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Jim Ruby, Executive Secretary
Environmental Quality Council

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

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

**MEDICINE BOW FUEL & POWER'S MOTION IN LIMINE --
RANAJIT SAHU**

COMES NOW Medicine Bow Fuel & Power, LLC (MBFP), by and through its undersigned attorneys, and hereby moves the Council for an order in limine excluding the testimony of Sierra Club's witness, Ranajit Sahu, on the grounds that Sierra Club has failed to disclose in its pre-hearing memorandum or at the pre-hearing conference the substance of his proposed testimony. Alternatively, the Council should exclude opinions of Ranajit Sahu for which there is no objective basis for any such opinions. In support hereof MBFP respectfully states:

In its pre-hearing memorandum Sierra Club identified Ranajit Sahu as witness in this matter. The identification, however, fails to provide the substance of Sahu's testimony. In its pre-hearing memorandum Sierra Club merely states that it "will call Dr. Sahu to testify about issues relating to the contested Medicine Bow permit." There is no identification of what issues Sahu will testify about. Sierra Club also failed to disclose the substance at the pre-hearing conference. It is respectfully submitted that this designation is woefully inadequate because it discloses nothing about the substance of Sahu's proposed testimony. The Council's July 2 Scheduling Order contemplated the requirement that the parties disclose in their pre-hearing memoranda the substance of the testimony of their witnesses. The Order specifically provided that the purpose of the pre-hearing conference was to identify the witnesses and the substance of their proposed testimony. As a procedural tool, the purpose of a pre-hearing order "is to insure the economical and efficient trial of every case on its merits without chance or surprise." *Smith v. Ford Motor Company*, 626 F.2d 784, 795 (10th Cir. 1980); *see also Central Contractors Co. v. Paradise Valley Util. Co.*, (purpose of pretrial conference is to eliminate surprise).

Sierra Club has failed to identify the substance of Sahu's proposed testimony and thus, its failure to do so is contrary to the purpose of the pretrial conference which is to eliminate surprise. The Council should prohibit any testimony from Sahu since the substance of the testimony has not disclosed.

Alternatively, Sahu should not be permitted to testify about any matters beyond his expert reports, and even there at a minimum, he should not be permitted to offer opinions on the following matters:

1. MBFP IS MAJOR FOR HAPs

In his deposition, Sahu testified that it is his opinion that MBFP is major for HAPs. It is proper to exclude expert opinion when it is based on the subjective belief of the expert or constitutes speculation. *See Hoy v. DRM, Inc.*, 114 P.3d 1268, 1283-84 (Wyo. 2005). The Council should enter its order excluding such opinion testimony because Sahu has no objective basis for such an opinion, which is nothing more than Sahu's subjective belief based on speculation. He has no facts, evidence or other information that MBFP is, in fact, major for HAPs. The opinion is also immaterial and irrelevant because Sahu has no evidence that Medicine Bow will be a major source of HAPs. The opinion should accordingly be excluded. *See Wyo. Stat. § 16-3-108(a)* (irrelevant or immaterial evidence shall be excluded in contested cases). When asked that question in his deposition he admitted it was only his opinion, stating: "Right. That's my opinion. It's more likely to be a major source of hazardous air pollutants." Depo. of Sahu at 75. The relevant portions of Sahu's deposition are attached hereto as Exhibit 1.

Sahu admitted he did not do anything to calculate the potential to emit for VOC/HAPs and thus, there is no objective basis for this opinion. *See Depo. of Sahu at 94-95* (Exhibit 1). Without an objective basis upon which Sahu's proffered opinion can be evaluated, Sahu is asking the Council to speculate and thus, his opinion is properly excluded as a matter of law. *See Hoy*, 114 P.3d at 1284 (affirming trial court's order

excluding expert from testifying because there was no objective basis upon which the expert's proffered opinion could be evaluated). Here, Sahu has no objective basis for this opinion, but instead seeks to present speculation and argument in lieu of reasoned, trustworthy scientific analysis, and should accordingly be excluded. Without independently conducting any such calculations, Sahu simply has no foundation for an opinion that the facility is major for HAPs.

Here, under Wyo. Stat. § 16-3-108(a) it is proper to exclude this proffered opinion because it simply is not "supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs." *Id.* This is a large, complex and expensive facility. Given the seriousness of the matter before the Council, flippant, baseless and speculative off the cuff opinions simply should not be considered, but instead should be excluded under Wyo. Stat. § 16-3-108(a).

2. VOCs/LDAR

For the same reasons, the Council should exclude Sahu's opinions that VOC's were improperly estimated and that the LDAR program is not BACT for fugitive emissions. Sahu has no basis for those two opinions, other than his subjective belief. He did not do any independent calculations for VOC/HAPs, nor did he do a BACT analysis for fugitive VOCs. See Depo. of Sahu at 93-95.

Q. Would it be fair to say, though, that in this particular instance, you didn't – you personally, in connection with formulating your opinions, you personally did not do a BACT analysis for equipment leaks for this facility?

A. I did not do a BACT analysis for this facility.

Depo of Sahu at 93; L 5-11. Nor did he even bother to do any research in EPA's RACT/BACT/LAER Clearinghouse to determine whether any other viable control options existed:

Q. Did you review that resource [EPA's RACT/BACT/LAER Clearinghouse] . . . to research BACT [for] equipment leaks?

A. Not recently and not for Medicine Bow.

Depo. of Sahu at 93: L25 - 94: L1-3. Thus, there is no foundation for those opinions. They are, therefore, immaterial and irrelevant and are nothing more than speculation, which should be excluded. Again, under Wyo. Stat. § 16-3-108(a) it is proper to exclude this proffered opinion because it cannot be seriously contended it is "supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs." *Id.*

3. DEQ's Failure to Include Fugitive PM Emissions in Short term Dispersion Modeling

Sahu is also designated to proffer an opinion on dispersion modeling for particulate matter (PM) and that MBFP supposedly failed to include short-term fugitive emissions of PM in its dispersion modeling. The opinion is immaterial and irrelevant because Sahu has no evidence that Medicine Bow failed to demonstrate compliance with the 24-hour PM₁₀ NAAQS and WAAQS. The opinion should accordingly be excluded. *See* Wyo. Stat. § 16-3-108(a) (irrelevant or immaterial evidence shall be excluded in contested cases). Sahu admitted he did not do any dispersion modeling in this case:

Q. I take it, then, you didn't do any fugitive particulate emission model[ing] in this case; is that correct?

A. I did not.

Depo. of Sahu at 100: L 23-25; 101:L 1 (Exhibit 1). In any event, there is no objective foundation for any such opinion and it accordingly would be speculation for Sahu to opine on whether MBFP's fugitive PM₁₀ emission modeling failed to demonstrate compliance with NAAQS and WAAQS. Without undertaking such a task, Sahu simply has no foundation for any such opinion.

In fact, Sahu admitted he is not an expert on dispersion modeling. Sahu depo at 100. The last time Sahu did any modeling for fugitive particulate emissions was approximately ten years ago. Depo at 101: L 20-22. At that time, he used ISCT, which has since been replaced by AERMOD. See March 4, 2009, Decision at IV-11. Under Wyo. Stat. § 16-3-108(a) it is proper to exclude this proffered opinion because it is not "supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs." *Id.* Given the seriousness of the matter before the Council, flippant, baseless and speculative off the cuff opinions simply should not be considered, but instead should be excluded under Wyo. Stat. § 16-3-108(a).

WHEREFORE, MBFP respectfully requests that the Council enter its order granting the relief requested and for further and other relief as it may deem just and appropriate.

DATED this 7th day of December 2009.

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CERTIFICATE OF SERVICE

I, John A. Coppede, hereby certify that on this 7th day of December 2009 a true and correct copy of the foregoing **MEDICINE BOW FUEL & POWER'S MEDICINE BOW FUEL & POWER'S MOTION IN LIMINE – RANAJIT SAHU** was served by hand delivery and/or electronic mail to:

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