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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 RESPONSE TO DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO DISMISS $PM_{2.5}$ AND CO_2 CLAIMS

I. INTRODUCTION

The Medicine Bow Fuel & Power (Medicine Bow) coal gasification and liquefaction plant will emit approximately 3 million tons of carbon dioxide (CO_2) each year. Carbon dioxide is a greenhouse gas that is the primary cause of climate change. At a time when the science points to one inevitable conclusion—that we must take immediate steps to curb this country's massive greenhouse gas emissions or suffer devastating consequences—the Department of Environmental Quality's (DEQ) decision to ignore these emissions is indefensible. Ignoring CO_2 frustrates the purpose of the Clean Air Act's Best Available Control Technology (BACT) standard to ensure that new facilities use the most up-to-date pollution control technology available to protect the public from harmful pollutants. In this case, DEQ's task is simplified because Medicine Bow plans to capture its CO_2 emissions and ship them for use in enhanced oil

recovery operations. Medicine Bow Response at ¶6. Medicine Bow has already selected what it believes to be the best available CO_2 control technology, so DEQ need only review other available options, including higher levels of capture, and include a CO2 emission limit in the permit to ensure that permit complies with BACT requirements.

Fine particulate matter ($PM_{2.5}$) poses a serious health threat, particularly to children, the elderly, and asthmatics. It causes premature death and increases the risk of heart attacks and lung cancer. *See* EPA, Particulate Matter, "Health and Welfare," *available at* http://www.epa.gov/oar/particlepollution/health.html. The U.S. Environmental Protection Agency (EPA) has been unable to discern a threshold level of ambient $PM_{2.5}$ pollution under which the death and disease associated with the pollutant would not occur. 71 Fed. Reg. 2,620, 2,635 (Jan. 17, 2006). Because $PM_{2.5}$ poses a more serious health threat than coarse particulate matter, EPA chose to regulate it as a separate pollutant over twelve years ago.

DEQ concedes that $PM_{2.5}$ is a pollutant "subject to regulation" under the Clean Air Act, and that an applicant must use the best available control technology and demonstrate that the facility will not exceed ambient air quality standards for each regulated pollutant. Yet DEQ violated these statutory directives by ignoring $PM_{2.5}$ entirely in the Medicine Bow permit and later claiming that it is required to use PM_{10} as a surrogate for $PM_{2.5}$. Even under EPA's surrogate policy, however, DEQ must individually assess whether use of PM_{10} as a surrogate is appropriate for a particular facility. The agency's argument that the law requires it to use PM_{10} as a surrogate for $PM_{2.5}$ in every case demonstrates its fundamental misunderstanding of the legal requirements that govern the use of surrogates. The Council cannot dismiss Sierra Club's $PM_{2.5}$ claim without reviewing whether DEQ conducted an individualized assessment in this case. For

purposes of a motion to dismiss, the Council must accept Sierra Club's allegation that DEQ did not undertake any assessment, let alone a proper one.

II. STANDARD OF REVIEW

In considering a Rule 12(b)(6) motion to dismiss, the Council must "focus on the allegations contained in the complaint and liberally construe them in the light most favorable to the plaintiff." *Cox v. City of Cheyenne*, 79 P.3d 500, 504-5 (Wyo. 2003) (citing *Duncan v. Afton, Inc.*, 991 P.2d 739, 742 (Wyo. 1999)). Dismissal is a "drastic remedy" and should be used "sparingly." *Bonnie M. Quinn Revocable Trust v. SRW, Inc.*, 91 P.3d 146, 148 (Wyo. 2004) (citations omitted). Wyoming courts will sustain a 12(b)(6) dismissal only when "it is certain from the face of the complaint that the plaintiff cannot assert any set of facts that would entitle that plaintiff to relief." *Id.* (citation omitted).

III. BACKGROUND

On March 4, 2009, the DEQ issued Medicine Bow an air permit under the Clean Air Act's Prevention of Significant Deterioration (PSD) provisions that authorized construction of an underground coal mine and coal gasification and liquefaction plant designed to make transportation fuels. Protest and Petition for Appeal ¶¶1,4; Medicine Bow Response ¶¶1,4. The facility will produce approximately 2.5 to 3.25 million tons of carbon dioxide every year, Medicine Bow Response ¶6, yet the PSD permit does not address carbon dioxide.

The facility and associated mine will emit up to 310 tons per year of particulate matter. Final Permit, p. 11, Administrative Record (AR) p. 1435. Neither Medicine Bow's Application nor DEQ's Application Analysis estimates $PM_{2.5}$ emissions. Although the EPA set national

ambient air quality standards (NAAQS) for $PM_{2.5}$ in 1997, DEQ ignored $PM_{2.5}$ in its Application Analysis and in the draft permit for Medicine Bow. AR p. 506 et seq., AR p. 1668 et seq. After issuing the draft permit, in response to Sierra Club's comments, DEQ first announced that it had used the PM_{10} surrogate policy, DEQ's Response to Comments at p. 5, AR p. 149. That policy contemplates use of PM_{10} as a surrogate for $PM_{2.5}$ under some circumstances. DEQ did not explain how it determined that use of PM_{10} as a surrogate was justified for the Medicine Bow permit.

IV. ARGUMENT

A. DEQ MUST ADDRESS $PM_{2.5}$ EMISSIONS FROM THE MEDICINE BOW FACILITY

To protect air quality from new major pollution sources, the Clean Air Act requires EPA to adopt national ambient air quality standards (NAAQS) for harmful air pollutants, 42 U.S.C. § 7409. The Act bars issuance of a PSD permit unless, *inter alia*, the permit-applicant demonstrates that the new source will not cause or contribute to a violation of *any* NAAQS. The Act further requires a BACT emission limit for *each* pollutant regulated under the Act. A BACT emission limit must be determined on a case-by-case basis based on the maximum degree of reduction achievable, taking into account energy, environmental, and economic impacts and other costs. 6 WAQSR § 4(a). EPA established NAAQS for fine particulates (PM2.5) in 1997; DEQ could not, therefore, permit the Medicine Bow plant without a demonstration that its fine particulate emissions would not "cause or contribute" to air pollution in excess of the PM2.5 NAAQS or increment, and a BACT limit for PM2.5.

DEQ argues that the Council should dismiss Sierra Club's $PM_{2.5}$ claim because it substituted PM_{10} (coarser particulates) for PM2.5 under EPA's "surrogate policy." DEQ

misapprehends its legal responsibilities. The surrogate policy does not require using PM_{10} as a surrogate for $PM_{2.5}$; rather, it requires an appropriate case-by-case analysis to determine whether PM_{10} can be used. DEQ conducted no such analysis for the Medicine Bow permit.

Several new authorities have emerged to clarify the law on this issue since the Council considered this question (in the matter of Basin Electric Power Cooperative, Dry Fork Station, Air Permit CT-4631).[1] Most notably, EPA recently explained that the surrogate policy demands a case-by-case analysis demonstrating that PM_{10} is an appropriate surrogate for PM2.5 for this particular plant. *See In the Matter of Louisville Gas & Electric Co., (Trimble)*, Petition IV-2008-3 at p. 42-46 (Aug. 12, 2009) (attached as exhibit 1). At a minimum, that analysis must include: (1) "a strong statistical relationship between PM_{10} and $PM_{2.5}$ emissions from the proposed unit" and (2) a showing that the "degree of control of $PM_{2.5}$ by the control technology selected in the PM_{10} BACT analysis will be at least as effective as the technology that would have been selected if a BACT analysis specific to PM2.5 emissions had been conducted." *Trimble*, at 45.The Council cannot dismiss the $PM_{2.5}$ claim without reviewing the specific record in this case.

1. $PM_{2.5}$ is a Distinct Pollutant Under the Clean Air Act Because it is More Dangerous Pollutant than PM_{10}

Particulate matter is made up of particles of varying sizes, and particle size determines, to a large extent, its health impacts. Prior to 1997, EPA regulated all particulate matter up to 10 microns in diameter under its PM_{10} standards. The fine particle component of PM_{10} – those up to 2.5 microns in diameter – are the most harmful to health. Accordingly, EPA promulgated a separate NAAQS for $PM_{2.5}$ in 1997 because it found that the PM_{10} standards did not adequately

[1] The Council tacitly acknowledged, in Dry Fork, that some level of individualized analysis was required before the PM10 could be substituted for PM2.5. It granted summary judgment on the claim only after determining that the evidence in the case showed that "reliance on the EPA's Surrogate Policy is appropriate in this case." *In re Basin Electric Power Cooperative Dry Fork Station Air Permit CT-4631*, EQC Docket No. 07-2801, Order Granting Basin Electric et al. Motions for Summary Judgment Para. 59 (Dec. 8, 2008).

protect public health and welfare. *See* 62 Fed. Reg. 38,653, 38,667 (July 18, 1997). EPA found that $PM_{2.5}$ tends to be generated by different types of sources than the coarser fraction of PM_{10} (*e.g.*, coal combustion vs. coal dust), is produced more often than PM_{10} by secondary chemical reactions of precursor pollutants in the atmosphere, is transported longer distances, and penetrates deeper into the human cardio-vascular system, creating a much greater risk of respiratory disease, cardiopulmonary disease, and premature death. *Id.*; *see also* 71 Fed. Reg. 2,620, 2,627 (Jan 17, 2006). Wyoming has incorporated the 1997 $PM_{2.5}$ NAAQS into its rules. 2 WASQR § 2(b).

Many more recent studies on $PM_{2.5}$ convinced EPA that stricter PM 2.5 standards would prevent "thousands of premature deaths" and "substantial numbers of incidences of hospital admissions, emergency room visits, aggravation of asthma and other respiratory symptoms, and increased cardiac-related risk." 71 Fed. Reg. 2,620, 2,643. In 2006, EPA revised the 24-hour NAAQS for $PM_{2.5}$ to be nearly twice as stringent as the original 1997 NAAQS. *See* 71 Fed. Reg. 6,144 (changing the 24-hour $PM_{2.5}$ standard from 65 micrograms per cubic meter to 35).

2. The Medicine Bow Permit Violates Wyoming Law and Clean Air Act Provisions Requiring Emission Limits for *Each* Regulated Pollutant.

The Medicine Bow PSD permit violates the most fundamental Clean Air Act PSD requirements by failing to ensure that the facility will not cause or contribute to a violation of $PM_{2.5}$ NAAQS and failing to include a $PM_{2.5}$ emission limit. WEQA, W.S. § 35-11-201; 6 WAQSR §§ 4(b)(i) & (ii); 42 U.S.C. §§ 7409 & 7475(a)(3). Despite the overwhelming evidence of the serious harmful health effects associated with even with short-term exposure to $PM_{2.5}$, DEQ did not require Medicine Bow to consider the most effective control technology options to minimize its emissions of $PM_{2.5}$. Medicine Bow conducted a BACT analysis for PM_{10} and

performed ambient air quality monitoring to demonstrate compliance with PM_{10} NAAQS. DEQ incorrectly claims that is sufficient to comply with the $PM_{2.5}$ NAAQS.

DEQ ignores the plain language of Wyoming's Environmental Quality Act (WEQA) and its implementing air regulations requiring DEQ to ensure NAAQS compliance and implement BACT for each distinct pollutant regulated under Wyoming law or the Clean Air Act. *See* DEQ Motion to Dismiss at 10-11.

> WEQA, W.S. § 35-11-201: "No person shall cause, threaten or allow the discharge or emission of any air contaminant in any form so as to cause pollution which violates rules, regulations and standards adopted by the council." (Emphasis added).
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> 6 WAQSR § 4(b)(i): "An analysis of the predicted impact of emission from the stationary source is required for all pollutants for which standards have been established under these regulations or under the Federal Clean Air Act . . . . A permit to construct . . . shall be issued only . . . if the ambient standard for the pollutant(s) is not exceeded." (Emphasis added).
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> 6 WAQSR § 4(b)(ii): "The required permit shall not be issued unless the proposed major stationary source . . . would meet an emission limit(s) or equipment standard(s) specified by the Administrator to represent the application of Best Available Control Technology for each pollutant regulated under these Standards and Regulations and under the Federal Clean Air Act." (Emphasis added).

Those requirements track those of the Clean Air Act and federal regulations. *See* 42 U.S.C. § 7475(a)(3), (4) (prohibiting construction absent demonstration "that emissions from construction or operation of [the] facility will not cause, or contribute to, air pollution in excess of any . . . national ambient air quality standard," and requiring BACT limit "for each pollutant subject to regulation under this chapter" (emphasis added)); CFR, 40 C.F.R. §§ 51.166(k)(1), 52.21(k)(1) (same).

The law includes no exception; a NAAQS-analysis is required for *any* NAAQS, and a BACT limit for every regulated pollutant. *See, e.g., Olivas v. State ex rel. Wyoming Workers'*

Safety and Compensation Div., 130 P.3d 476, 484 (Wyo. 2006) (holding that state agencies are bound by the "clear and unambiguous" words of statutes and regulations).

3. The "PM_{10} Surrogate Policy" Does Not Excuse DEQ's Failure to Address $PM_{2.5}$.

a. DEQ Illegally Failed to Justify its Use of PM_{10} is an Appropriate Surrogate for $PM_{2.5}$ in this Case.

The D.C. Circuit has ruled that surrogate limits may be used in lieu of direct limits for an air pollutant regulated under the Clean Air Act only under limited circumstances. *National Lime Ass'n v. EPA*, 233 F.3d 625, 637-39 (D.C. Cir. 2000); *see also Sierra Club v. EPA,* 353 F.3d 976, 982-85 (D.C. Cir. 2004). The EPA recently confirmed "that this case law governs the use of EPA's PM_{10} Surrogate Policy, and thus that the legal principle from the case law applies where a permit applicant or state permitting authority seeks to rely upon the PM_{10} surrogate policy in lieu of a $PM_{2.5}$ analysis to obtain a PSD permit." *In the Matter of Louisville Gas & Electric Co., (Trimble)*, Petition IV-2008-3 at p. 43 (Aug. 12, 2009) (attached as Exhibit 1).

In *National Lime*, the D.C. Circuit explained when it is appropriate to use a surrogate to establish emission limits for a regulated pollutant. A surrogate may be used only if:

> (1) the primary pollutant is invariably present in the surrogate pollutant;
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> (2) the control technology for the surrogate pollutant "indiscriminately captures" the primary pollutant; and
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> (3) the control technology for the surrogate pollutant "is the only means by which facilities 'achieve' reductions" of the primary pollutant.

233 F.3d at 639. This inquiry is factual, not legal. As a surrogate for $PM_{2.5}$ BACT, PM_{10} fails the second and third factors in *National Lime*. Because PM_{10} and $PM_{2.5}$ are different sized particles ($PM_{2.5}$ is a component of PM_{10}), technologies and work practices designed to control PM_{10} have different and lower control efficiencies for $PM_{2.5}$. 20 Fed. Reg. 20586, 20617.

Indeed, D.C. Circuit cases specifically addressing particulate matter surrogacy allow use of PM_{10} as a surrogate only based on a rigorous factual analysis demonstrating that it is a reasonable approach under the circumstances. *Compare American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1054 (D.C. Cir. 1999)(finding that PM_{10} was an arbitrary indicator for coarse PM), *rev'd on other grounds, with American Farm Bureau v. EPA*, 559 F.3d 512, 534-35 (D.C. Cir. 2009) (finding that EPA offered adequate factual and scientific justification to use PM_{10} as an indicator for coarse PM under the circumstances of that case).

If DEQ wants to use PM_{10} as a surrogate for $PM_{2.5}$ for the Medicine Bow facility, it must determine, as a factual matter, that the *National Lime* factors are satisfied for the particular permit at issue.

b. Recent Regulatory Activity Confirms that the PM_{10} Surrogate Policy Must be Applied Case-by-Case and is no Longer Technically Justified.

Recent regulatory activity relating to the PM_{10} surrogate policy has shed light on its status. In a final order recently issued by EPA Administrator Jackson, EPA objected to a Kentucky Title V operating permit for the Trimble County Generating Station because of the state agency's inadequate analysis of $PM_{2.5}$. *Trimble*, Exh. 1. The EPA clarified that any permitting authority seeking to use the PM_{10} surrogate policy must undertake a rigorous, individualized assessment of the appropriateness of surrogacy as applied to the proposed unit. Citing D.C. Circuit precedent, EPA stated, "[T]hese cases demonstrate the need for permit applicants and permitting authorities to determine whether PM_{10} is a reasonable surrogate for $PM_{2.5}$ under the facts and circumstances of the specific permit at issue, and not proceed on a general presumption that PM_{10} is always a reasonable surrogate for $PM_{2.5}$." *Id.* at 44.

EPA stated that, in making this determination, permitting authorities must assess important differences between PM_{10} and $PM_{2.5}$, including the fact that emission controls used to

capture coarse particles may be less effective in capturing fine particles, and that fine particles may be transported over much longer distances than coarse particles. *Id.* at 44 (citing 72 Fed. Reg. 20,586, 20,617 (April 25, 2007) and 70 Fed. Reg. 65,984, 65,997-98 (Nov. 1, 2005)). EPA emphasized its earlier conclusion that the technical difficulties that originally justified using PM_{10} as a surrogate "have largely been resolved." *Id.* (citing 73 Fed. Reg. 28,321, 28,340/2-3 (May 16, 2008)).

EPA clarified, moreover, that PM_{10} provides a reasonable surrogate for $PM_{2.5}$ only under limited circumstances, which must be demonstrated in the permit record:

> First, the source or the permitting authority establishes in the permit record a strong statistical relationship between PM_{10} and $PM_{2.5}$ emissions from the proposed unit...Without a strong correlation, there can be little confidence that the statutory requirements will be met for $PM_{2.5}$ using the controls selected through a PM_{10} NSR analysis....
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> Second, the source or the permitting authority demonstrates that the degree of control of $PM_{2.5}$ by the control technology selected in the PM_{10} BACT analysis will be at least as effective as the technology that would have been selected if a BACT analysis specific to $PM_{2.5}$ emissions had been conducted....The first [possible method] would be to perform a $PM_{2.5}$ –specific BACT analysis, in which case the requirement is met if the control technology selected through the PM_{10} BACT analysis is physically the same as what is selected though the $PM_{2.5}$ BACT analysis...The second path would be to perform a $PM_{2.5}$ –specific BACT analysis, and show that while the type and/or physical design of the control technology may be different, the efficiency for $PM_{2.5}$ control of the technology selected through the PM_{10} BACT analysis is equal to or better than the efficiency of the technology selected through the $PM_{2.5}$ BACT analysis...

Trimble, at 45.

Like the Kentucky permitting authority in the Trimble case, DEQ did not undertake an individualized assessment of the use of PM_{10} as a surrogate. Nothing in the Application, DEQ's Application Analysis, or its Response to Comments shows any correlation between PM_{10} and $PM_{2.5}$ from the Medicine Bow facility, nor any demonstration that the chosen PM_{10} controls will effectively control $PM_{2.5}$. AR 1001 et seq., 506 et seq.; 1425 et seq.

EPA's *Trimble* order is consistent with other recent agency pronouncements related to the PM_{10} surrogate policy. In May 2008, EPA issued a rule regarding implementation of the New Source Review (NSR) program for $PM_{2.5}$. 73 Fed. Reg. 28321 (May 16, 2008). In the preamble, EPA stated that SIP-approved states like Wyoming and Kentucky could continue to rely on the PM_{10} surrogate policy "if a SIP-approved State is unable to implement a PSD program for the $PM_{2.5}$ NAAQS . . . ." *Id.* Wyoming's SIP includes the $PM_{2.5}$ NAAQS. DEQ has offered no reason why it cannot implement a PSD program for the $PM_{2.5}$ NAAQS under its existing authority, so the May 2008 rulemaking did not enhance the legal status of the surrogate policy in Wyoming.

Confirming this analysis, when Administrator Johnson denied a Petition for Reconsideration regarding this rule in January 2009, he said: "Many states have already indicated that they have the general authority to regulate $PM_{2.5}$ under their existing SIPs even though specific regulatory changes are needed to fully implement the program in accordance with EPA's newly amended rules." *See* Letter from Johnson to Cort, (Jan. 14, 2009), *available at* http://www.epa.gov/nsr/documents/20090115cort.pdf. Wyoming, whose PSD program is essentially the same as the federal rules in all relevant respects, would be one of those states. Furthermore, Administrator Johnson confirmed that the surrogate policy "does not 'waive' or 'exempt' sources from complying with the statutory requirements." *Id.* He added, "Each permit that relies on the adequacy of the PM_{10} surrogate policy to satisfy the new $PM_{2.5}$ requirements is subject to review as to the adequacy of such presumption." *Id.*

EPA Administrator Jackson later granted reconsideration of the 2008 rule and stayed the grandfathering provision, which had allowed facilities in delegated states to use the surrogate policy for certain permits. In granting this stay, Administrator Jackson said: "the Agency intends

to propose to repeal the grandfathering provision on the grounds that it . . . is no longer substantially justified in light of the resolution of the technical issues with respect to $PM_{2.5}$'s monitoring, emissions estimation, and air quality modeling that led to the PM_{10} Surrogacy Policy in 1997." Letter from Jackson to Cort (April 24, 2009), *available at* http://www.epa.gov/nsr/documents/Earthjustice.pdf. EPA itself has therefore announced that using PM_{10} as a surrogate for $PM_{2.5}$ is no longer justified. DEQ has offered no technical explanation why a specific $PM_{2.5}$ BACT and modeling determination could not be performed for the Medicine Bow Facility.

c. The Wyoming SIP Does Not Require DEQ to Use PM_{10} as a Surrogate for $PM_{2.5}$.

DEQ erroneously argues that the Wyoming SIP mandates that DEQ must analyze $PM_{2.5}$ using PM_{10} as a surrogate in every case. *See, e.g.,* DEQ's Motion to Dismiss at 2 ("federal law requires Wyoming use PM_{10} as a surrogate for $PM_{2.5}$"); 14. The Wyoming SIP states "Wyoming will implement the current rules in accordance with EPA's interim guidance using PM_{10} as a surrogate for $PM_{2.5}$ in the PSD program." WYOMING'S INTERSTATE TRANSPORT DECLARATION AT 3 (Dec. 11, 2006) (attached as exhibit 2). The SIP merely points to EPA's guidance. As explained above, consistent with binding D.C. Circuit precedent, EPA interprets its guidance to allow use of PM_{10} as a surrogate *only* if the circumstances of the specific permit warrant it. *See, e.g., Trimble* at 42-46; Letter from Johnson to Cort, (Jan. 14, 2009), *available at* http://www.epa.gov/nsr/documents/20090115cort.pdf. As the *Trimble* order, the Medicine Bow has not been issued "in accordance" with EPA's guidance on the surrogate policy.

B. CO2 IS SUBJECT TO REGULATION UNDER THE CLEAN AIR ACT

Under Wyoming's regulations, Best Available Control Technology (BACT) is "an emission limit . . . based on maximum degree of reduction of each pollutant subject to regulation" under either WAQSR or the Federal Clean Air Act. 6 WAQSR § 4(a) (emphasis added); *see also id.* § 4(b)(ii). Because CO_2 is currently regulated under the Clean Air Act, it is "subject to regulation" for purposes of triggering BACT requirements.

In keeping with the plain language of the statute, EPA's longstanding regulatory interpretation of "subject to regulation under the Act" is that it refers to "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations." 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). Subchapter C contains CO_2 regulations. The Council should enforce the plain language of the Clean Air Act and EPA's exiting regulatory definition of "subject to regulation." While EPA has taken the position that CO_2 should not be considered "subject to regulation," the agency's arguments in support of this position have recently been rejected by the EPA's own Environmental Appeals Board (EAB) in *Deseret Electric Power Coop.*, P.S.D. Appeal. No. 07-03, 2008 WL 5572891(EAB Nov. 13, 2008). The Council should not dismiss Sierra Club's claims based on the same arguments that the EAB -- EPA's final arbiter of legal issues -- rejected in *Deseret*. Additionally, irrespective of whether CO_2 is "subject to regulation," the Council should not dismiss Sierra Club's claim that DEQ violated the law by failing to consider greenhouse gases as part of its collateral impacts analysis.

Although this Council addressed the question of whether CO2 is "subject to regulation" under the Clean Air Act in the Dry Fork case, it did not consider two pertinent decisions issued by the EAB. Additionally, the Council did not previously consider Delaware's state implementation plan (SIP), which is incorporated into federal law and regulates CO_2 under the Clean Air Act.

1. EPA Initially Defined "Subject to Regulation" in a 1978 Rulemaking and Has Not Formally Modified that Definition

a. EPA interprets "subject to regulation" to include any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations ("CFR")

In 1977, Congress amended the Clean Air Act to adopt the New Source Review provisions, including PSD permitting. EPA enacted PSD regulations to implement these amendments in 1978. 43 Fed. Reg. 26,388 (June 19, 1978). In the Preamble, EPA stated:

> Some questions have been raised regarding what "subject to regulation under this Act" means relative to BACT determinations. The Administrator believes that the proposed interpretation published on November 3, 1977, is correct and is today being made final. As mentioned in the proposal, "subject to regulation under this Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type.

43 Fed. Reg. at 26,397 (emphasis added).

b. EPA codifies CO_2 regulations in Subchapter C of Title 40 of the CFR in Section 821

Section 821 of the 1990 Clean Air Act Amendments ("Section 821") directed EPA to implement regulations to require monitoring and reporting of emissions of CO_2 by all sources subject to Title IV of the Clean Air Act. 42 U.S.C. § 7651k note; Pub. L. 101-549, Title IV, § 821, 104 Stat. 2699 (Nov. 15, 1990). In 1993, EPA promulgated these regulations and codified them in Subchapter C, Title 40, Part 75 of the CFR. 40 C.F.R. §§ 75.10, 75.13, 75.57(e), 75.64(a)(10). Not only do these regulations require that polluting facilities "measure" CO_2 emissions, *id.* § 75.10(a), they also prohibit CO_2 emissions unless the facility "account[s] for all such emissions." *Id.* § 75.5(d). Failure to comply with any of the regulatory requirements relating to CO_2 constitutes a violation of the Clean Air Act and subjects the violator to enforcement and penalties under the Act. *Id.* § 75.5(a).

c. The 2002 Reform Rules define "regulated NSR pollutant"

In December of 2002, EPA revised its New Source Review regulations ("2002 Reform Rules"). 67 Fed. Reg. 80,186 (Dec. 31, 2002). In that rulemaking, EPA established a definition for pollutants regulated under the New Source Review program, including PSD permitting. EPA defined "regulated NSR pollutant" as follows:

> (i) Any pollutant for which a national ambient air quality standard has been promulgated and any ... constituent or precursor for such pollutant... identified by the Administrator (e.g. volatile organic compounds and NOx are precursors for ozone);
>
> (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or
>
> (iv) *Any pollutant that otherwise is subject to regulation under the Act*; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112 (b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

40 C.F.R. §§ 52.21(b)(50), 51.166(b)(49) (emphasis added). Wyoming has adopted this definition. 6 WASQR § 4(a).

d. The U.S. Supreme Court holds that CO_2 is an "air pollutant" under the Clean Air Act and EPA Responds.

In 1999, a group of organizations filed a rulemaking petition with EPA asking the agency to regulate greenhouse gas emission from motor vehicles under § 202 of the Clean Air Act. *Massachusetts v. EPA,* 127 S. Ct. 1438, 1499 (2007). Section 202 requires EPA to regulate

emissions of "air pollutants" from motor vehicles if EPA determines that they "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). This determination is known as an "endangerment finding." EPA denied the petition for rulemaking in 2003 based on its conclusion that greenhouse gases are not "air pollutants" as defined in the Clean Air Act. 127 S. Ct. at 1450-51. EPA's position that greenhouse gases are not air pollutants would have excluded them from regulation under the Clean Air Act, including in PSD permitting and BACT analysis.

On April 2, 2007, the U.S. Supreme Court squarely rejected EPA's conclusion, holding that "[g]reenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'" *Id.* at 1462. The Court recognized that the Clean Air Act was broadly worded so as to provide EPA with the flexibility to deal with new, and even unforeseen, threats like global warming. *Id.* ("While the Congresses that drafted [the definition of air pollutant] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete."). The Court remanded the case to EPA for the agency to make a determination of whether an endangerment finding was appropriate.

On April 24, 2009, the EPA published a proposed endangerment finding in the Federal Register. 74 Fed. Reg. 18,886 (Apr. 24, 2009). It demonstrates that greenhouse gases, including CO_2, endanger public health and welfare. *Id.* at 18,901-03. A final endangerment finding will trigger regulation of CO_2 from motor vehicles under § 202(a)(1). 42 U.S.C. § 7521(a)(1).

Contrary to DEQ's assertions, nothing in the endangerment rulemaking means that CO_2 is not currently subject to regulation under the Act. The endangerment finding is required to

implement emission controls for greenhouse gas emissions from motor vehicles. Section 202 mandates that EPA "prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles" once the agency determines they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). In contrast with § 202, no "endangerment finding" is required before the BACT provisions of the Clean Air Act and Wyoming's regulations apply. As long as a pollutant is "subject to regulation" under the Act, BACT is required. 6 WAQSR § 4(a); 42 U.S.C. § 7479(3); *see also Deseret,* slip. op. at 25.

e. The Environmental Appeals Board *Deseret* decision rejected EPA's arguments for why CO_2 is not "subject to regulation"

In the wake of the Supreme Court's decision, EPA in 2008 offered a series of additional arguments for why—despite the fact that CO_2 is subject to regulation under Section 821 and is an air pollutant—it was not "subject to regulation" for the purposes of BACT. EPA asserted its position before the EAB in *Deseret*, a challenge to the EPA-issued PSD permit for the Bonanza coal-fired power plant in Utah[2]

In *Deseret*, EPA argued that it did not have the authority to impose a CO_2 BACT limit because the Section 821 regulations required monitoring and reporting, but not actual emissions controls. *Deseret*, slip op. at 2. On November 13, 2008, the EAB rejected all of EPA's excuses for finding that CO_2 is not "subject to regulation" under the Act. Specifically, the EAB rejected the argument that EPA could not impose a CO_2 BACT limit in a PSD permit because it had interpreted "subject to regulation" to mean "subject to actual control of emissions." *Id.* at 63. The

[2] This Council did not address the consequences of *Deseret* in the Dry Fork case because the EAB had not issued its ruling at the time the Council considered DEQ's motion to dismiss. (*In re Basin Electric Power Cooperative Dry Fork Station Air Permit CT-4631*, EQC Docket No. 07-2801, Order Granting Respondent Department of Environmental Quality's Motion to Dismiss (Aug. 21, 2008), *on appeal Power River Basin Res. Council v. Wyoming Dep't of Envtl. Quality*, Wyo. Sup. Ct. No. 09-0037.)

EAB found that the only agency interpretation of "subject to regulation" entitled to deference was its 1978 statement in the Federal Register that included all pollutants subject to regulations found in Subchapter C of Title 40 of the CFR. *Id.* at 37-42.

The EAB remanded the permit to EPA to reconsider its decision not to include a CO_2 BACT limit and required the agency to re-open the permit for public comment. *Id.* at 63-64. While the EAB found that EPA has "agency discretion" to determine in the first instance what pollutants are "subject to regulation" under the Clean Air Act, it concluded that none of the reasons EPA offered justified its decision that CO_2 was not such a pollutant. The EAB strongly suggested that EPA address this issue through a nationwide rulemaking with the opportunity for public comment. *Id.* at 61-64.

For the same reasons stated in *Deseret*, the EAB also recently remanded the CO2 BACT issue in *In re: Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02 (EAB Feb. 19, 2009), 2009 WL 4439769 (E.P.A.), slip op. at 31.

f. EPA responds to *Deseret* by issuing and then granting reconsideration of the Johnson Memo

In the final days of the Bush administration, then-EPA Administrator Johnson quickly issued a memorandum purporting to clarify the agency's interpretation of "subject to regulation" as only those pollutants that are subject to "actual control of emissions." *See* Memorandum from Stephen L. Johnson, EPA Administrator, to Regional Administrators at 6 (Dec. 18, 2008) ("Johnson Memo"), *available at* http://www.epa.gov/region07/programs/artd/air/nsr/nsrmemos/co2_psd.pdf. EPA did not provide any opportunity for public comment on the memo and therefore issued it in violation of the procedural requirements of the Administrative Procedures Act (APA), 5 U.S.C. § 101 et. seq. and the Clean Air Act. The Johnson Memo purports to establish an interpretation of the Act that

conflicts with the plain language of the statute. Moreover, it directly conflicts with prior agency actions and interpretations, including the 1978 preamble and the EAB's decision in *Deseret.*

Because the Memo is an informal document issued without any opportunity for public comment, it is insufficient to overcome the EPA's formally promulgated 1978 interpretation. *Christensen v. Harris Cty.,* 529 U.S. 576, 587 (2000) (holding that policy statements and opinion letters not subject to the rigors of the Administrative Procedures Act (APA) are not entitled to substantial deference). To modify or replace the 1978 interpretation, EPA must comply with the notice and comment procedures of the APA. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (requiring a rule-making when the agency affects a "fundamental change in its interpretation of a substantive regulation"); *United Farm Workers of Am., AFL-CIO v. Chao*, 227 F. Supp.2d 102, 107-08 (D.D.C. 2002) ("It is axiomatic that agencies must interpret their own legislative regulations in a manner that is consistent with previous interpretations or else provide opportunity for notice and comment under § 553 of the APA"). Because the agency has not yet done so, the 1978 interpretation stands.

The Johnson Memo also conflicts with the EAB's decision in *Deseret.* It relies on much the same rationale that the EAB rejected in that case and attempts to alter the agency's pre-existing interpretation of "subject to regulation" without undertaking the notice and comment procedures required by the EAB's decision in *Deseret.* An EAB ruling is a final agency action entitled to the same level of deference as a formal rule. S*ee generally* Sierra Club Petition to EPA for Reconsideration of Johnson Memo, *attached as* Exhibit 3 at 1-9. The Administrator had no jurisdiction to undo a statutory interpretation adopted in an EAB ruling by issuing an informal guidance memo. *Id.*

. The Administrator had no jurisdiction to undo a statutory interpretation adopted in an EAB ruling by issuing an informal guidance memo. *See* 40 C.F.R. § 124.2(a).

Sierra Club and others petitioned EPA to withdraw or reconsider the illegal Johnson Memo on January 6, 2009. *See* Exhibit 3. Under the Obama administration, EPA Administrator Lisa Jackson granted Sierra Club's petition for reconsideration. *See* Letter from EPA Administrator Lisa P. Jackson to David Bookbinder of Sierra Club at 1 (Feb. 17, 2009), *available at* http://www.epa.gov/nsr/documents/20090217LPJlettertosierraclub.pdf. Administrator Jackson recognized that a national rulemaking was needed with opportunity for public comment. *Id.* In the meantime, she made clear that the Johnson Memorandum "does not bind States issuing permits under their own State Implementation Plans" and that "PSD permitting authorities should not assume that the memorandum is the final word on the appropriate interpretation of Clean Air Act requirements." *Id.* EPA is currently in the process of reconsidering its interpretation of "subject to regulation" and will give the public the opportunity to comment. *See, e.g.,* 74 Fed. Reg. 18,886, 18,905 n.29 (Apr. 24, 2009). Because EPA has announced that it will reconsider its positions in a formal rulemaking proceeding, the Johnson Memo does not reflect EPA's final policy interpretation.[3]

For the same reasons the Council cannot rely on the Johnson Memo, it cannot rely on the Georgia Court of Appeals decision in *Longleaf*, which is based solely on the now-irrelevant Johnson Memo and coal industry propaganda asserting that CO_2 regulation would "impose far-reaching economic hardship on the State." *Longleaf Energy Assoc., LLC v. Friends of the Chattahoochee, Inc.*, 2009 WL 1929192, *8 (Ga. App. Jul. 7, 2009). This unsupported statement

[3] EPA's proposed greenhouse gas reporting rule confirms that EPA will address the issue of whether CO2 is "subject to regulation" under Section 821 or any other Clean Air Act provisions in a separate proceeding – *i.e.*, its reconsideration of the Johnson Memo. *See* 74 Fed. Reg. 16, 448, 16, 456 n.8 (Apr. 10, 2009) (confirming that EPA

makes no sense given the BACT requirement that emission limits must be set in light of "economic impacts and costs." 6 WAQSR § 4(a). The Georgia Supreme Court is therefore unlikely to uphold this flawed decision. *Longleaf, petition for cert. filed*, Case No. S09C1879 (Jul. 27, 2009), *available at* http://green-law.org/Files/GreenLaw/2009/PetitionforCertiorariFinal.pdf.

g. EPA Approves CO_2 Emission Limits Under the Clean Air Act in the 2008 Delaware SIP

Carbon dioxide became a "regulated pollutant" even under the terms of the Johnson Memo on April 29, 2008, when EPA approved a State Implementation Plan revision submitted by the State of Delaware that established emissions limits for CO_2, effective May 29, 2008. 73 Fed. Reg. 23101. The SIP revision imposes CO_2 limits on new and existing distributed electricity generators. Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, Air Quality Management Section, Regulation No. 1144. § 3.0.

In its proposed and final rulemaking notices, EPA stated that it was approving the SIP revision "under the Clean Air Act," 73 Fed. Reg. 11,845, and "in accordance with the Clean Air Act," 73 Fed. Reg. at 23,101. EPA's approval made these CO_2 control requirements part of the "applicable implementation plan" enforceable under the Act, 42 U.S.C. § 7602(q), and numerous provisions authorize EPA to so enforce these SIP requirements, *e.g.*, 42 U.S.C. § 7413 (authorizing EPA compliance orders, administrative penalties and civil actions). In addition, EPA's approval makes these emission standards and limitations enforceable by a citizen suit under Section 304 of the Act. 42 U.S.C. § 7604(a)(1), (f)(3).

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is reconsidering the Johnson Memo and will take comments in that proceeding on whether the proposed monitoring and reporting requirements make greenhouse gases "subject to regulation.")

The Delaware SIP revision constitutes regulation of CO_2 under the Clean Air Act because it was adopted and approved under the Act and is part of an "applicable implementation plan" that may be enforced by the state, by EPA, and by citizens under the Clean Air Act. Thus CO_2 is a pollutant "subject to regulation" under the Act for BACT purposes, even under the definition put forth in the Johnson Memo because it is "subject to . . . [a] regulation adopted by EPA under the Clean Air Act that requires actual control of emissions." Johnson Memo at 1.

Nevertheless, in an effort to evade the consequences of the Delaware SIP, the Memo purports to create an exception specifically designed to exclude the SIP from its definition of "regulation under the Act." *Id.* at 15. As support for its novel (and incorrect) interpretation, the Memo purports to rely on *Connecticut v. EPA*, 656 F.2d 902 (2d Cir. 1981). It construes that case as holding that the "Congress did not allow individual states to set national regulations that impose those requirements on all other states." Johnson Memo at 15. But *Connecticut* does not support that conclusion; indeed, it has nothing to do with the issue here, namely whether a particular pollutant is "subject to regulation" under the Act. Clean Air Act § 165(a)(4). Rather, *Connecticut* discusses only whether the quantitative limits imposed by one state on a particular pollutant apply to neighboring states under the "good neighbor" provision in § 110. *See Connecticut*, 656 F.2d at 909 (Section "110(a)(2)(E)(i) is quite explicit in limiting interstate protection to federally-mandated pollution standards.") (emphasis added). *Connecticut* provides no support to the Johnson Memo's arbitrary limitation on the scope of what constitutes a regulation under the Act – and demonstrates that the Memo's interpretation was driven not by the language or purpose of the statute, but rather by the prior Administration's intractable refusal to address CO_2 emissions.

Nothing illustrates this better than the Memo's conclusion that "EPA does not interpret section 52.21(b)(50) of the regulations to make CO_2 'subject to regulation under the Act' for the nationwide PSD program based solely on the regulation of a pollutant by a single state in a SIP approved by EPA." Johnson Memo at 15. In other words, conceding that the Delaware SIP constitutes "regulation under the Act", the Memo takes the position that such regulation by a single state is not enough. Neither the Act nor its regulations provide a basis for this position – indeed, the Memo makes no attempt to provide a basis.

Thus the Johnson Memo replaces the simple statutory test of whether a pollutant is "subject to regulation under the Act" with a test of whether the pollutant is "subject to regulation under the Clean Air Act in a sufficient number of states or, alternatively, in the state (or Region) where the facility is to be constructed." But that is not what the Act says, nor does the Memo offer any support for the contention that regulation of CO_2 in another state, approved by EPA, does not count as "regulation." Under the plain language of Section 165(a)(4), if CO_2 emissions are restricted under the Clean Air Act, whether in one state or all 50, they are "subject to regulation under the Act" – even under the Memo's improperly narrow definition of "regulation."

Finally, SIP regulations appear in "Subchapter C of Title 40 of the Code of Federal Regulations." 43 Fed. Reg. at 26,397. *See, e.g.*, 40 C.F.R. § 52.420 (2008) (incorporating by reference provisions of Delaware SIP). They are, accordingly, within the scope of the Agency's governing 1978 interpretation, even if that interpretation meant to say "regulated by requiring actual control of emissions" when it said "regulated." If the EPA wished to exclude SIP-based regulations, it would be required to modify its current interpretation, and provide the public with

notice and an opportunity to comment upon that modification. *See Paralyzed Veterans*, 117 F.3d at 586.

DEQ echoes the Johnson Memo by asserting that EPA approval of a SIP does not make pollutants regulated under that SIP subject to regulation under the Clean Air Act in other states. It cites *Vermont v. Thomas*, 850 F.2d 99, 102-04 (2nd Cir. 1988), for this proposition, but that case supports Sierra Club, not DEQ. In *Vermont v. Thomas*, EPA declined to accept Vermont's SIP, which proposed to regulate regional haze. *Id.* In contrast, EPA approved Delaware's SIP that regulates CO_2, making them federally enforceable. Because EPA must take formal action to approve a SIP, there is no risk that an individual state could unilaterally impose emission requirements on other states. Moreover, Delaware's comments on the status of CO_2 under federal law – made prior to the Supreme Court overturned EPA's position that CO_2 is not a pollutant – are irrelevant. *See* DEQ Motion to Dismiss at 29 n.7. It was EPA's approval of the SIP, not Delaware's adoption of it, that rendered CO_2 subject to regulation under the Act.

2. The Council Must Reject DEQ's Motion to Dismiss because CO_2 is "Subject to Regulation" Under EPA's Longstanding Interpretation of the Clean Air Act

Given the EAB's decision in *Deseret* and EPA's subsequent actions, it is now unclear whether EPA will seek to change its longstanding 1978 interpretation of "subject to regulation" through a notice-and-comment rulemaking process. Until then, the EPA's 1978 interpretation stands as the only valid existing interpretation of the statute. As the EAB held, this interpretation—unlike the others it rejected—"possesses the hallmarks of an Agency interpretation that courts find worthy of deference." *Deseret*, slip. op. at 39. EPA "issued it with a high degree of formality," it was subject to notice and comment, and was issued "relatively

contemporaneous[ly] with the statutory enactment and along with the original regulations implementing the statute." *Id.* at 39.

EPA interpreted "subject to regulation" for the purposes of BACT to mean "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. 26,397. Under this interpretation, CO_2 is subject to regulation because the Section 821 regulations requiring monitoring and reporting of CO_2 are codified in Part C of Title 40 of the Code of Federal Regulations, *see* 40 C.F.R. Part 75, and because the Delaware SIP regulates CO_2. Despite DEQ's argument and the many inconsequential EPA actions it cites, the 1978 interpretation is the only interpretation entitled to deference by this Council.

DEQ rests its argument for dismissal primarily on the notion that it cannot regulate greenhouse gas emissions because they are not "subject to actual emission controls." In support of this argument, DEQ relies on the 2002 Reform Rule's definition of "regulated NSR pollutant," which was incorporated into the state's PSD regulations in 2006. DEQ Motion to Dismiss at 20-23. DEQ's argument, however, was already rejected by the EAB in *Deseret*. Slip op. at 43-45. The definition simply mimics the statutory requirement that BACT is required for any pollutant "subject to regulation" under the Clean Air Act. *Id.* at 44.

DEQ also argues that the fourth catch-all provision in the definition of "regulated NSR pollutant"—"any pollutant that otherwise is subject to regulation under the Act"— should be read out of the regulation by applying the doctrine of *ejusdem generis*. Under this doctrine, when "a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." *Laughter v. Bd. Of Cty. Comm'rs for Sweetwater Cty*, 110 P.3d 875, n.14 (Wyo. 2005). DEQ argued that because the first three categories of "regulated NSR pollutant" included pollutants subject to emissions

controls, such as NAAQS and new source performance standards, the fourth category should also be read to require actual emissions controls. DEQ's Motion to Dismiss at 23; *see also Deseret*, slip. op. at 45 (stating that EPA made the same argument).

The EAB also rejected this argument, finding no evidence that in "parroting" the language found in the statutory BACT definition, EPA intended to narrow the fourth catch-all category in the regulation to include only pollutants subject to emissions controls. *Deseret*, slip. op. at 46 (relying on *Gonzales v. Oregon*, 496 U.S. 243, 257 (2006)). Nor did the EAB find any evidence that this had been EPA's consistent historical interpretation. *Id.* at 45. Furthermore, the EAB found that *ejusdem generis* is "only one, and not necessarily the best, means for discerning the text's intent." *Id.* For example, it is also a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 364 (2000). However, if the fourth catch-all category is read to include only the same pollutants subject to actual emissions standards under the first three categories, then it ceases to have independent meaning. Applying the *ejusdem generis* doctrine is particularly inappropriate in this case because the catch-all category uses the term "otherwise," indicating it applies to pollutants subject to regulation in a different manner than the specific categories listed. Therefore, like the EAB, this Council should reject DEQ's claim that the definition of "regulated NSR pollutant" prevents DEQ from regulating greenhouse gases.

DEQ also claims *Alabama Power Co. v. Costle*, 636 F.2d 323, 370 n. 134 (1979), supports its position, but it does not. The cited text merely notes that EPA has authority to adopt new source performance standards governing air pollutants that do not have national ambient air quality standards (NAAQS). It stands for the unremarkable proposition that EPA has authority under the various provisions of the Clean Air Act to regulate different pollutants in different

ways. In fact, it supports Sierra Club's position that once a pollutant is regulated in any manner under the Act, it becomes subject to regulation for purposes of BACT requirements.

DEQ's only other "authorities" are disclaimer language contained in EPA regulatory actions. The Advanced Notice of Public Rulemaking (ANPR) that DEQ cites, Motion to Dismiss at 20, is largely irrelevant. EPA's solicitation of comments on whether CO_2 should be regulated under certain Clean Air Act provisions has no bearing on whether it is already regulated under others. As explained above, the proposed greenhouse gas reporting rule merely confirms that EPA is reconsidering the Johnson Memo, and the endangerment finding only relates to greenhouse gas emissions from motor vehicles.

Having very thin legal authority, DEQ resorts to the familiar scare tactics that regulating CO_2 would impose a high burden, result in economic hardship and a flood of litigation. The Council should ignore these "sky is falling" claims as they are not based on any facts. To the contrary, the BACT provisions require that permitting authorities consider economics in determining permit limits. The facts of this case show that regulating CO_2 from the proposed Medicine Bow plant would be straightforward because Medicine Bow plans to use a control technology to capture its CO_2 and ship it to Wyoming Enhanced Oil Recovery operations. Moreover, Wyoming has much potential for Enhanced Oil Recovery, so requiring more capture of CO_2 would actually result in increased economic opportunities. DEQ makes no attempt to explain how a denial of DEQ's motion to dismiss could result in a flood of litigation.

3. DEQ Was Required to Consider Greenhouse Gas Emissions As Part of the "Collateral Impacts" Analysis For the Medicine Bow Facility

Notwithstanding DEQ's position that CO_2 is not "subject to regulation" under federal law, DEQ's analysis of the Application is flawed because the agency refused to consider

greenhouse gas emissions in its BACT "collateral impacts" analysis. As part of the BACT analysis, DEQ must "take into account energy, environmental, and economic impacts and other costs." 6 WASQR § 4(b). This analysis is known as the "collateral impacts" analysis and occurs at step four of the top-down BACT process articulated in the NSR Manual and employed by DEQ. NSR Manual at B.6, B.8. After DEQ has listed all available control options, eliminated technically infeasible options, and ranked the remaining control technologies, the agency then considers energy, environmental, and economic factors associated with its remaining choices. *Id.* at B.5-B.8.

In considering the collateral environmental impacts DEQ must consider both pollutants "subject to regulation" as well as those that are not regulated under the Clean Air Act. The NSR Manual explicitly states that the analysis of "collateral environmental impacts" should include consideration of "unregulated air pollutants." *Id.* at B.26. Moreover, the EAB has held repeatedly that the collateral impacts analysis includes pollutants that are not subject to regulation. *See, e.g., In re Christian County Generation, LLC*, PSD Permit No. 021060ABC (EAB 2008), 2008 EPA App. Lexis 4, 2008 WL 281839 (Jan. 28, 2008); *In re South Shore Power, LLC*, 2003 EPA App. Lexis 13, at *29 (EAB 2003); *In re Hillman Power Co., LLC*, 10 E.A.D. 673 (EAB 2002); *In re Steel Dynamics*, 9 E.A.D. 165, 189 n.29 (EAB 2000); *In re Kawaihae*, 7 E.A.D. at 116; *In re Matter of: Genesee Power Station Limited Partnership*, 4 E.A.D. 832, 848 (EAB 1993); *In re North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (EAB 1986).

The NSR Manual states that these "unregulated pollutants" may include greenhouse gases. NSR Manual at B.49 ("Significant differences in . . . greenhouse gas emissions may be considered."). In this case, DEQ should have considered the greenhouse gas emissions of all

technologies remaining in the BACT analysis process at step four. The Council should not dismiss this portion of the Sierra Club's claim.

V. CONCLUSION

For all the reasons stated herein, Sierra Club respectfully requests the Council deny the DEQ's motion to dismiss in its entirety.

Respectfully submitted this 17th day of August, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing *Sierra Club's Response to Department of Environmental Quality's Motion to Dismiss $PM_{2.5}$ and CO_2 Claims* through electronic mail on this the 17th day of August, 2009 to the following:

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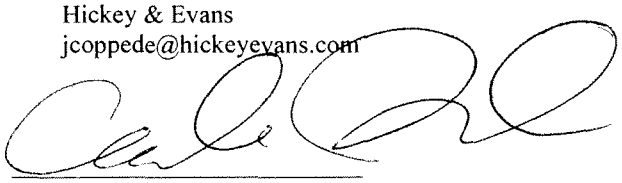

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