BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

ORDER DENYING PETITIONER'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO CLAIMS I AND V

THIS MATTER came before the Environmental Quality Council on September 1, 2009, for oral argument on the motion of the Petitioner Sierra Club for judgment on the pleadings as to Claims I and V.

Council members present at the hearing included Presiding Officer F. David Searle, Dr. Fred Ogden and Mr. John Morris. Council members participating remotely by telephone and/or video included Mssrs. Dennis Boal, Tim Flitner, Tom Coverdale and Ms. Cathy Guschewsky.

Petitioner appeared via telephone and was represented by Ms. Andrea Issod. The Department of Environmental Quality appeared and was represented by Ms. Nancy Vehr, Senior Assistant Attorney General. The Permittee appeared and was represented by Ms. Mary Throne and Mr. John Coppede.

The Council, having considered the motion, the memoranda in support of and opposition to it, and having heard argument and deliberating upon the motion, makes the following findings and decision upon the motion.

I. JURISDICTION

The Environmental Quality Council is empowered to act as the hearing examiner for the Department of Environmental Quality and determine all cases arising under laws, rules, regulations, standards or orders issued or administered by that department, pursuant to WYO. STAT. ANN. § 35-11-112(a). It is further empowered, under WYO. STAT. ANN. § 35-11-112(a)(iv), to conduct hearings in any case contesting the grant, suspension of, or denial of a permit of the type at issue in this matter. Petitioner has contested the Department's issuance of construction permit CT-5873 and requested a hearing before the Council. Accordingly, the Council has jurisdiction to hear and decide this motion.

II. STATEMENT OF THE CASE

Under the Wyoming Environmental Quality Act and pertinent regulations, an air quality construction permit is required before any person may commence construction of any new facility which may cause the issuance of air pollution in excess of applicable standards. On December 31, 2006, the Permittee applied for such a permit to construct an underground coal mine and an industrial gasification and liquefaction plant to produce transportation fuels and other products ("Medicine Bow IGL Plant" or "the facility").

Following technical review, the Department issued a construction permit on March 4, 2009. Among the provisions of the permit were those pertaining to emission of sulfur dioxide (SO_2) and challenged by Petitioner in its Claim I, and those pertaining to emission of fugitive particulate matter (PM) emissions, challenged by Petitioner in its Claim V.

Petitioner participated in the permitting process and objected to the permit's issuance. On May 4, 2009 it filed a protest and petition for hearing on its objections, which were divided into eight subcategories. At Claim I, Petitioner asserted that the Department failed to consider significant sulfur dioxide emission from the facility's flares in determining its potential to emit and also failed to apply "BACT" (Best Available Control Technology) to flares. At Claim V, Petitioner asserted that the Department failed to model impacts of fugitive emission of particulate matter.

Both the Department and the Permittee filed "responses" to the protest and petition for hearing filed by Petitioner. In its June 3, 2009 response to Claims I and V, the Permittee denied that the Department failed to comply with applicable requirements pertaining to flare emissions of SO_2, that the Department did not apply BACT to all sources of SO_2 and that it failed to use the proper process in defining BACT for the facility's SO_2 sources. In its June 4, 2009 response, the Department generally denied the allegations of both Claims I and V.

On August 3, 2009, Petitioner moved for "partial judgment on the pleadings" with respect to Claims I and V, citing WYO. R. CIV. P. 12(c), supplying legal argument in support of its motion as well as a number of exhibits in support. On August 17, 2009, both the Department and the Permittee filed memoranda responding to Petitioner's motion. Hearing on the motion for judgment on the pleadings was set for September 1, 2009.

III. ISSUES AND CONTENTIONS

Petitioner contended that it was entitled to judgment on the pleadings as to Claims I and V in that two material facts were undisputed on the face of the pleadings, either of which was sufficient to void the facility's permit as a matter of law. The Permittee averred that a motion for judgment on the pleadings requires all factual issues to be undisputed, leaving only questions of law to be determined, and that Petitioner had failed to establish a basis for judgment as to either Claim I or Claim V. The Department averred that both it and the Permittee had denied material factual allegations of both Claims I and V, which precluded the Council from granting the Petitioner's motion.

IV. FINDINGS OF FACT

1. Material allegations contained in Claim I have been denied by either or both Respondents. For example, at Claim I, Petitioner avers:

> WYDEQ failed to define Medicine Bow as a major source of SO2 emissions. WYDEQ acknowledged it did not set emission limits for the flares. WYDEQ stated in its Response that emission limits would not be practically enforceable as these units "cannot be tested using traditional EPA reference methods to determined compliance with emission limits." This is incorrect. Exclusion of flaring emissions from the project's potential to emit is unlawful. The definition of "potential to emit" includes startups and malfunctions. It is the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 C.F.R. § 52.21(b)(4). The maximum capacity to emit includes a number of planned and unplanned emission events. Medicine Bow acknowledged the liquid coal plant will have a number of annual startups and malfunctions, itself estimated the associated SO2 emissions that will be emitted in these events, and acknowledged that it is a major source of SO2 emissions.

Protest and Petition for Hearing, ¶ 44 (May 4, 2009).

The Department's response to this allegation is: "Denied."

Department's Response to Appeal, ¶ 44 (June 4, 2009).

The Permittee's response to this allegation is:

> MBFP denies the allegations in paragraph 44 that WDEQ incorrectly evaluated The potential sulfur dioxide emissions from the Facility and that the Facility is a major source of sulfur dioxide for PSD purposes. WDEQ concluded that the sulfur dioxide emissions from the MBFP facility did not trigger the PSD significance threshold. MBFP denies that the Facility is a major source of sulfur dioxide emissions. MBFP denies the allegations in paragraph 44 that assert that WDEQ reached the wrong conclusion. MBFP further denies that WDEQ did not set emission limits for the flares. WDEQ included flare emissions from routine and maintenance operations in the PTE and emission limits for the flares are included in Table II of the final permit. (Decision Document at III.1).

Permittee's Response to Appeal, ¶ 44 (June 3, 2009).

2. Material allegations contained in Claim V have been denied by either or both

Respondents. For example, at Claim V, Petitioner avers:

> Neither WYDEQ nor the Applicant modeled impacts of fugitive dust emissions of particulate matter.

Protest and Petition for Hearing, ¶ 62 (May 4, 2009).

The Department's response is: "Denied."

Department's Response to Appeal, ¶ 62 (June 4, 2009).

The Permittee's response is:

> MBFP admits, consistent with WDEQ's longstanding policy and 1994 Memorandum of Agreement (MOA) with the EPA, it did not model the impacts of Fugitive emissions of particulate in short-term 24-hour modeling. Annual fugitive Particulate emissions, however, were modeled. To the extent paragraph 62 suggests the modeling required by WDEQ is inadequate, MBFP denies the allegations.

Permittee's Response to Appeal, ¶62 (June 3, 2009).

V. CONCLUSIONS OF LAW

3. A party is entitled to judgment on the pleadings only if the undisputed facts appearing on the face of the pleadings establish that the movant is entitled to judgment as a matter of law. *Johnson v. Griffin*, 922 P.2d 860 (Wyo. 1996).

4. Only if all material allegations of fact with respect to a particular claim have been resolved, leaving questions of law alone to be resolved, may a motion for judgment on the pleadings be properly entered. *Box L Corp. v. Teton County*, 2004 WY 75, ¶ 2, 92 P.3d 811, 813 (Wyo. 2004).

VI. APPLICATION OF PRINCIPLES OF LAW TO CLAIMS I AND V

5. Material allegations of fact are disputed by the parties with respect to both Claims I and V. Entry of judgment on the pleadings in favor of the Petitioner is not warranted at this time as issues of fact still exist to be resolved with respect to both Claims I and V. *Ecosystem Resources, L.C. v. Broadbent Land & Resources, L.L.C.*, 2007 WY 785, ¶ 8, 158 P.3d 685, 688 (Wyo. 2007).

ORDER

IT IS THEREFORE ORDERED that:

1. The Petitioner's motion for partial judgment on the pleadings as to Claims I and V should be and hereby is DENIED.

2. The contested case hearing on this matter remains set for the week of December 7th, 2009.

SO ORDERED this 22ND day of September, 2009.

F. David Searle

F. David Searle, Presiding Officer
Environmental Quality Council

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 22nd day of September, 2009, I served a copy of the foregoing **ORDER DENYING MOTION** by electronic mail to the following:

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