Shannon Anderson (Wyoming Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
(307) 672-5809 Voice
(307) 672-5800 Fax
sanderson@powderriverbasin.org

Andrea Issod (Calif. Bar No. 230920)
Sierra Club
85 Second St, 2nd Floor
San Francisco, CA 94105
(415) 977-5544 Voice
(415) 977-5793 Fax
andrea.Issod@sierraclub.org

Daniel Galpern (Oregon State Bar No. 06195)
David A. Bahr (Oregon State Bar No. 90199)
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401
(541) 485-2471 x114 Voice
(541) 485-2471 x108 Voice
(541) 485-2457 Fax
galpern@westernlaw.org
bahr@westernlaw.org

Sierra Club's Attorneys

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 RESPONSE TO RESPONDENTS' PROPOSED SUMMARY JUDGEMENT ORDER

Sierra Club hereby submits general and specific objections to Respondent's proposed summary judgment order.

General Objections

1. Sierra Club disputes the proposed conclusions of law, as it has argued in its summary judgment motion and response, but recognizes that the Council has ruled in Respondents' favor.

2. Sierra Club objects to all findings of fact to the extent that they are not undisputed between the parties, because undisputed facts are the only relevant factual findings to summary judgment. The Council cannot grant summary judgment on an issue where there is any genuinely disputed issue of material fact. Summary judgment procedures set out in W.R.Civ.P. 56 apply to administrative cases. *Rollins v. Wyoming Tribune Eagle,* 2007 WY 28, ¶ 6; 152 P.3d 367, ¶ 6 (Wyo. 2007).

3. Sierra Club objects to all immaterial findings of fact.

4. All proposed findings that reference Sierra Club's expert are irrelevant and immaterial to the questions regarding whether the Medicine Bow permit is proper. It is DEQ's duty to ensure the Medicine Bow permit meets legal requirements, not Sierra Club.

Specific Objections

1. The statement of the case should describe claim III to include total HAPs. The sentence "In claim II the Protestant alleged that DEQ improperly determined that the facility was a minor source for methanol" should be

amended to include "and total HAPs." This is Protestant's claim, and the Council did not rule on Respondent's motion to strike this portion of Protestant's claim. The issues and contentions section contains the same error.

2. The issue and contentions are repetitive of the statement of the case and unnecessary.

3. Findings of Fact #5-7, 9-11, and 15-26 are irrelevant and immaterial.

4. The first sentence of Finding of Fact # 28 is irrelevant and immaterial. The amount of hours spent by DEQ staff does not evidence a proper decision and should not be taken into consideration.

5. Findings of Fact #29 and 32 are disputed between the parties, and contain issues of law.

6. The second sentence of Finding of Fact #33 should read "Medicine Bow did not characterize cold startup/shutdowns as part of normal operations." Otherwise, it is disputed, and it is an issue of law.

7. Finding of Fact #37 is an issue of law, not fact.

8. Findings of Fact #38, 40, 41 and 46 are disputed, while 42 is irrelevant and not material.

9. Findings of Fact #44 and 45 are irrelevant and not material to the issue of law regarding PM 2.5.

10. Finding of Fact #52 is immaterial, irrelevant, disputed and inappropriate as a factual finding on summary judgment. Any reasonableness

analysis must be contained in the permit record, not prepared as evidence for litigation to justify issuance of the permit afterwards. Further, the Council cannot rule that Medicine Bow's expert's analysis constitutes a reasonableness analysis because Sierra Club submitted expert testimony disputing that analysis. The Council cannot grant summary judgment when there are disputed issues of fact.

11. Findings of Fact #53-56 are objectionable for all the reasons stated in the last paragraph. The Council cannot make a determination that using a PM10 surrogate was reasonable on summary judgment because it did not hear the disputed issues of fact. It is inappropriate for the Council to make factual findings based on summary judgment arguments, without hearing evidence and expert testimony.

12. Finding of Fact #57 is irrelevant and immaterial.

13. Findings of Fact # 58, 68, 71, 75, 77, and 81 are misleading, and disputed.

14. Finding of Fact #77 is irrelevant, disputed and involves an issue of law, while # 59, 61, 62, 64, 67, 69, 70 and 76, 78, 80, 82, 84 and 88 are misleading, nonsensical, irrelevant, immaterial, or simply false -- and so disputed.

15. Conclusion of Law #2 misstates the law as an agency is entitled to no deference for its unreasonable interpretation of a regulation or law.

16. Conclusion of Law #5 is repetitive of #4 and Sierra Club objects to the term "drastic," and a citation is not provided to verify the source and appropriateness of this quotation. As the Council has repeatedly and consistently held, review of DEQ's permitting decisions is *de novo*. *In the Matter of Basin Electric Power Cooperative Dry Fork Station Air Permit* CT-4631, Docket No. 07-2801 (EQC Aug. 21, 2008, Order Denying Basin Electric Power Cooperative Inc.'s Motion to Dismiss Appeal at 7); *see also Appeal of 4W Ranch Objection to NPDES Permits*, Docket No. 04-3801 (EQC Mar. 5, 2007). *De Novo* review means the Council gives no deference to the agency's interpretation or application of the law. *Chavez v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 204 P.3d 967, 970 (Wyo. 2009). Medicine Bow's sole authority, *Printher v. Department of Administration and Information*, 866 P.2d 1300, 1302 (Wyo. 1994), does not involve *de novo* review. Review was controlled by a different standard pursuant to the Wyoming Administrative Procedure Act's provision for judicial review of agency decisions. *Printher* at 1302. Sierra Club objects to Conclusion of Law #6 for the same reasons and, additionally, there is no citation to verify the source of the "presumed to be correct" standard.

17. Regarding Conclusion of Law #28, Sierra Club objects to the selective recitation of a portion of the Wyoming definition of BACT.

18. Regarding Conclusion of Law #39, Sierra Club objects to the reference that "Sierra Club's interpretation of the regulation is based on inappli-

cable guidance and inapplicable caselaw." The Council has chosen to accept DEQ's interpretation, but that does not make EPA guidance and EAB case-law inapplicable.

19. Regarding Conclusion of Law #40, Sierra objects to the proposed revision of the WAQSR's clear BACT standard.

20. Regarding Conclusion of Law #41, Sierra Club objects that the Council made no such finding and this conclusion is completely erroneous.

21. Regarding Conclusion of Law #42, Sierra Club objects that the imposition of a work standard is consistent with the cited definition, given the lack of an on-the-record infeasibility determination.

22. Regarding Conclusion of Law #44, Sierra Club objects to the clause "as well as other sources of emissions" because the Council did not make any determinations regarding other SO2 emission sources besides the flares, nor were any other sources at issue. The sentence should end after flares, as the remainder is irrelevant, immaterial, repetitive, and confusing.

23. Regarding Conclusions of Law #45, Sierra Club objects on the ground that there was no finding that WDEQ's exclusion of such emissions was consistent with the PTE definition.

24. Regarding Conclusions of Law #51, Sierra Club objects on the ground that there was no finding as to MBFP's methodology.

25. Regarding Conclusions of Law #53, Sierra Club objects; the issue was whether the particular LDAR approved in the Permit is BACT for the facility, not whether "LDAR represents BACT."

26. Regarding Conclusion of Law #55, it is improper for the Council to consider the expert report of Ms. Winborn and the deposition of Mr. Keyfauver to support its conclusion in summary judgment because there are disputed issues of fact.

27. Regarding Conclusions of Law #39, 64, 66, these paragraphs regarding Sierra Club's evidence are irrelevant, immaterial, and inappropriate to the Council's question of whether or not DEQ met its legal requirements before issuing the Medicine Bow permit.

28. Regarding Conclusions of Law #60 and 70, these are disputed factual issues that the Council cannot determine on summary judgment motions.

29. Regarding Conclusion of Law #71, Sierra Club strongly objects to the proposed reformulation of the Summary Judgment standard.

30. Regarding Conclusion of Law #72, Sierra Club strongly objects to the characterization of Dr. Sahu's affidavit as "speculative, unsupported, and conclusory." The Council made no such findings, and bashing Sierra Club's highly-regarded witness is irrelevant, immaterial, and unnecessary to the Council's findings against the Sierra Club.

Respectfully submitted, this 23rd day of December, 2009.

/s/ Shannon Anderson
Shannon Anderson (Wyoming Bar No. 6-4402)
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
(307) 672-5809 Voice
(307) 672-5800 Fax
sanderson@powderriverbasin.org

Andrea Issod
Sierra Club
85 Second St, 2nd Floor
San Francisco, CA 94105
Telephone: (415) 977-5544
Facsimile: (415) 977-5793
Email: andrea.issod@sierraclub.org

David Bahr
Daniel Galpern
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401
Telephone: (541) 485-2471, ext. 108
Facsimile: (541) 485-2457
Email: bahr@westernlaw.org
Email: galpern@westernlaw.org

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the forgoing *Sierra Club's Response to Respondents' Proposed Summary Judgment Order* and associated documents via electronic mail on this the 23rd day of December, 2009 to the following:

John Corra
Director, DEQ
jcorra@wyo.gov

Nancy Vehr
Sr. Asst. Attorney General
nvehr@state.wy.us

Jude Rolfes
Medicine Bow Fuel & Power
jrolfes@dkrwaf.com

Mary Throne
Throne Law
mthrone@thronelaw.com

Hickey & Evans
bhayward@hickeyevans.com

John A. Coppede
Hickey & Evans
jcoppede@hickeyevans.com

Daniel Galpern
Daniel Galpern
Attorney for Sierra Club