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(representing the Club as full-time staff according to EQC rule 6(a))

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 DEQ'S MOTION FOR A PROTECTIVE ORDER ON
CLAIMS I AND V

Because DEQ's request for delay has no merit, is untimely, seeks a one-sided extension of the scheduling order that it previously supported, and would unfairly disadvantage Sierra Club, the Council should deny DEQ's motion in its entirety and order the DEQ to respond to Sierra Club's First Discovery Requests in accordance with Wyo. R. Civ. P. 12(c) by August 19, 2009. Alternatively, if the Council extends DEQ's deadline for responding to discovery, then all other dates in the scheduling order, including the trial date, must be extended.

After the scheduling conference, where DEQ and Medicine Bow represented that they wanted to move forward with discovery as quickly as possible, Sierra Club

worked diligently to propound a limited number of narrowly tailored discovery requests to both parties. Sierra Club sent these requests to DEQ on July 17, 2009, expecting to receive responses 30 days later, so our expert would have sufficient time to review the responses before the expert's rebuttal report is due on October 1, 2009. Sierra Club propounded 7 requests for admission, 4 interrogatories and document requests, plus an additional two document requests, from DEQ. In contrast, DEQ propounded 5 requests for admissions, and 24 interrogatory and document productions from the Sierra Club. Sierra Club responded to all of DEQ's discovery requests on August 17, 2009.

Sierra Club's Motion for Partial Judgment on the Pleadings on Claims I and V does not present any reason for DEQ to delay its responses, and the condensed scheduling order in this case does not allow for any delay. Sierra Club must seek discovery on Claims I and V because if the Council rejects its current motion, Sierra Club will need these additional facts to proceed to summary judgment and the hearing. These facts must be reviewed by our expert and be included in his expert report. That is not a "litigation strategy," as DEQ dubs it; it is what is required by the Wyoming Rules of Civil Procedure, and Sierra Club has no alternative.

Sierra Club's initial expert report is due on September 1, 2009, and its rebuttal report is due on October 1, 2009. The discovery Sierra Club has requested from DEQ must be reviewed by our expert and be included in the expert report according to Wyo. R. Civ. P. 26(a)(2)(B), which provides that: "the report shall

contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions.” The hearing on the Motion for Partial Judgment on the Pleadings is September 1, 2009, and there is no deadline for the Council to rule.

Therefore, if the Council extended DEQ’s response date, Sierra Club’s expert would be unable to opine on outstanding factual information relevant to the Club’s claims that is in DEQ’s possession. That result would be severely prejudicial to Sierra Club. The Council can only extend DEQ’s response date if it extends all other dates in the scheduling order accordingly. Extending DEQ’s deadline to respond to Sierra Club would necessitate extending the deadlines for expert reports, which would in turn necessitate extension of discovery deadlines, summary judgment motions, and the hearing date. Sierra Club continues to support an extension of the hearing date in this case given the current expedited schedule.

DEQ argues “if Protestants believe they need discovery, they should withdraw their Motion.” This is simply out of line because Sierra Club cannot rely on winning its Motion on the Pleadings. Sierra Club is entitled to the information it seeks in order to develop the record in the case.

DEQ has cited no actual reason for delaying its responses except for vague, unsupported claims that responding would waste agency time. DEQ’s references to federal court cases are irrelevant because federal schedules are usually at least

twice as long as the expedited schedule in the present case. When DEQ supported the current scheduling order in this case, it should have been aware that the schedule left no room for discovery extensions. Sierra Club voiced repeated concerns at the initial scheduling conference that the parties would not be able to meet the terms of the scheduling order. DEQ's support of the scheduling order should bar it from now seeking a one-sided extension, which would prejudice Sierra Club if the remainder of the schedule is not correspondingly extended.

DEQ contends that Sierra Club is not "promoting the conservation of resources and judicial economy," however, it is DEQ that is expending the Council's resources by bringing this motion. The Council should note that the Sierra Club made an attempt to compromise with DEQ by stipulating to stay discovery on two of its other claims. Sierra Club offered this compromise at the potential risk to its own case, to try to persuade DEQ from pursuing the current motion.

As DEQ admits, its responses to Sierra Club are due on August 19, 2009. DEQ's motion is untimely because the Council does not have sufficient time to rule before DEQ's responses are due. This is unfair to the Sierra Club, which has already expended significant efforts to respond to both parties' discovery requests.

Based on the foregoing reasons, Sierra Club requests that the Council deny DEQ's motion in its entirety and order DEQ to respond to Sierra Club's discovery requests immediately. In the alternative, if the Council wishes to grant DEQ an extension, it must extend every other deadline in the scheduling order accordingly.

To implement this option, the Council should propose a new hearing date and then ask the parties to submit revised proposed schedules. The Sierra Club continues to support an extension of the hearing date in this case because the current schedule has been burdensome. A proposed scheduling order for both options is attached.

Respectfully submitted this 19th day of August, 2009

FOR PETITIONER SIERRA CLUB

A handwritten signature in black ink, appearing to read "Andrea Issod", written over a horizontal line.

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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 for a Protective Order on Claims I and V* through electronic mail on this the 19th day of August, 2009 to the following:

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