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Department of Environmental Quality

FILED
AUG 13 2009
Jim Ruby, Executive Secretary
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

DEQ'S MOTION FOR PROTECTIVE ORDER AS TO CLAIMS I AND V

Respondent, Wyoming Department of Environmental Quality (DEQ), by and through its undersigned counsel, and pursuant to WYO. STAT. ANN. § 16-3-107(g), WYO. R. CIV. P. 26(c) and the Environmental Quality Council Rules, Chapter II, Sections 3 and 4, hereby moves for an order limiting the scope of discovery in the above-captioned matter. In support of this Motion, DEQ states as follows:

1. The Sierra Club Wyoming Chapter and the Sierra Club National Headquarters (Protestants) filed a Protest and Petition for Hearing (Petition) in the above-captioned matter with the EQC on May 4, 2009.

2. On July 20, 2009, the DEQ received *Plaintiff's First Set of Discovery Requests to Wyoming Department of Environmental Quality*. Several of Protestants' discovery requests seek information related to Petition Claim I (Flare SO₂ Emissions) and Claim V (Fugitive PM Emissions), specifically Requests for Admissions Nos. 1 and 2, Interrogatory No. 1 (as it relates to Requests for Admissions Nos. 1 and 2) and

Interrogatory No. 2, and Requests for Production No. 1 (as it relates to Interrogatory No. 1 and Requests for Admission Nos. 1 and 2) and Request for Production No. 2. A copy of *Plaintiff's First Set of Discovery Requests to Wyoming Department of Environmental Quality* is attached hereto as Exhibit 1. DEQ's deadline for respondent to Protestants' First Set of Discovery is August 19, 2009.

3. Two weeks later, on August 3, 2009, Protestants moved for partial judgment on the pleadings as to Claims I and V. Protestants' motion asserts that "there is no disputed issue of fact, and the Sierra Club is entitled to judgment as a matter of law on these two claims." *See* Protestants' Motion at p. 16.

4. Allowing parties to simultaneously seek discovery on the very same issues that Protestants assert are undisputed is a litigation strategy this Council should not condone. Rather than promoting the conservation of resources and judicial economy, Protestants' litigation strategy forces the DEQ to expend valuable agency time and resources responding to both Protestants' discovery request and Protestants' Motion. If Protestants believe they need discovery, they should withdraw their Motion for Partial Judgment on the Pleadings.

5. Furthermore, Protestants should not be allowed to seek discovery and then try and convert their Motion for Partial Judgment on the Pleadings to a Summary Judgment Motion by attaching or supplementing their original Motion with additional documents. *See* WYO. R. CIV. P. 12(c). DEQ's Response to Protestants' Motion is due August 17, 2009. DEQ's deadline for responding to Protestants' discovery request is

August 19, 2009. DEQ is concerned that Protestants will submit a reply or supplemental memoranda prior to the hearing and possibly attach supplemental materials, without DEQ having had any opportunity to complete discovery. *See* Scheduling Order at ¶ h. (discovery cut-off is October 30, 2009 and expert deposition cut off is November 13, 2009). If Protestants need additional facts, Protestants should withdraw their Motion and proceed with discovery as scheduled.

6. Finally, DEQ is also concerned that Protestants will claim that they need additional time to file expert designations and reports regarding Claims I and V if the DEQ's Request for Stay of Discovery is granted and Protestants' Motion for Judgment on the Pleadings is denied. Again, this Council should not permit Protestants through their selection of a particular litigation strategy to dictate changes to the scheduling order. Neither this Council, nor the DEQ or Medicine Bow should have to bear the burden or the consequences of Protestants' ill-conceived litigation strategy. Protestants should bear that burden.

7. The Wyoming Administrative Procedures Act provides that contested case discovery is available in accordance with specific provisions of the Wyoming Rules of Civil Procedure, including Rule 26. WYO. STAT. ANN. § 16-3-107(g); *see also In re Contempt Order Issued Against Anderson*, 765 P.2d 933, 935 (Wyo. 1988) (contested case discovery is governed by the Wyoming Administrative Procedures Act).

8. The scope of discovery is limited to matters, not privileged, that are relevant to the claim or defense of the party seeking discovery. WYO. R. CIV. P. 26(b)(1).

9. However, the scope of discovery may be further limited by a protective order limiting or barring discovery to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” WYO. R. CIV. P. 26 (c).

10. The Wyoming Rules of Civil Procedure further provide that the filing of a motion for protective order “shall stay the disclosure or discovery at which the motion is directed.” *Id.*

11. A protective order could protect DEQ against the needless expenditure of time, money and resources of state personnel, and prevent inefficient use of state resources on discovery over issues that Protestants are seeking to dismiss. *See Persons v. Runyon*, 172 F.3d 879, 1999 WL 104427, *3 (10th Cir. 1999)(unpublished)(discovery was not appropriate where legal issues determined the outcome), *Feist v. Jefferson County Comm'rs Court*, 778 F.2d 250, 252 (5th Cir. 1985)(proper to first determine whether plaintiff raised a claim upon which relief could be granted before authorizing discovery), *Florsheim Shoe Co. v. U.S.*, 744 F.2d 787, 797 (Fed. Cir. 1984) (motion to suspend discovery pending disposition of the motion to dismiss was proper because motion raised questions of law for which factual discovery was not necessary or appropriate).

12. DEQ's Motion for a Protective Order barring discovery as to Claims I and V until the Council has ruled on Protestants' Motion for Partial Judgment on the

Pleadings would not prejudice Protestants because the discovery cut-off, except for expert depositions, is not until October 30, 2009.

13. As required by WYO. R. CIV. P. 26 (c), DEQ's counsel has in good faith conferred with Protestants' Attorney and Staff member Andrea Issod, representing the Protestants as full-time staff, in an effort to resolve this issue without the need for EQC action, but such effort was not productive with respect to Claims I and V. On August 7, 2009, DEQ's counsel spoke with Ms. Issod asking Protestants to either forego discovery on Claims I and V or withdraw their Motion for Partial Judgment on the Pleadings, but Protestants did not agree to do either. DEQ's counsel informed Ms. Issod that this motion would be forthcoming.¹

14. On August 7, 2009, DEQ's counsel also spoke with Medicine Bow's attorney, Ms. Mary Throne, whom represented that Medicine Bow might oppose DEQ's Motion because of concerns that Protestants would seek extensions of time for Protestants' expert designations and other discovery.

15. Therefore, DEQ Respectfully moves this Council for an order barring discovery related to Protestants' Claims I and V pending the Council's ruling on the *Sierra Club's Motion for Partial Judgment on the Pleadings*. In the alternative, by virtue of this Motion having been filed, discovery regarding Claims I and V is currently stayed, and therefore this Council could refrain from ruling on this Motion for Protective Order

¹ The DEQ and the Sierra Club stipulated to stay discovery regarding Claims VII (PM_{2.5}) and VIII (CO₂) pending the Council's ruling on DEQ's Motion to Dismiss.

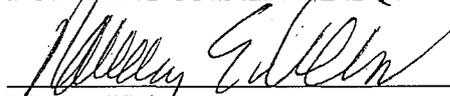
pending this Council's ruling on the *Sierra Club's Motion for Partial Judgment on the Pleadings*. A proposed Order is attached hereto.

16. Should this Council rule on this Motion for Protective Order before ruling on the *Sierra Club's Motion for Partial Judgment on the Pleadings*, DEQ respectfully requests this Council order that the DEQ is not required to provide responses to Protestants' discovery requests regarding Claims I and V until such time as the EQC rules on the *Sierra Club's Motion for Partial Judgment on the Pleadings*.

17. Should this Council deny the *Sierra Club's Motion for Partial Judgment on the Pleadings*, DEQ respectfully requests this Council provide that the DEQ have ten days from the date of the Council's ruling to respond to the Sierra Club's First Set of Discovery Requests regarding Claims I and V. *See supra* at ¶ 2.

DATED this 13th day of August, 2009.

FOR RESPONDENT DEQ:



Nancy Vehr
Sr. Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
PH: (307) 777-6946
Fax: (307) 777-3542

Attorney for the State of Wyoming, DEQ

CERTIFICATE OF SERVICE

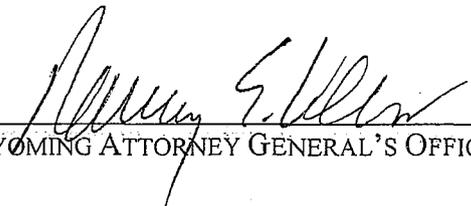
I hereby certify that I have served a true and correct copy of the foregoing DEQ's MOTION FOR PROTECTIVE ORDER AS TO CLAIMS I AND V through United States mail, postage prepaid on this 13th day of August, 2009 addressed to the following:

Patrick Gallagher
Andrea Issod
Sierra Club Environmental Law
85 Second Street, 2d Floor
San Francisco, CA 94105-3441

Mary A. Throne
John A. Coppede
Hickey & Evans, LLP
P.O. Box 467
Cheyenne, WY 82001-0467

and via email addressed to the following:

Pat.gallagher@sierraclub.org
Andrea.issod@sierraclub.org
mthrone@hickeyevans.com
mthrone@wyoming.com
icoppede@hickeyevans.com



WYOMING ATTORNEY GENERAL'S OFFICE

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

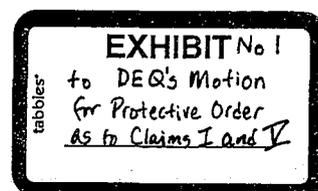
IN THE MATTER OF:)
MEDICINE BOW FUEL) DOCKET NO. 09-2801
& POWER, LLC)
AIR PERMIT CT-5873)

**PLAINTIFF'S FIRST SET OF DISCOVERY REQUESTS TO WYOMING
DEPARTMENT OF ENVIRONMENTAL QUALITY**

Pursuant to Rules 26(e), 33, 34 and 36 of the Wyoming Rules of Civil Procedure and Chapter 2, Section 14 of the Department of Environmental Quality Rules of Practice and Procedure, Sierra Club hereby submits the following discovery requests to Wyoming Department of Environmental Quality. Please serve responses to these requests to: Andrea Issod, Sierra Club Environmental Law Program, 85 Second Street, 2nd Floor, San Francisco, CA 94105.

DEFINITIONS AND INSTRUCTIONS

- A. The responses are to be in the form prescribed by Wyoming Rules of Civil Procedure Rules 33, 34 and 36.
- B. Unless otherwise specified, in answering request for production, produce each document in its entirety, including all attachments, cover memoranda, and appendices, even if only a portion of the document is responsive to the demand. Please also mark each document clearly with the associated request.
- C. In responding to these Requests for Production, please produce all documents available to you at the time your responses are provided, including any and all documents within the possession of your attorney, subordinates, employees, and agents.
- D. Pursuant to Wyo. R. Civ. P. 26(e), initial responses must be supplemented to reflect events occurring or information becoming available before the hearing.



- E. If privilege is claimed as a ground for not producing a document, describe the legal and factual bases for the claim of privilege or any other objection to each Request for Production, or part thereof, in sufficient detail so as to permit the adjudication of the validity of the claim or objection, and identify all documents which refer or relate to the information requested.
- F. If you cannot respond to the requests made herein, after exercising due diligence to identify the documents needed to do so, please state why the response has not been supplied, as well as what efforts have been made to respond, and state whatever information you have concerning the unanswered portion at the time in which you respond.
- G. All words within these requests using the singular include the plural, and use of the plural includes the singular
- H. Medicine Bow Fuels & Power, LLC is referred to herein as "Medicine Bow."
- I. Medicine Bow's "Permittee's Response to Appeal" dated June 3, 2009 is referred to herein as "Response."
- J. "You" or "Your" means Medicine Bow, its parent companies, agents, officers, attorneys, employees, and directors.
- K. The words "and" and "or" shall be construed conjunctively or disjunctively so as to make each Request for Production inclusive.
- L. The words "any," "all," and "each" shall be construed conjunctively or disjunctively so as to make each request inclusive.
- M. "Document" means and refers to, without limitation, all written, typed, graphic matter or otherwise preserved communications including any letter, memorandum, diagram,

drawing, sketch, diary, log, test, analysis, study, projection, check, invoice, receipt, bill, purchase order, shipping order, contract, lease, agreement, work paper, calendar, envelope, paper, telephone message, tape, computer tape, computer disc, computer card, other electronic media, electronic data active files, electronic data archived files, electronic data backup files, electronic file fragments, recording, videotape, film, microfilm, microfiche, drawing, account, ledger, statement, financial data, and all other writings or communications including all non-identical copies, drafts, and preliminary sketches no matter how produced or maintained in your actual or constructive possession, custody or control or of which you have knowledge of the existence, and whether prepared, published or released by you or by any other person or entity. Without limitation, the term "document(s)" shall include any copy that differs in any respect from the original or other versions of the document, such as, but not limited to, copies containing notations, insertions, corrections, marginal notes, or emendations.

- N. "Communication" includes without limitation on definition (M) above or otherwise, a transmittal of information in person, by telephone, by facsimile, or by electronic medium.
- O. The term "Permit" refers to Air Permit CT-5873, issued on March 4, 2009.
- P. The term "tpy" refers to tons per year.
- Q. The term "EPA" refers to the United States Environmental Protection Agency.
- R. The term "Application" shall refer to Medicine Bow's Application for a Prevention of Significant Deterioration Permit, submitted to WYDEQ on December 31, 2007.
- S. The term "SO₂" shall refer to sulfur dioxide.
- T. The term "Facility" refers to Medicine Bow's proposed industrial gasification and liquefaction plant and underground mine referenced in Air Permit CT-5873.

- U. The term "WYDEQ" refers to the Wyoming Department of Environmental Quality.
- V. The term "BACT" refers to Best Available Control Technology.
- W. The term "SSM" refers to startup, shutdown and maintenance.
- X. The term "LDAR" refers to Leak Detection and Repair.
- Y. The term "HAP" refers to Hazardous Air Pollutant.
- Z. The term "MACT" refers to Maximum Achievable Control Technology.

REQUESTS FOR ADMISSION

1. Please admit that malfunctions of the Medicine Bow Facility will occur.
2. Please admit that Medicine Bow did not provide a BACT analysis for emissions from the flares to WYDEQ.
3. Please admit that Medicine Bow did not provide a BACT analysis for emissions from fugitive components to WYDEQ.
4. Please admit that WYDEQ did not consider coal cleaning in its BACT analysis.
5. Please admit that WYDEQ utilized a top-down BACT analysis pursuant to the EPA's 1990 New Source Review Workshop Manual.
6. Please admit that WYDEQ's Application Analysis estimated that methanol emissions would exceed 10 tpy.
7. Please admit that WYDEQ did not account for CO₂ and other greenhouse gas (GHG) emissions from the Medicine Bow facility during the air permitting process.

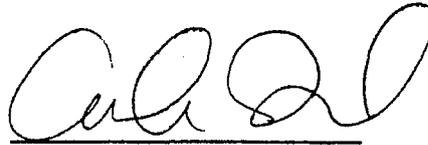
INTERROGATORIES

1. For every Request For Admission that WYDEQ either denied or admitted with qualification, please state the specific basis for such denial or qualified admission, and identify all documents forming the basis for any denial or qualified admission.
2. Please describe the BACT process WYDEQ undertook to reach the conclusion that the SSM plan Medicine Bow provided represented BACT for the flares. (See WYDEQ Response to Comments at p. 16). Please clearly identify the documents in the Administrative Record supporting your response, including page numbers.
3. Please describe the BACT process WYDEQ undertook to reach the conclusion that the LDAR plan Medicine Bow provided represented BACT for the fugitive component leaks. Please clearly identify the documents in the Administrative Record supporting your response, including page numbers.
4. Please describe the process WYDEQ undertook to reach its conclusion that CO₂ and other GHG emissions need not be considered in the air permitting process.

REQUESTS FOR PRODUCTION

1. Please produce all documents referred to, related to, relied on, or otherwise supporting WYDEQ's responses to Interrogatories 1-4. Please clearly identify the documents in the Administrative Record supporting your response, including page numbers.
2. Please provide a copy of the 1994 Memorandum of Agreement with the Environmental Protection Agency (EPA) regarding modeling of fugitive particulate matter emissions.
3. Please produce any communications in the last five years related to the above-referenced 1994 Memorandum of Agreement with EPA.

Respectfully submitted July 17, 2009,

A handwritten signature in black ink, appearing to read 'Andrea Issod', written in a cursive style. The signature is positioned above a horizontal line.

Andrea Issod
Sierra Club Environmental Law Program
85 Second Street, 2d Floor
San Francisco, CA 94105-3441
Phone: (415) 977-5544
Fax: (415) 977-5793
andrea.issod@sierraclub.org

CERTIFICATE OF SERVICE

I, Andrea Issod, hereby certify that on this 17th day of July 2009 a true and correct copy of the foregoing **PLAINTIFF'S FIRST SET OF DISCOVERY REQUESTS TO WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY** was served via United States mail and electronic mail upon the following:

Mary Throne
John A. Coppede
Hickey & Evans
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Nancy Vehr
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nvehr@state.wy.us



Andrea Issod
Sierra Club