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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

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

**SIERRA CLUB'S CONSOLIDATED RESPONSE TO DEQ'S AND
MEDICINE BOW'S STATEMENTS OF FACT IN SUPPORT OF
MOTIONS FOR SUMMARY JUDGMENT**

FILED

Nov 30, 2009

**Jim Ruby, Executive Secretary
Environmental Quality Council**

Pursuant to W.R.Civ.P. 56.1, Sierra Club hereby submits the following consolidated response to the statements of fact offered by the Wyoming Department of Environmental Quality (“DEQ”) and Medicine Bow Fuel & Power, LLC (“Medicine Bow”):

**RESPONSE TO STATEMENTS OF FACT
RELEVANT TO PM_{2.5} CLAIM**

As Presented by DEQ

1. Regarding DEQ’s Statement of Fact 42; Petitioner do not dispute that SO₂ and NO_x are PM_{2.5} precursors.
2. Regarding DEQ’s Statement of Fact 43; Petitioner disputes that no BACT limit were set for the flares. *See* Sierra Club Motion for Summary Judgment at 20-32.
3. Regarding DEQ’s Statement of Fact 44; Petitioner disputes these facts because all the technical tools for evaluating PM_{2.5}, including measurement, monitoring and modeling tools, have been available throughout the permitting process. Sahu Aff., exhibit A, at ¶¶5, 6 , 8-10,17-18.
4. Regarding DEQ’s Statement of Fact 45; Petitioner cannot confirm or deny DEQ’s policy or dates of such policies.
5. Regarding DEQ’s Statement of Fact 46; Petitioner disputes these facts to the extent that PM_{2.5} emissions were not modeled and modeling of PM₁₀ was not compared to PM_{2.5} NAAQS, WAAQS, or PSD increments Sahu Aff., exhibit A, at ¶19.
6. Regarding DEQ’s Statement of Fact 47; Petitioner does not dispute.

7. Regarding DEQ's Statement of Fact 48; Petitioner does not dispute.

As Presented by Medicine Bow

8. Regarding Medicine Bow's Statement of Fact 68; Petitioner does not dispute that WDEQ did not require MBFP to evaluate PM_{2.5} emissions. Petitioner does not dispute that WDEQ used PM₁₀ as a surrogate, but claims that use of surrogate was improper, which is a question of law. Petitioner is not aware whether WDEQ has had an agency practice since 1997. Petitioner disputes that use of a surrogate is required as part of the SIP, which is a question of law, and disputes that rulemaking and use of surrogate are in flux at the federal level.

9. Regarding Medicine Bow's Statement of Fact 69; This is a question of law that Petitioner disputes.

10. Regarding Medicine Bow's Statement of Fact 70; Petitioner disputes that use of surrogate was reasonable, because DEQ did not perform a reasonableness analysis, Keyfauver Depo., exhibit 1 at 89:24-92:3. Petitioner also disputes these facts because Ms. Winborn's analysis is incorrect and inadequate and the Winborn Report is admissible evidence. Sahu Aff., exhibit A, at ¶¶11-13.

11. Regarding Medicine Bow's Statement of Fact 71; Petitioner disputes these facts because Ms. Winborn provides no support for her argument and work practices provide different degree of control for different size particles, and the Winborn Report is admissible evidence. Sahu Aff., exhibit A, at ¶15.

12. Regarding Medicine Bow's Statement of Fact 72; Petitioner disputes the mischaracterization of the *Trimble* case, which is a question of law. Petitioner does not dispute that one of the factors in assessing reasonableness is the degree to which emission controls for PM₁₀ also control PM_{2.5}. The Winborn Report is inadmissible evidence and the conclusions therein are inadequate and unsupported. Sahu Aff., exhibit A, at ¶11. Petitioner does not dispute the remaining facts.

13. Regarding Medicine Bow's Statement of Fact 73; Petitioner does not dispute that baghouses and electrostatic precipitation were considered for control, although Medicine Bow provides no citation to support their claim. The Winborn Report is inadmissible evidence and the conclusions therein are inadequate and unsupported. Sahu Aff., exhibit A, at ¶11.

14. Regarding Medicine Bow's Statement of Fact 74; Petitioner disputes these facts because PM₁₀ to PM_{2.5} emissions from fugitive particulate emissions sources will vary significantly depending on numerous factors such as wind velocity and surface friction factor, Ms. Winborn improperly estimates PM_{2.5} emissions and work practices provide different degree of control for different size particles, and the Winborn Report is admissible evidence. Sahu Aff., exhibit A, at ¶¶14-15.

15. Regarding Medicine Bow's Statement of Fact 75; Petitioner does not dispute that Permit Condition No. 47 requires application of water and chemical suppressants to all haul roads. Petitioner disputes the remaining facts, and Medicine Bow has failed to support them. Sahu Aff., exhibit A, at ¶¶14-15.

**RESPONSE TO STATEMENTS OF FACT
RELEVANT TO SO₂ CLAIM**

As Presented by DEQ

16. Regarding DEQ Statement of Fact 29: Sierra Club disputes to extent that PSD review did not include either BACT analyses for SO₂ flares. *See* Permit App., July 31, 2008 (AR 78); DEQ Application Analysis, June 19, 2008 (AR 506-582); US EPA Region 8 Comments to DEQ, Aug. 4, 2008 (AR1656-1661).

17. Regarding DEQ Statement of Fact 30: Sierra Club cannot confirm or deny because DEQ has not provided a pincite citation by which it can verify these statements. To the extent a response is required, Sierra Club denies.

18. Regarding DEQ Statement of Fact 31: Sierra Club cannot confirm DEQ's policy.

19. Regarding DEQ Statement of Fact 32: This is a question of law that Sierra Club disputes because EPA has repeatedly stated SSM events are to be considered in determining PSD applicability. US EPA Region 8 letter of comment to WYDEQ (AR 1656-67); Sierra Club's Motion for Summary Judgment at 23-28 (collecting sources including *In re Tallmadge*, 2003 WL 21500414 (E.A.B. 2003)).

20. Regarding DEQ Statement of Fact 33: Sierra Club cannot confirm or deny based on the broad record cites DEQ provides.

21. Regarding DEQ Statement of Fact 34: Sierra Club admits.

22. Regarding DEQ Statement of Fact 35: Sierra Club disputes because Permit CT-5873 limits emissions from each of the three turbines to 10.8 tpy (totaling 32.4 tpy) but does not limit the SO₂ from any other unit. Permit (AR 1412). The

emissions estimate on AR 1419 does not appear to be an enforceable emissions limit.

23. Regarding DEQ Statement of Fact 36: Sierra Club admits emissions from Cold Starts (including Initial) and malfunction events were excluded from the Facility's PTE but cannot confirm on what this exclusion was based on the broad record cites provided. Sierra Club disputes the propriety of excluding these events from PTE. Sierra Club Motion for Summary Judgment at 20-28; Sahu Aff., exhibit A, at ¶¶20-22.

24. Regarding DEQ Statement of Fact 37: Sierra Club cannot confirm DEQ's reasoning for their failure to address malfunctions in permitting. Sierra Club disputes that Chapter 1, Section 5 of WAQSR provides a valid basis for excluding malfunctions, which is a question of law Sierra Club Motion for Summary Judgment at 20-28; Sahu Aff., exhibit A, at ¶¶20-22.

25. Regarding DEQ Statement of Fact 38: Sierra Club admits.

26. Regarding DEQ Statement of Fact 39: Sierra Club disputes that the SSEM plan is BACT. Sierra Club Motion for Summary Judgment at 28-32; Sahu Aff., exhibit A, at ¶22.

27. Regarding DEQ Statement of Fact 40: Sierra Club admits DEQ did not establish flare SO₂ emissions limits, but disputes remainder because EPA suggested reference methods of monitoring compliance, including hour limitations. US EPA Region 8 Comment to DEQ, Aug. 4, 2008 (AR 1660-61). Sahu Aff., exhibit A, at ¶22; *see also* Sahu Aff., exhibit A, at ¶22.

28. Regarding DEQ Statement of Fact 41: Sierra Club admits.

As Presented by Medicine Bow

29. Regarding MB Statement of Fact 23: Sierra Club admits DEQ's calculation of the Facility's Potential To Emit (PTE) for SO₂ is 36.6 tons per year (tpy) and that PSD regulations establish a threshold of 40 tpy of SO₂ emissions to trigger BACT review as a major source, although Medicine Bow provides no citations. Sierra Club disputes that PTE must include cold starts and malfunctions, which is a question of law, or in the alternative, a triable issue. Sierra Club Motion for Summary Judgment at 20-28; Sahu Aff., exhibit A, at ¶¶20-22.

30. Regarding MB Statement of Fact 24-26: Sierra Club admits, although Medicine Bow does not provide any citations.

31. Regarding MB Statement of Fact 27: Although Medicine Bow provides no citations, Sierra Club admits that the application separated the SO₂ emissions estimates into the three categories, but Sierra Club disputes Medicine Bow's definition of normal. Sahu Aff., exhibit A, at ¶¶20-22. Sierra Club disputes that combustion turbines are the primary source of SO₂ because the flares will emit significantly more tons per year of SO₂. Medicine Bow Resp. 41-42; DEQ Application Analysis, page 8, Table Va (AR 513); Medicine Bow PSD Permit Application at page 3-7 (AR 78-52). Sierra Club admits MBFP expects cold starts to occur every three to four years.

32. Regarding MB Statement of Fact 28: Sierra Club does not dispute the definition of a cold start or the estimate of SO₂ in the initial cold start year. Sierra Club cannot confirm or deny that there will be reduced emissions from cold starts after the initial year because Medicine Bow has not provided any citation to support this statement.

33. Regarding MB Statement of Fact 29: Sierra Club admits DEQ omitted cold starts from the PTE, and that the initial PTE for SO₂ was 32.9 tpy, although Medicine Bow did not provide any pinpoint citations. Sierra Club disputes the meaning of “normal operations” and “normal operating conditions.” Sierra Club Motion for Summary Judgment at 20-28; Sahu Aff., exhibit A, at ¶¶20-22.

34. Regarding MB Statement of Fact 30: Sierra Club admits WDEQ requested additional information from Medicine Bow on SO₂, although Medicine Bow has not provided any citation.

35. Regarding MB Statement of Fact 31: Sierra Club does not dispute that Medicine Bow provided information on October 14, 2008, although there is no citation. There is no citation for the remaining facts and Sierra Club cannot confirm or deny.

36. Regarding MB Statement of Fact 32: Sierra Club admits WDEQ made these comments but disputes their legality. The comments speak for themselves and Sierra Club disputes Medicine Bow’s characterization.

37. Regarding MB Statement of Fact 33-35: Medicine Bow’s Statement of Facts numbered 33-35 assert legal or immaterial issues to which Sierra Club need

not respond. Sierra Club nonetheless disputes in 35 that the DEQ's interpretation of PTE is entitled to deference because *Printher* did not involved the same *de novo* review. *See* Sierra Club's Response to Summary Judgment. To the extent a further response is deemed required, Sierra Club disputes.

38. Regarding MB Statement of Fact 36: Sierra Club need not respond to sentences one and two because they do not assert material facts, but to the extent a response is required, Sierra Club denies the first sentence because it is a separate violation of law. *In re Masonite*, 5 E.A.D. 551 at *15-16 (E.A.B. 1994). Sierra Club admits sentence three. Sierra Club admits sentence four to the extent that the permit imposes a work practice standard on the emissions from the flares through the SSEM Plan but disputes that this is an enforceable requirement of the permit and disputes that it is consistent with the definition of BACT, which is a question of law for the Council. Sierra Club Motion for Summary Judgment at 28-32; Sahu Aff., exhibit A, at ¶¶20-22.

39. Regarding MB Statement of Fact 37: Medicine Bow's Statement of Fact 37 asserts immaterial and legal issues to which Sierra Club need not respond. To the extent a response is deemed required, Sierra Club disputes. Sierra Club Motion for Summary Judgment at 20-28; Sahu Aff., exhibit A, at ¶22.

40. Regarding MB Statement of Fact 38: Medicine Bow's Statement of Fact asserts issues of law to which Sierra Club need not respond. It also contains a reference to Ms. Winborn's report, which is inadmissible evidence. Sahu Aff., exhibit A, at ¶22.

41. Regarding MB Statement of Fact 39: Sierra Club admits to the extent that the statement quotes the Decision Document but disputes that the record demonstrates that a work practice standard is the only rational choice for the flares, and disputes that the record contains an infeasibility determination, and Medicine Bow has not supported this statement by pinpoint citation to the specific portions of the record in violation of W.R.Civ.P. 56.1. Sahu Aff., exhibit A, at ¶22.

42. Regarding MB Statement of Fact 40-41: Sierra Club admits these requirements, but does not admit these requirements make the SSEM plan BACT. Sierra Club Motion for Summary Judgment at 28-32; Sahu Aff., exhibit A, at ¶¶20-22.

43. Regarding MB Statement of Fact 42: Sierra Club disputes as a legal and factual matter. Sierra Club Motion for Summary Judgment at 20-28; Sahu Aff., exhibit A, at ¶¶20-32.

RESPONSE TO STATEMENTS OF FACT RELEVANT TO HAZARDOUS AIR POLLUTANT CLAIMS

44. Regarding DEQ Statement of Fact 50, Sierra Club disputes to the extent DEQ offers it to imply that sufficient information was provided to enable either DEQ or the public to verify estimated equipment counts. *See* Keyfauver Depo., exhibit. 1, at 62:15-22; Sahu Aff., exhibit A, at ¶ 24.

45. Similarly, regarding Medicine Bow Statement of Fact 43, first, the claim that WDEQ “implemented terms in the Permit” makes no sense. Second,

Sierra Club disputes that there is ample support in the record that Medicine Bow

supplied the necessary information. For the same reason, Sierra Club denies Medicine Bow Statement of Facts 48 and 49. Sahu Aff., exhibit A, at ¶¶24-26.

46. Sierra Club objects to the citation in Medicine Bow Statement of Facts 49, 53, 58, 59, 61, 62, and 63, to the expert report of Katrina Winborn, as that report constitutes unexamined hearsay that may not be admitted into evidence.

47. Regarding Medicine Bow's Statement of Fact 44, the authority provided for the "primary source" claim provides no support for the statement; Sierra Club accordingly disputes.

48. Regarding DEQ Statement of Fact 52, the statement is over-broad for failure to specify *which* emission factors DEQ asserts *may* be used for *what* purpose. Sierra Club disputes that DEQ properly approved of Medicine Bow's use of the emission factors that Medicine Bow utilized in its PTE calculation, and so disputes statement 52 to the extent it is offered in support of that approval. DEQ cites as authority an EPA Advanced Notice of Proposed Rulemaking (ANPRM) that discusses the "appropriateness of using emission factors" for activities, including permitting, for which the factors were not developed, 74 Fed. Reg. 52723. The ANPRM proceeds to outline plans to "develop a process that, at the end of the emissions factors development, will result in high quality emissions factors," *Id.* 52725, i.e. "one that is more objective (more science based) and designed to reduce the variability associated with manual emissions factor development." The cited authority thus strongly conflicts with DEQ's statement. *See also* Sahu Aff., exhibit A, at ¶¶20-22. 25-26.

49. Regarding DEQ Statement of Fact 53, Sierra Club disputes to the extent that DEQ fails to specify in this purported fact to which portion of 40 C.F.R. Part 60 it refers, to which requirement within that regulation the facility is purportedly “subject,” and for what purpose. Sierra Club also disputes to the extent this statement is offered in support of DEQ’s conclusion that Medicine Bow properly calculated PTE for VOCs and HAPs by using SOCFMI average emission factors. *See Sahu Aff.*, exhibit A, at ¶¶ 25-26.

50. Regarding DEQ Statement of Fact 54, Sierra Club disputes that the issue – whether, or not, the particular emission factors utilized by Medicine Bow are widely used – is a material fact. The question is whether their use in Medicine Bow’s PTE estimates for VOC and HAP emissions was appropriate. Sierra Club disputes that Medicine Bow provided sufficient information to enable either DEQ or the public to verify that the emission factors utilized in the PTE analyses were appropriate. Further, DEQ failed to provide the required pinpoint cites within a 403-page EPA Guidance document to which it cites as purported support. In fact, the EPA document upon which DEQ relies for support in fact provides information that undermines the use to which Medicine Bow put its selected emission factors. DEQ Ex. 49, comparing Tables 2-1 with Table 2-5; *Sahu Aff.*, exhibit A, at ¶¶ 24-26.

51. Regarding DEQ Statement of Fact 55, Sierra Club disputes that the described process will result in “actual verification” of leak emissions. Further, to the extent the statement is offered for the purpose, Sierra Club disputes that the annual exercise is relevant to or constitutes an appropriate substitute for the con-

struction of accurate PTE calculations that must be undertaken as a condition of receiving a PSD preconstruction permit. Sierra Club also disputes that Medicine Bow's LDAR program – with its selected leak detection rates – is BACT. Sahu Aff., exhibit A, at ¶¶ 26, 29, 33.

For the same reason, Sierra Club disputes that Medicine Bow Statement of Fact 53 constitutes a material fact.

52. Regarding DEQ Statement of Fact 56, Sierra Club disputes this statement in light of DEQ's failure to provide pinpoint citations to "NSPS" and "NESHAP" sections that DEQ asserts are "consistent" with Medicine Bow's selected leak definitions. In addition, Sierra Club disputes that this statement is relevant to any material fact in this matter since new source performance standards constitute only the floor for BACT analysis, and not the ceiling. Therefore, any purported consistency of selected leak definitions with NSPS and NESHAP standards provides no evidence that the definitions comprise (part of) BACT or MACT for the facility. Sahu Aff., exhibit A, at ¶ 33.

53. Relatedly, Medicine Bow Statement of Fact 46 implies that DEQ required it to base its fugitive VOC leak estimates on 500ppm for valves and 2000ppm for pumps. No pinpoint record citation is provided for this assertion and Sierra Club denies the assertion and its implication that DEQ's requirement barred Medicine Bow from adopting more stringent detection levels as part of its duty to employ BACT.

54. Regarding Medicine Bow Statement of Fact 54, Sierra Club disputes that this constitutes anything but an unsound argument, and does not even attempt to offer an undisputed factual statement.

55. Regarding DEQ Statement of Fact 57, Sierra Club disputes that the statement supports any material fact in this matter for two reasons. First, the described annual exercise is not relevant to the legitimacy of DEQ's approval of Medicine Bow's construction of PTE calculations that must be undertaken accurately prior to receipt of a PSD preconstruction permit. Second, Sierra Club disputes that the "application methodology" is the appropriate one. Sahu Aff., exhibit A, at ¶32.

56. Regarding DEQ Statement of Fact 58, Sierra Club disputes in part. Sierra Club agrees that a well-designed and implemented LDAR program with appropriate leak detection definitions can assist in controlling emissions. Sierra Club disputes to the extent DEQ's statement implies or is advanced for the proposition that Medicine Bow's proposed LDAR is BACT. Sierra Club also disputes that DEQ's cited authority provides support for DEQ's acceptance of Medicine Bow's proposed LDAR program as BACT for fugitive VOC/HAP leaks. In particular, the cited authority describes a development process for SOCFI VOC leak performance standards that is markedly differs from the BACT analysis that was required of DEQ and Medicine Bow, but not undertaken. 72 Fed. Reg. 64860, 64864.

57. Regarding DEQ Statement of Fact 59, Sierra Club disputes because the cited authority provides no support for the statement and because the state-

ment in so ambiguous as to provide no support for any material fact at issue in this matter.

58. Regarding DEQ Statement of Fact 60, Sierra Club disputes that the statement supports any material fact in this matter. Medicine Bow’s “identification” was not the result of a proper top-down BACT analysis and provides no support for DEQ’s subsequent approval of Medicine Bow’s LDAR program as “representative” of BACT. DEQ Ex. 11 at 000525.

59. Similarly, Sierra Club disputes Medicine Bow Statement of Facts 58 and 59, both because Medicine Bow failed to consider leakless components as part of its BACT analysis and because it failed to consider a range of LDAR programs including ones significantly more stringent than the one it offered. Sahu Aff., exhibit A, at ¶¶ 33-34.

60. Similarly, Sierra Club disputes Medicine Bow Statement of Fact 61 as it reports, purportedly as an undisputed fact, a *non-sequiter* argument in support of Medicine Bow’s rejection of any LDAR program, as BACT, that is more stringent than DEQ required it to utilize.

61. Similarly, Sierra Club disputes Medicine Bow Statement of Fact 62 as it relies on a *non-sequiter* featured in an inadmissible report Medicine Bow offered from Ms. Winborn. That argument, that because leakless components may not be available for all applications their use in some applications cannot be BACT, defies understanding.

62. Regarding Medicine Bow Statement of Fact 63, Sierra Club disputes on the ground that this constitutes a wholly conclusory and unsound argument.

63. Regarding DEQ Statement of Facts 61-62, Sierra Club disputes to the extent the statements are offered to support DEQ's contention that the selected thresholds and monitoring frequencies are BACT for fugitive VOC/HAP emissions for the facility. Sahu Aff., exhibit A, at ¶¶ 33-35

64. Regarding DEQ Statement of Fact 63, Sierra Club disputes in part if, by this statement, DEQ means to support an assertion that Medicine Bow provided adequate information to enable DEQ and the public to verify the fugitive component emissions calculations. Sahu Aff., exhibit A, at ¶¶ 24-26.

65. Regarding DEQ Statement of Fact 65, Sierra Club disputes that the statement constitutes or provides support for any material fact at issue in the matter because the fact that the detection level was lowered to 500ppm from 2000 ppm does not make the selected LDAR and its detection definitions BACT or MACT. Sahu Aff., exhibit A, at ¶¶ 29, 33-35.

66. Regarding DEQ Statement of Fact 66, Sierra Club disputes the statement because it is inaccurate (total HAPs emissions exceed 10TPY), because unjustified assumptions continued to underlie Medicine Bow's PTE calculation for HAPs subsequent to the redesign, and because DEQ fails to include pinpoint citations to its denoted authorities for this statement.

67. Regarding DEQ Statement of Fact 67, Sierra Club disputes in part. Sierra Club accepts the statement to the extent it admits that Medicine Bow failed

to perform adequate VOC or HAP PTE calculations. But Sierra Club disputes to the extent the statement means to convey that *Sierra Club's* expert performed no VOC or HAP emission calculations. As to that, Sierra Club disputes both on the ground of impossibility (given that inadequate information was provided that rendered it impossible to verify the appropriateness of Medicine Bow's selected emission factors) and also as to materiality – given that it was DEQ's burden, at minimum, to ensure the accuracy of Medicine PTE calculation for fugitive VOC and HAP emissions. Sahu Aff., exhibit A, at ¶ 24.

RESPONSE TO STATEMENTS OF FACT RELEVANT TO FUGITIVE EMISSION CLAIM

As Presented by DEQ

68. Regarding DEQ Statement of Fact 68, Sierra Club responds that DEQ asserts a non-material fact using an ambiguous term, “uncertainties,” and thus does not require a response. Moreover, it relies on an opinion expressed in James Nall's affidavit that is offered without factual support. Finally, DEQ's exhibit 39 at page 14, contains no mention of short term emission modeling as suggested by DEQ and therefore does not support this statement of fact. To the extent that a response is required, Sierra Club disputes

69. Regarding DEQ Statement of Fact 69, Sierra Club disputes there is an established statewide policy to not use short term fugitive particulate modeling.

See Memorandum of Agreement on Procedures for Protecting PM₁₀ NAAQS in the

Powder River Basin 2 (AR 3571) (restricting the application of the Memorandum to the Powder River Basin); *see also* *See* Dry Fork Generating Station, Gillette, Wyoming, Basin Electric Power Cooperative. DEIS prepared in August 2007 (PM₁₀ modeling on page 4-26), *available at* http://www.usda.gov/rus/water/ees/pdf/Basin_DF_DEIS/Basin%20Dry%20Fork%20DEIS%20Ch4-7%200907.pdf (describing the 24 hour PM₁₀ impact including fugitive emissions).

70. Regarding DEQ Statement of Fact 70, Sierra Club admits that Medicine Bow modeled for annual, but not 24-hour fugitive PM emissions. Sierra Club disputes that the non-pinpoint citation to exhibits 11 and 25 "demonstrate [] the Facility would comply with the annual PM₁₀ WAAQS and NAAQS."

As Presented by Medicine Bow

71. Regarding MB Statement of Fact 64, Sierra Club disputes that Claim V alleges DEQ failed to require *all* modeling of particulate matter, because Claim V, in fact, alleges that DEQ failed to require short term (24 hour) modeling of particulate matter. *See* Sierra Club Motion for Summary Judgment 47-8 (alleging DEQ failed to require short term (24-hour) modeling of particulate fugitives). In addition, Sierra Club disputes that the DEQ's permitting analysis is consistent with other permitting decisions. *See* Dry Fork Generating Station, Gillette, Wyoming, Basin Electric Power Cooperative. DEIS prepared in August 2007 (PM₁₀ modeling

on page 4-26), *available at*

http://www.usda.gov/rus/water/ees/pdf/Basin_DF_DEIS/Basin%20Dry%20Fork%20DEIS%20Ch4-7%200907.pdf (describing the 24 hour PM₁₀ impact including fugitive emissions)¹

72. Sierra Club admits DEQ did not require inclusion of fugitive emissions in the modeling to demonstrate compliance with the short term standard for particulate matter. DEQ Decision Document, March 4, 2009 at 14 (AR 43).

¹ Other permitting authorities that have included 24 hour PM fugitive modeling in their analysis. *See* Highwood Generating Station, Great Falls, Montana¹, Southern Montana Electric Cooperative Inc. Final EIS prepared in January 2007, *available at* http://www.deq.mt.gov/eis/HighwoodGeneratingStation/VolI/H%20-%20FEIS%20Vol.%20I%20-%20Chapter%204_Environmental%20Consequences.pdf; Ely Energy Center, Ely, Nevada. Sierra Pacific Resources. Appendix 9 – Air Quality Impact Analysis prepared in October 2007, *available at* <http://ndep.nv.gov/bapc/download/ely/A9.pdf>; White Pine Energy Station, Ely, Nevada. White Pine Energy Associates/LS Power. Appendix 8 – Environmental Evaluation and Dispersion Modeling Files prepared in December 2006, *available at* <http://ndep.nv.gov/bapc/download/ls/app8.pdf>; Plant Washington, Sandersville, Georgia Power4Georgia, LLC. PSD Permit Application prepared in January 2008. *available at* <http://www.air.dnr.state.ga.us/airpermit/downloads/permits/psd/dockets/plantwashington/facilitydocs/30300051app.pdf>; Longleaf Energy Station, Hilton, Georgia. LS Power. PSD Permit Application prepared in November 2004, *available at* http://www.air.dnr.state.ga.us/airpermit/downloads/permits/psd/dockets/longleaf/facilitydocs/Longleaf_PSD_Applic.pdf; Hyperion Energy Center, Union County, South Dakota. Hyperion Refining LLC. PSD Permit Application prepared in December 2007, *available at* http://www.hyperionec.com/files/HEC_SD_PSD_App.pdf; Kentucky NewGas, Central City, Kentucky. Kentucky SynGas, LLC. Air Permit Application – Volume 2 Air Modeling Report prepared in December 2008; Advanced Supercritical Pulverized Coal (ASCPC) Project, Essexville, Michigan. Consumers Energy. PSD Permit Application – Section 6 Ambient Impact Analysis. prepared in October 2007, *available at* <http://www.deq.state.mi.us/aps/downloads/permits/CFPP/2007/341-07/Section%206%20-%20Ambient%20Impact%20Analysis.pdf>; Virginia City Hybrid Energy Center, Wise County, Virginia. Virginia Dominion Power. PSD Permit Application Volume II Class II Air Quality Modeling. Prepared in February 2007 and updated in August 2007 (including fugitive particulate matter emissions using a 24 hour standard in the modeling analysis).

73. Regarding MB Statement of Fact 65, Sierra Club disputes that the Memorandum is valid. *See* Memorandum of Agreement on Procedures for Protecting PM₁₀ NAAQS in the Powder River Basin 2 (AR 3571) (restricting the application of the Memorandum to the Powder River Basin). Sierra Club admits that DEQ relied on the Memorandum of Agreement in failing to include short term modeling of particulate matter in its permitting analysis.

74. Regarding MB Statement of Fact 66, Sierra Club disputes §234 (Simpson Amendment) is applicable in the present case. *See* Section 234 of the Clean Air Act (restricting section's application to the three years following its enactment).

75. Regarding MB Statement of Fact 67, Sierra Club disputes that there is no expert testimony to support this claim. Initial Expert Report of Ranajit Sahu 25 (describing experience with inclusion of fugitive particulates as part of modeling). Furthermore, Sierra Club disputes that the only support for Claim V is R. Sahu's testimony. *See* Dry Fork Generating Station, Gillette, Wyoming, Basin Electric Power Cooperative. DEIS prepared in August 2007 (PM₁₀ modeling on page 4-26), *available at* http://www.usda.gov/rus/water/ees/pdf/Basin_DF_DEIS/Basin%20Dry%20Fork%20DEIS%20Ch4-7%200907.pdf (describing the 24 hour PM₁₀ impact including fugitive emissions in a DEQ permit).

Respectfully submitted this 30th day of November, 2009.

/s/ Shannon Anderson

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the forgoing *Sierra Club's Consolidated Response To Statements Of Fact In Support Of Motions For Summary Judgment* and associated documents via electronic mail on this the 30th day of November, 2009 to the following:

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