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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 IN LIMINE TO LIMIT HEARING EVIDENCE AND
TESTIMONY ON CLAIMS II AND III TO THE ISSUES RAISED IN SIERRA
CLUB'S PETITION**

DEQ respectfully requests, pursuant to DEQ Rules of Practice and Procedure, Ch. II, §§ 2 and 14, that the testimony and evidence during the hearing be limited to the issues raised in Sierra Club's Protest and Petition for Hearing filed on May 5, 2009, for the following reasons:

1. "All persons requesting a hearing or protesting a permit shall file . . . a written petition[.]" 1 DEQ RPP § 3(b).
2. Chapter 1, Section 3(c) of the rules require the petition set forth:
 - (i) Name and address of the person making the request or protest and the name and address of his attorney, if any.
 - (ii) The action, decision, order or permit upon which a hearing is request or an objection is made.
 - (iii) A statement in ordinary, but concise language of the facts on which the request or protest is based, including

whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated.

(iv) A request for hearing before the Council.

3. The Wyoming Rules of Civil Procedure provide for “notice pleading.” WYO. R. CIV. P. Rule 8; *see also Krenning v. Heart Mountain Irr. Dist.*, 2009 WY 11, ¶30, 200 P.3d 774, 783 (Wyo. 2009). Pleadings are liberally construed to ensure substantial justice. *Krenning*, 200 P.3d at 783. “However, notice pleading imposes ‘the fundamental . . . obligation of every pleader to apprise his adversary of the nature of the claim against him.’” *Id.*

4. On May 4, 2009, the Sierra Club filed its Protest and Petition for Hearing (Petition) with the EQC. *See* Attachment A hereto.

5. Sierra Club included eight claims in its Petition. *See* Attachment A. Claims II and III are the subject of this motion.

ARGUMENT I. Hearing Evidence and Testimony Should be In Accordance with Sierra Club’s Allegations in Claim II – VOC and HAP Emissions from Fugitive Components and the BACT Analysis for Such Emissions.

6. Sierra Club captioned Claim II as “WYDEQ Improperly Quantified HAP Emissions from Fugitive Component Leaks, and Failed to Apply BACT to VOC Emissions from Fugitive Component Leaks.” The caption states that VOC and HAP emissions from fugitive component leaks were an issue. *See* Attachment A at p. 13.

7. Sierra Club set forth Claim II in paragraphs 48 – 52 of their Petition as follows:

48. **Fugitive component leaks** from valves, pumps, compressors, and connectors in the Medicine Bow facility are a source of **VOC emissions, which include HAPs such as methanol.**

49. The permit Application improperly calculated emissions from **fugitive sources**, including tanks, valves, pumps, compressors, and connectors, using outdated and inaccurate emission factors. Moreover, the Application did not even contain a final count of components.

50. Reliance on inaccurate, unreliable and biased emission factors in calculating a source's potential to emit is improper and unlawful.

51. Neither the Applicant nor WYDEQ conducted a proper **BACT analysis** to control **VOC emissions from fugitive component leaks.** The Applicant and WYDEQ concluded that the only available control technology for addressing fugitive component emissions is a Leak Detection and Repair ("LDAR") Program, as defined by the New Source Performance Standard requirements of Subpart VVa of 40 CFR part 60.

52. The facility is subject to the New Source Performance Standards, but New Source Performance Standards are a starting point for a **BACT analysis**, not BACT itself. 6 WAQSR § 4(a); *see also* 40 C.F.R. §§ 52.21(j) & (b)(12). The science and engineering of LDAR programs has advanced significantly in recent years and the facility must employ the best available LDAR standards.

Attachment A at ¶¶ 48-52 (emphasis added).

8. The common sense reading of Sierra Club's allegations in Claim II indicates that the Sierra Club allegations related to fugitive VOC and HAP emissions from leaking components and the BACT analysis for such emissions. *Id.*

9. Claim II is silent as to VOC or HAP emissions from the flares. The flares function as control devices, not components. *Compare* Ex. 25 at DEQ000040 (flares) *with* Ex. 15 at DEQ000078-000054, DEQ000078-000231 through -249.

10. The DEQ RPP require that the Petition set forth the factual and, where possible, the legal basis for the Petition. 1 DEQ RPP § 3 (c).

11. Claim II of Sierra Club's Petition did not set forth any facts or legal basis as to VOC or HAP emissions from the flares. *See* Attachment A at ¶¶ 48 – 52. Therefore, as set forth in Chapter 1, Section 3(c) of the DEQ Rules of Practice and Procedure, hearing evidence and testimony should be in accordance with the allegations in Claim II – VOC and HAP emissions from fugitive components and the BACT analysis for such emissions.

ARGUMENT II – Hearing Evidence and Testimony Should be In Accordance with Sierra Club's Allegations in Claim III – Quantity of Methanol Emissions and if "Major" then Needed a MACT Review.

12. Sierra Club captioned Claim III as "WYDEQ Erroneously Concluded that Medicine Bow is a Minor Source of Methanol and Failed to Conduct a Case-by-Case MACT Determination to Control Methanol and other HAP Emissions." The caption states that the amount of methanol emissions are an issue, and if major for methanol, then the attendant MACT requirements that would apply to Methanol and other HAP emissions. *See* Attachment A at p. 14.

13. Sierra Club's Claim III was set forth in paragraphs 53 – 59 of their Petition as follows:

53. As detailed in the previous claim [Claim II], WYDEQ did not properly estimate **methanol emissions from fugitive component leaks. Allegations in Claim II are incorporated herein.**

54. Even applying outdated and inaccurate emission factors, the Application and WYDEQ's Application Analysis estimated that **methanol emissions** would exceed the **10 tpy** major source limit and acknowledged that Medicine Bow is a major source of Hazardous Air Pollutants ("HAPs").

55. Maximum Achievable Control Technology ("MACT") requirements apply to "major sources" that have the potential to emit 10 or more tons per year of any one HAP or 25 or more tons per year of a combination of HAPs. 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.41; 6 WAQSR § 6(f)(iv).

56. EPA's comments stated that WYDEQ must conduct a case-by-case MACT analysis before commencement of construction.

57. In its Response, WYDEQ stated that, after a "reevaluation" of information, it determined that the Medicine Bow will emit only **9.2 tpy of methanol**, and is therefore a **minor source of HAPs**. WYDEQ did not justify this new conclusion. The improper emission factors already significantly underestimate **methanol leaks from fugitive components**, and even this inaccurate **methanol estimate** is almost **10 tpy**.

58. In order to limit potential-to-emit to render Medicine Bow a "minor" or "area" source for MACT purpose, WYDEQ must issue a "federally enforceable" permit containing practically enforceable conditions limiting HAP emissions. There are no practically enforceable conditions in the Permit limiting **methanol emissions**.

59. Medicine Bow is a major source of HAPs as defined in 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.41; and 6 WAQSR § 6(t)(iv). WYDEQ must conduct a case-by-case MACT analysis for all HAPs emitted by the facility according to 42 U.S.C. § 7412(g)(2); 6 WAQSR § 6(g).

Attachment A at ¶¶ 53-59 (emphasis added).

14. The plain reading of Sierra Club's allegations in Claim III indicates that the Sierra Club allegations relate to methanol emissions from fugitive components over the 10 TPY MACT threshold and, if that occurs, then Sierra Club alleges that a "case-by-case MACT analysis for all HAPs" must occur. *Id.*

15. All the factual allegations contained in Claim III relate to fugitive methanol emissions from component leaks and the 10 TPY MACT threshold. *Id.*

16. The DEQ RPP require that the Petition set forth the factual and, where possible, the legal basis for the Petition. 1 DEQ RPP § 3 (c).

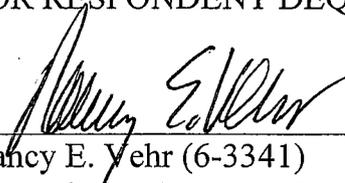
17. Claim III of Sierra Club's Petition did not set forth any facts for HAP emissions other than Methanol. *See* Attachment A at ¶¶ 53 – 59. Therefore, as set forth in Chapter 1, Section 3(c) of the DEQ Rules of Practice and Procedure, hearing evidence and testimony should be in accordance with the allegations in Claim III – methanol emissions from fugitive components and the 10 TPY single HAP MACT threshold.

CONCLUSION:

The Sierra Club's attempt to expand the issues on the eve of hearing defies the DEQ Rules of Practice and Procedure and fair pleading. Therefore, the DEQ respectfully requests the the testimony and evidence during the hearing be limited to the issues raised in Sierra Club's Protest and Petition for Hearing filed on May 5, 2009.

DATED this 7th day of December, 2009.

FOR RESPONDENT DEQ:



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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing DEQ's MOTION IN LIMINE through United States mail, postage prepaid on this 7th day of December, 2009 addressed to the following:

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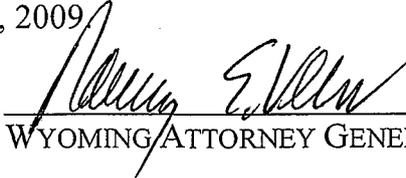
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