids facility's air quality effects on health and visibility – concerns that are no different from any citizen in Wyoming. Thus, Ms. Del Rio and Dr. Lillegraven are not in a unique position or otherwise aggrieved to qualify as parties in this matter.

As demonstrated by the Sierra Club's Motion for Summary Judgment, Sierra Club's complaints surrounding the Facility's Permit are all procedural. Nothing presented by the Sierra Club or any of its members reflects why and how it has a

recognizable interest in the issuance of the permit or how they are uniquely and adversely affected by the issuance of the permit. They have no personal stake in the outcome, nor do they claim any articulable injury derived by the issuance of the permit. *See Jolly v. State Loan and Inv. Bd.*, 38 P.3d 1073 (Wyo. 2002). Indeed, the Sierra Club bases its standing on subject matter wholly unrelated to its arguments; that is, it makes procedural complaints, while alleging standing based on speculative, substantive effects. Sierra Club's procedural complaints are indistinguishable from those which any citizen of Wyoming could make. They are unable to establish that they are adversely affected in fact by the issuance of this permit. The fact that the Sierra Club disagrees with the terms of the permit is insufficient to establish injury. Other than asserting speculative interests shared by the general public, the Sierra Club fails to provide facts to support any allegation of injury specific to its interests. Based on the above factors, the Sierra Clubs' Motion for Summary Judgment should be denied, as it lacks standing to be a party to this appeal.

B. WDEQ Correctly Analyzed $PM_{2.5}$ Using EPA's Surrogacy Policy

In its Order denying WDEQ's Motion to Dismiss Claim VII, the Council established a new two-part test for assessing the appropriateness of the WDEQ's reliance on EPA's Surrogacy Policy to use PM_{10} as a surrogate to demonstrate compliance with the standards for $PM_{2.5}$. *See In Re Basin Electric,* EQC Dkt. No. 07-2801, Order Denying Respondents' Motion to Dismiss Claim VII and Granting Motion to Dismiss Claim VIII (November 2, 2009). As discussed below, MBFP questions, whether it is appropriate for the Council to rely on a federal decision from the EPA Administrator, *In the Matter of*

Louisville Gas and Electric Company Trimble County, Kentucky P.Title V/PSD Air Quality Permit, Petition No. IV-2008-3 (EPA August 12, 2009) (Hereinafter *Trimble*), issued after the Permit's effective date of March 4, 2009, to impose new, post-permit obligations on the WDEQ. The decision results from an objection to a Title V/PSD permit for a coal-fired facility, which will generate larger particles than MBFP's gas-fired turbines. Thus, the circumstances, both procedurally and factually are distinguishable from the application of the PM_{10} surrogacy policy to the MBFP Facility. Also, federal administrative decisions are not binding on the Council. Given the August 2009 timing of *Trimble* decision, MBFP respectfully requests that the Council reconsider its application to this case.

Whether *Trimble* standards apply or not, the record on this appeal contains ample evidence the WDEQ's reliance on the surrogacy policy was appropriate for the MBFP Facility, as it was for Basin's Dry Fork Station. The Council's November 2 Order in this appeal suggests reliance on the surrogacy policy depends on whether technical impediments to implementing the $PM_{2.5}$ standard in Wyoming's PSD program remain and whether the use of PM_{10} as a surrogate is reasonable for the MBFP Facility. The Sierra Club has cherry-picked from the record to find testimony allegedly supporting its position, but has no evidence to refute the testimony of agency personnel, the report and testimony of MBFP's expert or even the testimony of its own expert, all of which support reliance on the surrogacy policy.

As a threshold matter, technical impediments remain to the implementation of $PM_{2.5}$ in Wyoming's PSD program. The following exchange during the deposition of

Ranjit Sahu, the Sierra Club's expert, supports the notion that all the regulatory pieces are not yet in place for the WDEQ to address $PM_{2.5}$ directly in PSD permitting:

> Q. Do you know whether the EPA has promulgated any rules on significant impact levels on $PM_{2.5}$?
>
> A. Not final rules. I'm aware of proposed rules.
>
> Q. Do you know whether the EPA has promulgated any rules for significant monitoring concentrations?
>
> A. Not final rules.

Exhibit N, Deposition of Ranajit Sahu at 97:22-25; 98:1-3.

The WDEQ's modeler, summarized why, for his purposes, the only reasonable choice was to model PM_{10} as a surrogate for $PM_{2.5}$

> Fugitive sources of PM_{10} emissions from the plant were modeled to compare the predicted impacts to the NAAQS/WAAQS and PSD increments. PM_{10} was also used as a surrogate to represent the impacts of $PM_{2.5}$, because a complete set of modeling tools, including well-established emission factors for all sources, modeling significance levels, and PSD increments are not yet available for $PM_{2.5}$
> WDEQ Aff. of Josh Nall at ¶ 21.

In addition, to the deficiencies noted by Mr. Nall, EPA has yet to promulgate final rules of stack testing of $PM_{2.5}$. 74 *Fed. Reg*. 12970 (March 2009) (proposed rule for Methods for Measurement of Filterable PM_{10} and $PM_{2.5}$ and Measurement of Condensable Particulate Matter Emissions from Stationary Sources). In short, the tools required to include $PM_{2.5}$ directly in the Permit for this Facility were not available at the time MBFP submitted the application and are still not available to the agency, since no final rules have been promulgated, making it technically infeasible for the agency to

incorporate $PM_{2.5}$ into its PSD program through means other than the surrogacy policy. As noted by Mr. Nall, without the relevant modeling tools, as well as the PSD increments, he could not conduct or evaluate the necessary modeling to determine compliance with PSD permitting requirements. Without a stack test for $PM_{2.5}$, the WDEQ has no way to measure compliance even if it were to establish a $PM_{2.5}$ limit for a source at the MBFP facility. Without all of the pieces in place to regulate $PM_{2.5}$, analyzing it would be a pointless, unnecessary and no doubt, expensive exercise in futility for the agency and the permit applicant.

Given the ongoing technical obstacles to implementation, it seems unnecessary, as a practical measure to move to the second step outlined in the Council's Order. Nonetheless, it appears the Council's Dismissal Order requires consideration of both technical feasibility of implementing $PM_{2.5}$ standards and the reasonableness of using PM_{10} as a surrogate. MBFP's expert, Katrina Winborn, applied the suggested reasonableness factors form *Trimble* to determine whether for the MBFP Facility, PM_{10} represents a reasonable surrogate for $PM_{2.5.}$ In light of the fact that the turbines at issue here are gas-fired, rather than coal-fired, there is an even stronger basis for relying on the surrogacy policy here than there was in the Basin Electric appeal, as explained in detail by Ms. Winborn:

> Particulate emissions from the combustion turbines will result from the combustion of (gaseous) syngas and natural gas. The EPA's Compilation of Air Pollutant Emission Factors (AP-42) provides a discussion of emissions from stationary gas turbines and provides suggested emission factors in its Volume I, Chapter 3, Section 1. With regard to particulate emissions, EPA states that "PM emissions are negligible with natural gas firing and marginally significant with distillate oil firing because of the low ash

> content."No mention of $PM_{2.5}$ emissions, or of "fine particulate", is made in this document, and the emission tables presented in this section do not differentiate between PM_{10} and $PM_{2.5}$. In Chapter 1 of AP-42, the section addressing emissions from natural gas combustion in heaters and boilers (Section 4) contains a similar statement: "[b]ecause natural gas is a gaseous fuel, filterable PM emissions are typically low." This section continues on to state that "[p]articulate matter from natural gas combustion has been estimated to be less than 1 micrometer in size and has filterable and condensable fractions. … Therefore, the PM emission factors presented here may be used to estimate PM_{10}, $PM_{2.5}$ or PM_1 emissions." Since both of these AP-42 sections address gas combustion emissions, it is reasonable to assume that PM emissions from stationary gas combustion turbines will likewise be comprised of PM_1 or smaller, and that similarly, calculated PM emissions from turbines can be used to estimate used to estimate PM_{10} and $PM_{2.5}$. Thus, use of the Surrogate Policy for $PM_{2.5}$ emissions from the gas turbines is reasonable.
> Ex. G1 at 30-31 (footnotes omitted)

Ms. Winborn bolstered the position stated in her expert report with specific information from General Electric, the manufacturer of the gas turbines for the MBFP Facility. In her Affidavit, she cited the GE paper confirming that the emissions from one of their gas-fire turbines are likely to be smaller in size than $PM_{2.5}$ Ex. G at ¶ 11. As a consequence analyzing for PM_{10} captures all the particulate at issue and relying on PM_{10} to represent $PM_{2.5}$ is reasonable.

Ms. Winborn further states, the emissions control technology for gas turbines at the MBFP Facility would be no different if a BACT analysis for $PM_{2.5}$ had been conducted:

> Emission control technologies for $PM_{2.5}$ can differ and should be evaluated on a case-by-case basis, depending on the source of $PM_{2.5}$ emissions, and both the amounts and proportions of direct $PM_{2.5}$ emissions and $PM_{2.5}$ precursors emitted by the source in question. However, in some cases, the emission controls to be employed for PM_{10} and $PM_{2.5}$ can be, or must be, the same technology. That is the case for the proposed MBFP facility, and this fact supports the use of the Surrogate Policy for $PM_{2.5}$. The selected

> control technology for particulate matter (PM_{10}) from the combustion turbines is a combination of good combustion practices and use of fuels with low potential for particulate emissions. This decision was made after consideration of using baghouses and electrostatic precipitation (ESP) as part of the top-down BACT analysis for PM_{10}. Both baghouses and ESP were determined to be technically infeasible, as it was found that neither technology could provide a lower particulate emission rate than the baseline emission rate. As noted in the previous section, all particulate emissions from gaseous combustion in the stationary turbines are considered to be less than 1 micrometer in diameter. This may explain why no additional control could be gained from baghouse and ESP technology. In this case, no difference exists between the emission control selected for PM_{10} versus $PM_{2.5}$, and no additional control for $PM_{2.5}$ can be achieved over what is currently proposed. Thus, use of the Surrogate Policy for $PM_{2.5}$ for the combustion turbines remains justified.
> Ex. G1 at 33

Baghouses and electrostatic precipitators (ESP), the only other BACT choices were eliminated using PM_{10} as a surrogate and they also would have been eliminated if particulate had been analyzed as $PM_{2.5.}$ As explained by Ms. Winborn in her report and by the WDEQ in its permit analysis, the size of the particles from gas turbines are too small to allow any further reduction in emissions from the use of either a baghouse or an ESP. The WDEQ stated the following in their permit analysis:

> MBFP eliminated an ESP and baghouse as viable control options for particulate emissions from the turbines. This is due to the fact that particulate emissions from the turbines are estimates at 0.003 grains per dry standard cubic foot (gr/dscf), and the ESP and baghouse are not able to provide any further reduction.
> Ex. B at 21 DEQ000526.

The analysis for fugitive particulate matter from coal storage and material handling resulting primarily from hauling activity presents a different set of circumstances, but the end result is the same. Whether the particulate from these activities is analyzed as PM_{10} or $PM_{2.5,}$ the emissions controls determined under the

BACT analysis would be no different, confirming that PM_{10} was also a reasonable surrogate for fugitive particulate emissions. As explained by Ms. Winborn:

> With regard to fugitive particulate emissions, the previous section established that based on AP-42 emission factors, emissions of $PM_{2.5}$ are less than PM_{10} by average factors, depending on the fugitive emission source. It should also be noted that the proportion of $PM_{2.5}$ to PM_{10} in fugitive dust may vary, depending on the emission source and meteorological conditions (rain, wind, etc.). However, the same set of emission control techniques are applied for fugitive particulate emissions regardless of the size of the particulate matter, and irrespective of varying proportions due to meteorological conditions. EPA's AP-42 document describes techniques such as watering and the use of chemical wetting agents as primary means of controlling dust emissions. No differentiation between PM_{10} and $PM_{2.5}$ exists for these types of controls. Therefore, regardless of the amount of PM_{10} and $PM_{2.5}$ in the MBFP fugitive emission inventory, the selected control technologies for the MBFP facility will remain the same. Thus, use of the Surrogate Policy for $PM_{2.5}$ is justified.
> Ex. G1 at 33-34.

The Sierra Club ignores the relevant analysis in the WDEQ administrative record, the testimony of its own expert, and the testimony of MBFP's expert and instead seizes on testimony of WDEQ's permitting engineer, Andrew Keyfauver to argue the Permit is defective. Sierra Club both misrepresents Mr. Keyfauver's testimony and ignores the portions of his testimony contrary to their position. First, Sierra Club erroneously asserts Mr. Keyfauver "could not provide a reason why WDEQ cannot adopt a PSD program," citing page 6:15-25 of his deposition. Sierra Club Motion at 19. The citation provides no support for the assertion and is unrelated to the $PM_{2.5}$ issue. Asked later in his deposition about modeling of $PM_{2.5}$, a topic outside the scope of his job duties at WDEQ, he deferred to Mr. Nall, who has provided the Affidavit discussed above, and then, gave general answers about the availability of measurement standards for $PM_{2.5}$ and the

monitoring network in Wyoming. Ex. A at 87: 23-25; 88:1-11; 90:11-19. There is no testimony from Mr. Keyfauver stating or implying WDEQ has the tools available to regulate $PM_{2.5}$ today in its PSD program. Suggesting that this was Mr. Keyfauver's position, as Sierra Club has, is pure fabrication.

During the deposition, Mr. Keyfauver was asked a number of questions concerning whether he considered, as part of the permitting review, if the BACT selected for PM_{10} was comparable to the BACT for $PM_{2.5}$ and if the agency considered which portion of the particulate was $PM_{2.5}$. In response to a series of questions on this topic, Mr. Keyfauver stated the agency did not conduct such an analysis since they used the surrogacy policy. Sierra Club Ex. 1 at 89-92. At the time the WDEQ conducted the analysis for the Permit, it was entitled to rely on the recent directive of the Council in the Basin decision regarding the treatment of $PM_{2.5.}$ In Basin Electric, this Council ruled the surrogacy policy remained appropriate in light of the incomplete rulemaking at the federal level to implement fully the $PM_{2.5}$ standards in the PSD program. *In re Basin Electric,* Dkt. No. 07-2801 (Order Granting Respondents' Motion for Summary Judgment on Protestants' Claim VII, December 8, 2008) The Council also ruled in Basin that the agency is entitled to rely on prior adjudications of this Council in making its permitting decisions. *See In re Basin Electric,* Dkt. No. 07-2801 (Order Granting Respondents' Motions for Summary Judgment on Protestants' Claims II and III, December 3, 2008, at ¶ 41, citing *Montana-Dakota Util. Co. v. Pub. Serv. Comm'n,* 746 P.2d 1272, 1275 (Wyo. 1987)). In short, the suggested framework found in *Trimble* was not authority in Wyoming at the time of the agency's permit review for MBFP and unless

the WDEQ staff were clairvoyant, they could not possibly anticipate the need to document such a reasonableness inquiry.

Despite the fact neither the agency, nor, MBFP could have anticipated the requirements of *Trimble,* there is evidence in both the Administrative Record and testimony on appeal to demonstrate the reasonableness of using the surrogate policy here. As stated above, the agency concluded further controls on the turbines, the primary source of particulate, were not available. In addition, the Decision Document states the precursors to the formation of particulate are controlled and confirmed the modeling was adequate, as well:

> PM_{10} includes all particulate matter less than 10 micrometers and smaller, which means PM_{10} also includes $PM_{2.5}$. The Division's review of MBFP's modeling analysis concluded that the total PM_{10} ambient impacts were less than the PM_{10} NAAQS/WAAQS and PSD increment standards. Furthermore, the permit established BACT emission limits for $PM_{2.5}$ precursors: nitrogen oxides (NO_x), sulfur dioxide (SO_2) and volatile organic compounds (VOCs)
> Ex. D at II.9 DEQ001430

Mr. Keyfauver reconfirmed the control of the precursors in his deposition testimony. Sierra Club Ex. 1 at 93:22-25; 94:1-14.

Thus, there is evidence in the WDEQ record to establish the reasonableness of the use of PM_{10} as a surrogate for $PM_{2.5}$ even though not phrased as suggested by EPA in *Trimble.* In addition, Ms. Winborn's expert report also concludes for this Facility, PM_{10} is a reasonable surrogate for $PM_{2.5}$. Finally, given the technical obstacles remaining to full implementation of the $PM_{2.5}$ standard in PSD permitting, including the lack of a stack test to measure compliance, there is no basis to support the Sierra Club's permit

challenge on this issue. The Sierra Club has no evidence to refute the record or the evidence in this appeal and for this reason Respondents are entitled to summary judgment.

C. Sierra Club's Motion Fails to Demonstrate WDEQ Error in the Calculation of PTE for Sulfur Dioxide or the Regulation of the Pollutant

Sierra Club's Claim I has been divided into two claims in its Motion for Summary Judgment. This Opposition continues to view the claim as a single challenge. The Claim asserts the WDEQ did not properly regulate the emissions of Sulfur Dioxide from the flares by 1) Not including all startup/shutdown and malfunction emissions in the Facility's Potential to Emit (PTE); and 2) By not requiring BACT to control the emissions from the flares. As argued in depth in MBFP's Motion for Summary Judgment, the record demonstrates the conditions in the Permit adequately control emissions from the flares by requiring that emissions above the PTE be justified at every stage and minimized in accordance with the SSEM plan, Appendix A, to the Permit, Ex. F. The agency will review emissions beyond the PTE on a case-by-case basis in accordance with the Permit and relevant regulations in the WAQSR. WDEQ Aff. of Chad Schlichtemeier at ¶¶ 53-54. The Sierra Club has offered nothing in the form of admissible evidence or legal authority to call into question the legality of the Permit.

1. WDEQ Properly Calculated the PTE for SO_2

The Sierra Club provides page after page of analysis of cases which are irrelevant to the question at hand: Whether WDEQ erred in its calculation of the Facility's PTE for

SO_2. Sierra Club does not cite one case, one permitting decision or one relevant piece of guidance calling into question the WDEQ's longstanding interpretation of its definition of Potential to Emit found Chapter 6, Section 4(a) of the WAQSR. Consistent with its interpretation of the regulation and relevant EPA guidance, WDEQ does not include cold startup/shutdown and malfunction emissions in its PTE determination. Ex. D, WDEQ Decision Document at III.1, DEQ 001434 ; WDEQ Aff. of Chad Schlichtemeier at 52. Sierra Club has no evidence and no expert opinion to refute the analysis and affidavit testimony supporting the WDEQ decision. Rather, they have created their own interpretation of the regulations and ask this Council to adopt it, rejecting the WDEQ's interpretation of its own regulations.

None of the cases discussed in the Sierra Club's brief support the proposition that the CAA requires emissions resulting from startup/shutdown or malfunction events to be included in the facility's PTE. In fact, the phrase "potential to emit" is discussed in only two of the cases relied on by the Sierra Club. In addition to the meaningless caselaw, Sierra Club attempts to rely on EPA Guidance documents that in reality support the WDEQ's determination. The cases and the guidance for the most part address how permitting agencies are to regulate excess emissions, primarily startup/shutdown emissions. They are labeled "excess" in the EPA documents because they are not permitted emissions. For the Sierra Club to quote phrases out of context and to rely on these cases and guidance documents to support its position on potential to emit is a disingenuous and a not so subtle attempt to mislead this Council. To the extent any of the

cited guidance may appear to provide limited support, guidance is not law and is not binding on the WDEQ.

The Sierra Club relies heavily on the decision of the Environmental Appeals Board (EAB)[3] decision, *In re Tallmadge Generating Station*, 2003 WL 215000414, PSD Appeal No. 02-12. The issue in this case was not whether startup/shutdown emissions should be included in the facility's potential to emit but whether the permit properly regulated ***the excess emissions*** resulting from startup/shutdown events. In other words, the decision begins with the premise that startup/shutdown emissions are excess emissions--"i.e, emissions in excess of BACT or other permit limits." *Id.* at 9. The PSD permit issued by the Michigan Department of Environmental Quality exempted "the permittee from complying with BACT and other emission limits during startup and shutdown events, as long as the permittee has prepared a plan, approved by the permit issuer, to minimize emissions during those events." *Id.* At 10. The Permit at issue here contains no automatic exemption. In sharp contrast to the *Tallmadge* permit, the MBFP Permit at Condition 10, for example, establishes various limits for the turbines and states "they shall apply at all times."[4] Ex. F, DEQ 001412. Also in apparent contrast to *Tallmadge,* the Permit, as issued, requires compliance with a startup/shutdown plan, included in both the draft permit, presented for public comment, and the final permit at Condition 31:

> During periods of startup, Medicine Bow Fuel & Power, LLC shall adhere to their procedures in their Startup/Shutdown Emission Minimization Plan,

[3] As discussed above, this Council is not bound by decisions of the EAB.

[4] *See also,* Condition 14 at DEQ OO1413.

> attached as Appendix A. This plan may be modified as deemed necessary by Medicine Bow Fuel & Power, LLC without amending the permit, but revisions to the plan shall be approved by the Division prior to implementation.
> Ex. F. at DEQ 001416

In addition to *Tallmadge*, Sierra Club also cites *In Re: RockGen Energy Center*, 8 EAD 536, 1999 WL 63224, PSD Appeal No. 99-1, and *In Re: Indeck-Elwood, LLC,* 2006 WL 3073109, PSD Appeal 03-04. These cases, like *Tallmadge*, have nothing to do with calculating PTE for permitting purposes, but rather concern the treatment of excess emissions during startup/shutdown. In both cases, again, the permits contained exemptions from certain permitting requirements during startup and shutdown. There are no such conditions granting an automatic exemption for excess emissions in the Permit before the Council. Reference to these cases only confuses the issue of analyzing the SO_2 PTE determination in front of the Council. These cases, in fact, support the WDEQ's PTE determination in that they treat startup/shutdown emissions as "excess emissions."

Similarly, the other cases and guidance cited by Sierra Club focus primarily on the requirements states must meet in the development of their state implementation plans (SIPs) for determining when and how to enforce exceedances of excess emissions resulting from startup/shutdown and malfunction events. These cases fail to provide support for the Sierra Club position. In the 1990's, EPA began developing guidance and SIP requirements questioning states' treatment of emissions resulting from malfunctions and startup/shutdown in the context of enforcement. Essentially, EPA suggested states were too quick to excuse these emissions as unavoidable when, instead, states should be

considering enforcement actions. *See* Sierra Club Ex.15, Memorandum of Steve Herman re SIPs: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown.

For example, in *Michigan Department of Environmental Quality v. Browner,* 230 F.3d 181 (6th Cir. 2000), relied on by the Sierra Club, the issue in front of the court was whether Michigan's SIP was deficient for including provisions providing an automatic exemption from compliance with emission limitations during periods of startup/shutdown and providing a broad allowance for malfunctions. The court noted the "EPA disapproved Michigan's entire SIP revision based upon its conclusion that the proposed rules eliminate the possibility of enforcement by allowing automatic exemptions for ***excess emissions*** resulting from SSM if the sources meets certain other criteria." *Id.* At 185 (emphasis added).[5] Simply put, the Michigan SIP case does not call on states to permit startup/shutdown emissions; it requires states to put in place stricter requirements for enforcing against such emissions.

A few items cited by Sierra Club in their motion mention PTE calculations, but do not provide support for their position. The letter from EPA Region I refers only to emissions from emergency generators, which are not at issue here. Region I also recommends permitting at an arbitrary level of 500 hours with any hours beyond that treated as excess. Sierra Club Ex. 13, Letter from Steven C. Riva. In short, this is a case where specific guidance also acknowledges that beyond a certain level, the emissions will

[5] Wyoming also adjusted its definition for excusable malfunction to meet the heightened SIP requirements, which resulted in the adoption of WAQSR Ch. 1, Sec. 5, requiring more justification before malfunctions will be excused from violations.

not be included in PTE, again supporting WDEQ's position. In any event, EPA guidance, while it instructs decision making, it is not binding on WDEQ or this Council, particularly when it is not even clearly applicable to the situation. EPA Guidance is not federal law. *See, e.g., Appalacian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000). The October 2009, Title V Order involving the BP Refinery in Indiana does discuss PTE. However, that Petition deals with a complex refinery modification, not a new facility, as is at issue here. The EPA Administrator also specifically did not rule on whether the modification triggered NSR/PSD applicability. *See* Sierra Club Ex. 11; *In re Masonite,* 5 EAD 551, 1994, WL615380, cited by Sierra Club is also inapplicable to this case. There the EAB considered whether fugitive emissions from wood chips should be included in PTE. The case does not address startup/shutdown or malfunction emissions.

Sierra Club attempts to use the definition of "projected actual emissions," from WAQSR, Ch.4 as supporting their position that SO_2 emissions from flaring must be included. The definition of projected actual emissions is used to calculate emissions when a facility is proposing a modification. It has no applicability to interpreting the application of the PTE definition for a new facility. To the extent it is relevant, it suggests WDEQ's interpretation of PTE is correct. If startup/shutdown emissions were intended to be included in the PTE for a new facility, the regulation could specifically include them, as they are for modifications.

Finally, the Sierra Club suggests the Council should just accept, on faith, the EPA's lengthy, last minute comment, on WDEQ's treatment of cold startup emissions.

At the eleventh hour before the August 2008 hearing, US EPA Region VIII submitted comments suggesting WDEQ should reevaluate its treatment of startup/shutdown emissions. WDEQ provided a response to those comments and although it did not add the "cold" startup emission, it reevaluated the Facility's SO_2 emissions, increased the PTE and reaffirmed that the Facility is minor for SO_2. There is nothing further in the record from EPA and EPA has taken no further action. In short, the EPA comments are not binding or even persuasive. They are simply public comments in the record.

In summary, Sierra Club has not presented any admissible evidence in support of their claim of error in the PTE calculation for SO_2. They have cited EPA administrative decisions in a failed effort to suggest the law is on their side, when in fact they have no authority in support of their position. In these circumstances, the only evidence in the record supports the WDEQ's decision and the Council should defer to the agency's interpretation of its regulations excluding cold startup/shutdown and malfunction emissions from PTE. Under these circumstances, Sierra Club has not made a case for summary judgment and its motion must be denied and Respondents' Motions granted.

2. The DEQ properly determined that the SSEM plan was proper for controlling SO_2 emissions from the flares during SSM events.

The Protestant argues that "[t]he evidence clearly shows that DEQ did not apply BACT to the flares." They further argue that the SSEM is not BACT for the flares because according to the Protestant the DEQ failed to determine that "an emissions limitation was technically infeasible," the SSEM plan was not subject to "a proper BACT

analysis," and the SSEM plan is "unenforceable." The argument is seriously misleading, unsupported by the record and contrary to law.

a. The SSEM Plan

First, Sierra Club attempts to rely on 40 CFR § 52.21(b)(12) and WAQSR, Ch. 6. § 4(a) for its proposition that the WDEQ must determine that an "emission limit" on the flares is infeasible before it can prescribe an SSEM plan. Sierra Club's reliance on those regulations is misplaced because they do not support Sierra Club's proposition. Sierra Club cannot cite any such authority because the statement is contrary to law. It is proper for the WDEQ to prescribe an SSEM plan whenever it determines that economic or technological limitations on the application of measurement methodology to an emissions unit, such as a flare, would make an emission standard infeasible. *See* WAQSR, Ch. 6. See 4(a) and WAQSR, Ch.6. § 4(a).

Second, Sierra Club failed to advise the Council that DEQ specifically addressed this issue in its March 4, 2009 Decision. In response to a comment from Earthjustice and others, including Sierra Club, regarding applying emissions limits to the flares, the DEQ stated: "The Division did not establish emissions limits for the flares as emissions limits would not be practically enforceable as these units cannot be tested using traditional EPA reference methods to determine compliance with emission limits." Ex. D at IV. 35 DEQ 001448. It, therefore, made no engineering sense to establish emissions limits on the flares since those limits could not be measured for compliance and therefore enforced.

Instead, consistent with the law, the WDEQ prescribed a work practice and operational standard to minimize flare emissions: "the Division considered the SSEM

plan [Startup Shut down Emissions Minimization Plan] to represent BACT for the flares during startup/shutdown operations. DKRW has also indicated that the SSEM for the facility will continuously be evaluated for improvements to minimize emissions." Exhibit D at IV. 35.

The WDEQ is allowed to prescribe such a plan whenever it determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible . . .." WAQSR, Ch. 6. § 4(a). Even Protestant's expert agrees that it is appropriate to prescribe a work practice standard when the agency determines emission limits would be deemed, for whatever reason, inappropriate. Ex. N Deposition of R. Sahu at 65:1-5; 18-23.

Second, Sierra Club attempts to confuse this issue by misleadingly suggesting that WDEQ was required to conduct a BACT analysis on the SSEM plan itself. Sierra Club has failed to cite any authority for this proposition which can only be described as misleading at worst and sophomoric at best. Nor can Sierra Club cite any authority because the argument is contrary to the definition BACT. BACT means, in relevant part, an emission limitation based on the maximum degree of reduction of a regulated pollutant which would be emitted from or results from any proposed major stationary source or major modification. *See* WAQSR Ch. 6. 4(a). The SSEM plan is not subject to a BACT analysis because it is not a regulated pollutant that is going to be emitted from or result from any major stationary source or major modification. Instead, the WDEQ must only determine that an emissions standard is infeasible because of economic or

technological constraints on applying the methodology to measure the emission standard. Here WDEQ determined that given the absence of such measurement methodology it was infeasible to set an emissions limit on the flares.

Third, contrary to Sierra Club's argument, in selecting the SSEM as BACT for the flares WDEQ was not required to do more than what the regulation required. According to Sierra Club, in prescribing the SSEM plan, WDEQ was first required to determine whether other "control options" existed for controlling SO_2 emissions from the flares. Aside from being contrary to the regulation, the argument in itself is misleading because Sierra Club fails to advise the Council that even its own expert agrees there are no post combustion emission controls for flares so that the only available option for controlling flare emissions must rely on controlling what and how much goes to the flares. Ex. N Sahu Deposition at 59:3-15. Thus, SO_2 flare emissions would be controlled by controlling the sulfur content in the vent streams directed to the flares and in preventing or reducing the amount of flow directed to the flare. Winborn Report, Ex. G1at 8.

Fourth, even assuming by some stretch of Sierra Club's imagination a top down BACT analysis was required for the flares, the result would be the same as the option selected by DEQ: the SSEM plan. Ex. G1 Winborn Report at 8. Sierra Club's own expert admitted he had no evidence, facts or other information to the contrary because he did not perform any such BACT analysis. Ex. N Sahu Deposition at 66:1-7; 16-25; and at 67:1-4.

b. The SSEM Plan is enforceable and Protestants have no evidence to the contrary.

Alternatively, Sierra Club argues that the SSEM plan is not BACT because according to the unsupported argument of Sierra Club's counsel, the SSEM plan is supposedly unenforceable. Instead of providing any evidence or cogent legal argument, Sierra Club instead resorts to quoting a portion of the deposition of Andrew Keyfauver, and omits the objection made in response to the question quoted by Sierra Club regarding whether Mr. Keyfauver could explain how the SSEM plan was enforceable. The relevant testimony reveals that the question at issue was outside of Mr. Keyfauver's job duties.

Q. Given that the plan requires Medicine Bow use it to the greatest extent possible, can you explain how this plan is enforceable?

MS. VEHR: Objection. Outside of his job description.

A. I do not know. I'd have to defer to Chris Hanify, the district engineer.

In fact, when asked whether he considered the SSEM plan enforceable, Mr. Keyfauver unequivocally answered "yes." Sierra Club Ex. 1 Deposition of Andrew Keyfauver at 58:11-17.

The SSEM plan contains multiple requirements which MBFP most follow during start up and shut. Permit, Ex. F, App. A. Sierra Club points to one requirement to argue the plan is unenforceable because there is no number assigned to low and normal operating pressures. When asked how pressure checks are enforceable without numerical specificity, Mr. Keyfauver answered: I am not an expert, but I would – I could only guess that the pressure checks are part of a safety procedure prior to sending the gas down to other units." Sierra Club Ex. 1 Depo. of Keyfauver at 59:15-19.

The permit also contains specific provisions regarding the operation of the flares, which Sierra Club ignores in arguing there are no enforceable requirements for the flares:

> 22. Medicine Bow Fuel & Power, LLC shall monitor SO_2 emissions from the HP and LP flares. Monitoring of SO_2 emissions shall consist of installing flow monitoring equipment to the flares, and by either direct sampling of the flow to the flares or sampling of the coal. Records shall be kept for a period of at least 5 years and shall be made available to the Division upon request.
>
> 23. That the HP and LP flares shall be designed, constructed, operated and maintained to be smokeless, per Chapter 5, Section 2(m) of the WAQSR, with no visible emissions except for periods not to exceed a total of five (5) minutes during any two (2) consecutive hours as determined by Method 22 of 40 CFR part 60, Appendix A.
>
> 24. Medicine Bow Fuel & Power, LLC shall maintain and operate the HP and LP flares during all period of active operation such that the controls remain effective as viable emission control devices.
>
> 25. That the presence of a pilot flame shall be monitored using a thermocouple and continuous recording device or any other equivalent device to detect the presence of a flame on the HP and LP flares. Medicine Bow Fuel & Power, LLC shall maintain records noting the date and duration of time during active operation when the pilot flame is not present in the HP and LP flares. Records shall be kept for a period of at least 5 years and shall be made available to the Division upon request.
>
> Exhibit F, MBFP Permit. In short, Sierra Club has merely offered its unsupported and speculative opinion that the SSEM is unenforceable.

D. Sierra Club Has No Admissible Evidence the WDEQ Failed to Properly Calculate or Regulate Fugitive Emissions From Equipment Leaks

1. The Sierra Club Has No Evidence to Challenge the Emission Calculations

Under the CAA, as implemented in the Act and the WAQSR, a source is major for hazardous air pollutants if it will emit 10 or more tons per year of any single hazardous

air pollutant or 25 tons per year of any combination of hazardous air pollutants. In the final decision document and final permit, WDEQ concluded the Facility's PTE for methanol, a hazardous air pollutant, is 9.2 tpy, making the Facility a minor source of HAPs. Sierra Club's obligation on a Motion for Summary Judgment is to bring forth ***admissible evidence*** to challenge this determination. Sierra Club's Motion falls well below this standard. Sierra Club presents no evidence in support of its challenge; rather it relies on random citations to documents found on the internet and Sierra Club Counsel's interpretation of those documents in its argument. There is no testimony cited in support of the Motion's interpretation and indeed, a review of the Sierra Club expert's deposition reveals there is no evidence to support the Sierra Club claim.

Although their argument is broken into multiple parts, the Sierra Club's primary objections to the calculation of hazardous air pollutants are the WDEQ failed to "verify" the information provided by MBFP in support of the calculations and the WDEQ improperly allowed MBFP to use EPA's average emission factors to estimate the emissions. While, the Sierra Club may have preferred a different methodology, they have no evidence that the one chosen by the agency is in any way contrary to law.

First, the Sierra Club attempts to find fault with the WDEQ's analysis by claiming the agency failed to require verification of the component parts, including connectors, relief valves, valves and sampling connectors, listed in Appendix B of the Application. WDEQ Ex. 15. The Sierra Club is demanding design information that does not exist at this point of the project and is not required prior to permit issuance for a new facility.

Sierra Club Ex. 1 Keyfauver Deposition at 61-62; Sierra Club Ex. 16 Winborn Deposition at 90-92; Ex. J Aff. of James Knox at ¶ 11.

Emissions from approximately 4000 component parts are estimated in Appendix B. The numbers of the different types of components are found in Appendix B. By submitting these in the Application, MBFP is committed to meeting these expectations. In addition, the component counts provided are not a random number, but based on engineering information currently available. Ex. J Aff. of James Knox at ¶ 11. WDEQ's standard permit condition related to applications also binds MBFP to the substantive commitments in the application:

> That all substantive commitments and descriptions set forth in the application for this permit unless superseded by a specific condition of this permit, are incorporated herein by this reference and are enforceable as conditions of this permit.
> Ex. F at Condition 2

As further insurance that MBFP's final design meets the expectations of the application, MBFP must submit as-built drawings *prior* to start-up. Ex. F at Condition 19. If the Facility is major at that time, it will need to meet the requirements for a major source of HAPs. This provides a strong incentive for the Facility to be constructed in such a way to minimize the components and their emissions. Annual reporting of HAPs emissions is required, as well. Ex. F at condition 20.

The Sierra Club's second strategy is to attack the use of EPA's approved protocol as the basis for estimating the emissions in the Application. The Sierra Club does not deny the permit is based on approved EPA methodology; rather they suggest MBFP should have selected a different EPA methodology. The Council can ignore this pure

conjecture. A close reading of the Sierra Club brief reveals it merely cites internet documents without any authentication or testimony in the form of affidavits or depositions to support their position. The brief writers' interpretation of complex permitting documents for EPA and other sources is not evidence of error on the part of WDEQ or MBFP. It is simply inadmissible, non-expert opinion from Sierra Club counsel. Although, the Sierra Club cites deposition testimony, a review of the deposition testimony reveals the Sierra Club is distorting the record to suit their purposes.

To calculate leak emission estimates, MBFP utilized average emission factors found in table 2-1 of the EPA's Protocol for Equipment Leak Emission Estimates for the Synthetic Organic Chemical Manufacturing Industry (SOCMI). This protocol, although developed in 1995, remains "the only option or guidance currently presented by EPA for equipment leak calculations." Winborn Report, Ex. G1 at 15. To challenge the use of what is a standard tool in permitting, the Sierra Club argues the WDEQ should have required the "EPA correlation equation approach," despite the fact that the EPA document cited by Sierra Club states this is not feasible for new sources when no actual screening values are available. Sierra Club also challenges the selection of the SOCMI factors, as opposed to another category of factors. Neither objection is supported in the record.

First, as a new "greenfield" facility, screening values are not available for the MBFP Facility since final engineering is not yet completed and no facilities of its type have been built recently. As explained by James Knox, Vice President of Engineering for DKRW Advanced Fuels:

> The selection of the SOCMI factors described in Section 3.2.6.3 of the application was the only realistic choice available to us to estimate the VOC and HAP emissions from equipment leaks. The average factor estimate only requires an equipment count and service conditions, both of which we provided in the permit. Determining screening values specific to this facility was not an option as there are no recent (state of the art) coal to chemical plants or methanol plants of this size in operation.
> Ex. J. Aff. of James Knox at ¶ 12.

The Sierra Club distorts Ms. Winborn's deposition testimony in a failed effort to find evidence that screening values were available for the estimated 4000 components described in the application. Sierra Club asserts Ms. Winborn admitted that she did not use the "preferred method" and that she did not attempt to obtain actual emission test data from vendors. Sierra Club Motion at 39, citing Winborn deposition at 105. In a series of questions over a few pages of deposition testimony, Ms. Winborn explained using screening values was not feasible:

> Q. Okay. Now, did Medicine Bow, in its application, obtain or attempt to obtain more specific or better data?
>
> A. No. I don't think it's very possible to do that.
>
> Q. Did they attempt—did Medicine Bow attempt to obtain vendor data?
>
> A. No. Again, I think that would be very difficult to obtain.
>
> …
>
> Q. Do you know if specific data on at least some of the Medicine Bow components is available?
>
> A. What do you mean?
>
> Q. Specific data as to their emission values that could be plugged into a correlation equation approach.

A. I don't think such data exists that could be put into a correlation equation approach.

Sierra Club Ex. 16, Winborn Deposition at 104-107.

Far from admitting any lack of diligence, as alleged by Sierra Club, Ms. Winborn stated affirmatively that the necessary data is not available for a correlation equation. The Sierra Club has no evidence that it was feasible to use a different methodology to calculate the emission factors or any testimony or legal support that MBFP was required to use a different approach.

Sierra Club also criticizes WDEQ and MBFP for selecting SOCMI factors, as opposed to some other category of emission factors. Sierra Club makes this assertion without any evidence and despite the fact the WDEQ has concluded the MBFP facility is a SOCMI facility. Ex. F at Condition 38; Sierra Club Ex. 16, Winborn Deposition at 95: 8-13. The rationale for selecting SOCMI factors, as opposed to refinery factors, is set forth in the application, WDEQ Ex. 15 at 3.2.6.3. The Sierra Club has nothing to demonstrate this was error. With nothing to rely on, Sierra Club attacks the WDEQ engineer for not being a student of EPA approved permitting factors, despite the fact his testimony displayed more than adequate knowledge to use the EPA factors. Sierra Club Ex. 1, Keyfauver Deposition at 72-74. Ironically, without any evidence to support their position, Sierra Club seems to be asserting WDEQ should be choosing different permitting tools than those approved by EPA. The 1995 factors utilized by WDEQ and MBFP remain in effect. Ex G1 at 15-16.

Finally, Sierra Club alleges without any support that HAPs from the flares are not included in the PTE. In accordance with WDEQ's determination of what must be included in the PTE, discussed earlier in this memorandum, all emissions from the flares are provided in the Application. The flares will be designed to operate at 98% efficiency. Ex J. Aff. of James Knox at ¶ 10.

The Sierra Club argues without legal authority or evidence that WDEQ should have required MBFP to use a different method for calculating the fugitive emissions from equipment leaks. Nowhere do they provide any evidence that the calculations are incorrect. In short, Sierra Club has no evidence the emissions calculations for methanol or VOCs are incorrect. Without evidence, the Sierra Club cannot sustain a Motion for Summary Judgment.

2. WDEQ Properly Concluded LDAR is BACT for Fugitive Emissions from Equipment Leaks

The Sierra Club, without any evidence to support their claim, attempts to find fault with the WDEQ's conclusion that a structured leak detection and repair program (LDAR) represents BACT for fugitive emissions from equipment leaks. Specifically, Sierra Club does not seem to be suggesting that LDAR was the wrong choice, but that WDEQ erred in not requiring consideration of other options. MBFP, in its Application, identified LDAR as the only option for BACT:

> The only available control technology for comprehensively addressing equipment leak fugitive emissions is a structured Leak Detection and Repair 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.
> WDEQ Ex. 15 at 4-27.

The WDEQ, after requesting additional information from MBFP over the course of the application review, accepted LDAR as BACT, requiring leak detection levels at 500 ppm for valves and connectors and 2000 ppm for pumps, with additional reporting requirements. Decision Document at IV.5 and II.14. The Permit requires the following:

> Medicine Bow Fuel & Power, LLC shall utilize a LDAR program in accordance with 40 CFR part 60, subpart VVa. Monitoring under the LDAR program shall be conducted a minimum of every six (6) months. Records of monitoring shall be conducted a minimum of every six (6) months. Records of monitoring and repair measures shall be kept for a period of at least 5 years and shall be made available to the Division upon request.
> Ex. F at Condition 21.

The Sierra Club asserts the WDEQ analysis is flawed and the agency should have considered three additional options for BACT including leakless components and variations on the selected LDAR programs, including one detecting leaks at lower levels than the 500 ppm/2000ppm levels. Sierra Club Motion at 46. The Sierra Club has manufactured these options and has no evidence to justify them as BACT options for the facility. The only citation for these BACT options is to a Model Rule for equipment leaks from Mid-America Regional Air Management Association (MARAMA). No expert testimony or testimony from any source is provided, making the citation to MARAMA's model rule meaningless hearsay.

Sierra Club cites the deposition testimony of Mr. Keyfauver and Ms. Winborn as admitting some sort of failure on the part of the WDEQ for not considering leakless valves as a BACT option. The deposition testimony and other evidence in the record do

not support the claims. Mr. Keyfauver explained a shortened BACT analysis was justified in choosing LDAR:

> Q. Okay. Did you conduct or review a BACT analysis for the fugitive component leaks?
>
> A. Yes.
>
> Q. Okay. Did you conduct a top-down analysis?
>
> A. That was the modified analysis. Because it's difficult to do a top-down BACT analysis for fugitive emissions.
>
> Q. Why is that?
>
> A. Because there is typically only one control strategy for fugitive emissions, as I understand, for VOC, VOC HAP emissions.
>
> Q. And what is that control strategy?
>
> A. An LDAR program.
>
> Sierra Club Ex. 1, Keyfauver Deposition at 74:16-25; 75:1-3.

Similarly, during the course of Sierra Club's detailed questioning of Ms. Winborn, she explained the technical obstacles to considering leakless valves as BACT. Sierra Club Ex. 16, Winborn Deposition at 120-125. In her expert report, she cited EPA's analysis of the technical limitations to selecting leakless valves for controlling fugitive emissions in the agency's development of New Source Performance Standards (NSPS) for SOCMI facilities, 40 C.F.R. subpart 60 VVa:

> We also considered an equipment standard requiring installation of "leakless" equipment. "Leakless" equipment, such as diaphragm valves, is less likely to leak than standard equipment, but leaks may still develop. Therefore, monitoring or other type of observation is appropriate to ensure that leaks are caught if they develop. In addition, these types of equipment may not be suitable for all process operating temperatures, pressures, and

> fluid types. We could not identify any new "leakless" technologies that could be applied in all applications. Therefore, requiring "leakless" equipment is not technically feasible and this option was not considered to be BDT for SOCMI or petroleum refining sources.
> Ex. G1 at 20-21 quoting 72 Fed. Reg. 64864.

Sierra Club has no evidence that leakless valves were a viable control option for the Facility, required to be considered in a top-down BACT analysis. Even if leakless valves should have made the BACT list, Sierra Club still has no evidence they would have qualified as BACT. Their expert conceded he did not do a BACT analysis for fugitive emissions from equipment leaks for the facility; nor, did he conduct any independent research in EPA's RACT/BACT/LAER Clearinghouse to determine whether any other viable control options existed. Ex. N, Sahu Deposition at 93:5-25; 94:1-3.

The Sierra Club relies on irrelevant arguments challenging WDEQ's process for determining BACT, rather than producing any evidence the ultimate selection was incorrect. Sierra Club attacks the WDEQ for "rubber-stamping" the selection, suggesting the agency has produced a "sham" permit. The record does not support the Sierra Club's diatribe against the WDEQ and by extension, MBFP.

First, the Sierra Club is well aware MBFP first proposed a more relaxed LDAR program with leak detection limits of 10,000 ppm. WDEQ questioned these limits and MBFP proposed 500ppm/2000ppm as the leak detection limits. WDEQ Ex. 15 at 4-27; Sierra Club Ex. 1, Keyfauver Deposition at 75-76. These levels were proposed in the Draft Permit and submitted for public comment. Commenters suggested the leak detection limits should be lowered further. In response, WDEQ requested additional information from MBFP to determine if lower limits were feasible. MBFP provided its

response on September 30, 2008, citing information from EPA that lower leak detection limits resulted in more, not fewer, emissions of VOCs and HAPs. Ex. K. WDEQ accepted this information, but in the final permit, not only imposed the LDAR program required of SOCMI facilities in subpart VVa, but unlike the NSPS, requires mandatory reporting every six (6) months. Ex. D at II. 14.

Finally, the Sierra Club asserts the selection of BACT as LDAR must be defective because it is the same as the NSPS and NESHAP standards for SOCMI facilities. The Sierra Club erroneously claims the NSPS and NESHAP may never represent BACT. While it is true the NSPS and NESHAP are generally the floor or starting point for BACT, those standards can represent BACT when newly promulgated. In other words, they generally represent the most recent review of available, reasonable control technologies as of the date of their adoption. In this instance the SOCMI, subpart VVa, was adopted as a final rule on November 16, 2007 and is applicable to sources which commenced construction after November 7, 2006. *72 Fed. Reg.* 64860. As Ms. Winborn testified, at the time of the application submission and review, very little time had elapsed since the adoption of SOCMI leak detection and repair standards and therefore, it was appropriate to select them as BACT. Sierra Club Ex. 16, Winborn Deposition at 128. Mr. Keyfauver also emphasized in his testimony that not only does subpart VVa represent the NSPS, but also the NESHAP which, unlike BACT, is adopted without reference to cost, giving more credence to the WDEQ's BACT decision. Sierra Club Ex. 1, Keyfauver Deposition at 66, 76.

E. MBFP Properly Modeled for Fugitive Particulate Matter Emissions to demonstrate compliance with the NAAQS. Sierra Club has no Evidence to Support its Argument to the Contrary

Sierra Club argues that MBFP failed to conduct short-term modeling of model fugitive particulate matter (PM) emissions and in so doing it cites case law that is not on point and fails to inform the Council that the MBFP conducted fugitive PM_{10} emission modeling in accordance with WDEQ's requirements. Sierra Club also fails to advise the Council that, in doing its modeling, MBFP demonstrated to the WDEQ that MBFP would not cause or contribute to a NAAQS or a WASQS violation.

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

Sierra Club has no evidence that MBFP's fugitive PM_{10} emission modeling in any way failed to demonstrate its compliance with NAAQS and WASQS. Its own expert did not do any dispersion modeling in connection with his opinions in this case or any modeling for fugitive PM emissions. R. Sahu Depo. at 101:11-14; 20-25; and at 102:1.

The cases cited by Sierra Club are inapposite to the facts of this case and thus they offer no support for its argument. For example, unlike here, *In re Masonite Corp., supra,* involved a failure to consider fugitive emissions in calculating the net emissions increase of PM_{10} attributable to a major modification. The case simply has no bearing on WDEQ's analysis for the MBFP Permit. Similarly, the case, *In re Northern Michigan*

University, also cited by Sierra Club, is irrelevant here. The case does not discuss modeling of fugitive emissions. Rather, it remanded a decision to the Michigan Department of Environmental Quality for failure to properly document its rationale for modeling emissions from a coal-fired boiler. It does not appear to discuss the question of fugitive emissions.

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

V. CONCLUSION

The Sierra Club's Motion for Summary Judgment is lacking in any evidence or law to support a finding in its favor on any of its claims. The evidence in the record refutes the baseless arguments contained in the Sierra Club's Motion. Indeed the evidence, when viewed in light of Sierra Club's obligation to meet the burden of persuasion in this matter, supports in favor of granting Respondents' Motions for Summary Judgment on all claims.

DATED this 30th day of November 2009.

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CERTIFICATE OF SERVICE

I, Mary A. Throne, hereby certify that on this 30th day of November 2009 a true and correct copy of the foregoing **MEDICINE BOW FUEL & POWER'S RESPONSE IN OPPOSITION TO SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT** was served by regular mail and electronic mail to:

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