Filed: 1/12/2021 4:19:18 PM WEQC

Matt J. Micheli, P.C., WY Bar No. 6-3839
Macrina M. Jerabek, WY Bar No. 7-5757
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
Facsimile: (307) 778-8175
mjmicheli@hollandhart.com
mmjerabek@hollandhart.com

ATTORNEYS FOR PETITIONER
CITATION OIL & GAS CORP.

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of:	)	
Citation Oil & Gas Corp.	)	Docket No. 20-2601
Air Quality Permit No. P0027427	)	
Through Permit No. P0027433	)	

CITATION OIL & GAS CORP.'S RESPONSE TO DEQ'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF CITATION OIL & GAS CORP.'S MOTION FOR SUMMARY JUDGMENT

Citation Oil & Gas Corp. ("Citation") petitioned the Wyoming Environmental Quality Council ("Council") to review and vacate permit conditions included in seven minor air source permits issued by the Wyoming Department of Environmental Quality's ("DEQ") Air Quality Division ("AQD"). After negotiations failed, Citation filed a Motion for Summary Judgment alleging the AQD had improperly concluded that: (1) Citation's facilities underwent modification—through addition, recompletion, workover, or fracture treatment of certain wells—that triggered construction permitting; and (2) Citation's facilities are therefore subject to the Presumptive Best Available Control Technology ("PBACT") requirements outlined in a 2018 Guidance document, including federal New Source Performance Requirements for Leak Detection and Repair that are not otherwise applicable to these facilities. Subsequently, DEQ

filed its Response and Cross Motion for Summary Judgment ("Motion"). The foregoing paragraphs reflect Citation's response and reply to DEQ's motion.

INTRODUCTION

DEQ asserts in its Cross Motion that upon AQD's receipt of Citation's operating permit applications in January 2020, AQD correctly determined based on policy and guidance that "Citation had previously modified each facility by addition, recompletion, workover, or fracture treatment of certain wells without seeking a permit." Cross Mot. at 1. This finding, which finds no support in AQD's underlying permit analyses, therefore triggered the imposition of BACT under Wyoming's air quality rules. *See* Cross Mot. at 1; Wyo. Stat. Ann. § 35-ll-801(e); *Rules Wyo. Dep 't of Envtl. Quality*, *Air Quality* ("WAQSR") Ch. 6, § 2(v). Consequently, AQD argues, it acted appropriately when it imposed certain monitoring conditions upon these facilities, consistent with its PBACT analysis outlined in the 2018 *Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance* ("2018 Guidance document").

DEQ's arguments are founded on the flawed premise that it has the authority to impose through "policy" and "guidance" the binding determination that in *every* case, a recompletion, workover, or fracture treatment of wells, or the addition of a well, *per se* results in an emissions increase and therefore qualifies as a modification. Cross Mot. at 7-18. Yet DEQ never defines what constitutes an emissions increase and asserts that any increase, regardless of amount or period of time, triggers onerous construction permitting requirements. *Id*. DEQ's position is arbitrary, would result in absurdity, and must be rejected.

Furthermore, even if AQD properly determined that modifications occurred at these facilities, AQD's application of the PBACT as proscribed in its 2018 Guidance document is

nevertheless inappropriate. AQD is not at liberty to impose additional regulatory burdens on operators based on the arbitrary, selective enforcement of its administrative guidance. The 2018 Guidance document, by its own terms, does not apply to the facilities at issue as it expressly limits PBACT to "facilities with associated wells that have a first date of production (FDOP) on/after **February 1, 2019** and to facilities with a modification occurring on/after **February 1, 2019**." 2018 Guidance, p. 2 (emphasis in original). AQD cannot rely on internal, unwritten policies to circumvent those threshold dates and unilaterally impose PBACT requirements as outlined in the 2018 Guidance document without regard to the date of the first date of production or date of a modification. Such a blanket determination would inherently result in due process violations and fail to account for the requisite "technical practicability and economic reasonableness" considerations that a BACT determination necessitates.

Accordingly, Citation requests that this Council grant its motion for summary judgment, deny DEQ's motion for summary judgment, and revoke Conditions 7 through 13 of the seven permits at issue in this appeal based on the following findings:

> **(1)** AQD's presumption that the facilities were modified is arbitrary and capricious;
>
> and
>
> **(2)** even if the facilities were modified, AQD improperly subjected Citation to monitoring requirements set forth in the 2018 Guidance document that are not applicable under the plain terms of the Guidance.

To the extent the Council determines that a remand to AQD is necessary, Citation requests that the Council require (1) that AQD make modification determinations, including an assessment of emissions increases from Citation's facilities, based on objective and transparent criteria, such as a ton-per-year basis; and (2) if a modification did occur, apply the PBACT in effect as of the year that the modification occurred.

ARGUMENT

I. AQD Arbitrarily Presumed that the Changes at Citation's Facilities Constituted "Modifications" that Triggered Construction Permitting.

DEQ's arguments are based on a flawed premise that the identified changes at each of the facilities necessarily constituted a modification as defined in Chapter 1, Section 3 of the Wyoming Air Quality Rules—and therefore Citation should have submitted a BACT determination under the Chapter 6, Section 2 construction permitting rules if it wanted to avoid application of the PBACT in the 2018 guidance. This argument, however, relies on a mischaracterization of the facts as agreed upon by all parties, and a misapplication of the relevant law.

Citation maintains that none of the changes at the seven facilities subject to this petition qualified as a modification. Ultimately, however, this Council need not make a determination regarding whether a modification actually occurred—rather, the question before the Council is whether AQD acted arbitrarily by relying on guidance to make a presumption that the activities at issue *per se* resulted in an increase in emissions, without defining what constitutes emissions increase or assessing the change in emissions (if any) at the individual facility level.

A. Citation Submitted Operating—Not Construction—Permit Applications that AQD Deemed Complete.

In March of 2018, after a year of cooperative work with AQD, Citation completed its environmental audit under the Audit Privileged and Immunity Provisions in the Wyoming Environmental Quality Act, Wyo. Stat. Ann. §§ 35-11 -1105-1106. Citation submitted to DEQ its findings and a compliance plan, which included submittal of various permit applications for 25 of its Wyoming facilities. Each of these seven facilities *already* had been either permitted

under WAQSR Chapter 6, Section 2(c) and were subject to BACT, or had received a construction permit waiver in which DEQ determined that the facility was "insignificant in both emission rate and ambient air quality impact" under WAQSR Chapter 6, Section 2(k)(viii). Redweik Dec. ¶16 (listing permit/waiver lists for each of the facilities); Exh. B. Consistent with the compliance plan and its understanding of the path forward, Citation submitted applications for operating permits or updates to existing operating permits to cover *existing operations*.[1] Redweik Dec. ¶¶ 14-17. The purpose of these applications was to ensure that the existing equipment and current facility operations were appropriately reflected in the permits. Redweik Dec. ¶ 14, 16.

Importantly, AQD accepted these applications as complete on February 24, 2020 and although the agency has the authority to make requests for additional information during the permitting process, it did not. Redweik Dec. ¶¶ 19-20; Exh. C. Rather, the agency simply presumed that a modification had occurred and applied the PBACT in the 2018 guidance *without any further dialogue with Citation*. Redweik Dec. ¶¶ 20-21. Admittedly, Citation was unaware of the status of the draft permits due to a breakdown in internal company communications and the departure of the employee with responsibility for these permits, and thus did not submit comments objecting to the permit conditions contained therein. Redweik Dec. ¶¶ 22-23. However, to the extent DEQ implies that, absent having commented on the draft permits, Citation is now precluded from seeking the relief requested from this Council, DEQ is mistaken. Nothing in the provisions governing permit appeals or contested case hearings prohibits a party

[1] Under Chapter 6, Section 2(a)(iii), operating permits are required for facilities that have completed construction/modification and passed the 120-day startup period. Because the facilities are existing and no construction or modification was contemplated, Citation appropriately submitted operating permit applications rather than a construction or modification permit applications under Chapter 6, Section 2(a)(ii).

that did not comment on the draft permit from challenging final permit conditions. *See* Wyo. Stat. Ann. § 16-3-107(a) ("In any contested case, all parties shall be afforded an opportunity for hearing"); *see also* Permit Nos. P0027427-33 (AQD itself acknowledging Citation's statutory right to appeal the permit conditions, noting, an "appeal of this permit as a final action of the Department must be made to the Environmental Quality Council within thirty (30) days of permit issuance per Section 8, Chapter 1, General Rules of Practice and Procedure, Department of Environmental Quality."); *see also* Chapter 2, Section 4 of Contested Case Hearing, Department of Environmental Quality (omitting any requirement to comment on a draft permit prior to challenging final permit conditions). Furthermore, Citation did offer after issuance of the permits in June of 2020 to make a demonstration that the changes did not result in modifications. Redweik Dec. ¶ 25. AQD refused this offer. *Id*.

Chapter 6 of the WAQSR establishes applicable operating and construction permitting requirements for both minor sources and major sources of air contaminants. WAQSR Ch. 6 § 1(a). Under these regulations, construction permitting is required for all *new* minor sources or *modifications* to existing minor sources. And only construction permits include the time- and cost-intensive demonstrations (including BACT) found at WAQSR Chapter 6, Section 2(c). When Citation applied for minor source permits under its audit compliance plan, it did so based on an understanding that it was applying for operating permits for existing facilities—not construction permits. Redweik Dec. ¶¶ 13-14, 18. The various demonstrations required for construction permits were, therefore, not included in these applications. Redweik Dec. ¶¶ 17-18. It is disingenuous for DEQ to assert that Citation bore the burden of making the alternate demonstrations required in a *construction permit*, Cross Mot. at 16, where Citation submitted

operating permit applications[2] on AQD forms that included all of the information for the existing facility (including emissions data) required at WAQSR Chapter 6, Section 2(b). Redweik Dec. ¶¶ 14-18; *Permit Applications*, Permit Nos. P0027427-33.

As DEQ acknowledges, it has a "responsibility to review the permit application in full," Cross Mot. at 19, and to make a rational determination. *See Gilbert v. Bd. of Cnty. Comm'rs of Park Cnty.*, 2010 WY 68, ¶ 10 ("The arbitrary and capricious test requires the reviewing court to review the entire record to determine whether the agency reasonably could have made its finding and order based upon all the evidence before it"). Although DEQ makes much of the obligation of the permittee to provide information to the agency, AQD did not question the adequacy of these applications at the time of permitting despite making its own determination that modifications had occurred requiring construction permits. Indeed, AQD ultimately determined Citation's applications to be complete and never asked for additional information. Redweik Dec. ¶¶ 19-20; Exh. C. To simply presume that the change constituted a modification without further analysis, and unilaterally impose permit conditions associated with a construction permit, is the height of arbitrary and capricious agency action. *See Mullinax Concrete Serv. Co. v. Zowada*, 2010 WY 146, ¶ 20 (noting that an agency's determination of damages required a "before and after" analysis and because there was "no evidence in the record on which to base such analysis,

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[2] Citation objects to the assertion that Citation attempted to "avoid applicable requirements by simply asserting that it did not intend to reveal that it had modified its facilities." Cross Mot. at 19. At no time has DEQ alleged, or Citation conceded, that the company withheld information related to these changes or attempted to use the operating permit to avoid a construction permit application. This type of "[u]nsubstantiated allegations carry no probative weight in summary judgment proceedings. To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Cypert v. Indep. Sch. Dist. No. I-050 of Osage County*, 661 F.3d 477, 481 (10th Cir. 2011); *see also Bogdanski v. Budzik*, 2018 WY 7, ¶ 18, 408 P.3d 1156, 1161 (Wyo. 2018) (in opposing a summary judgment motion, a party "must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden[.]").

which in and of itself, amounts to a lack of substantial evidence" the decision was arguably arbitrary and capricious).

B. AQD Inappropriately Presumes that the Changes at Citation's Facilities *Per Se* Increase Emissions and Therefore Always Constitute a "Modification" as Defined by Governing Regulations.

At the heart of DEQ's legal argument is the presumption that in *every* case and under *any* circumstance, a recompletion, workover, or fracture treatment of wells, or the addition of a well, *per se* results in an emissions increase that triggers onerous construction permitting requirements. Cross Mot. at 7-18. As a result, DEQ posits, AQD had no duty to further investigate whether a "modification" as defined in the regulations[3] actually occurred at each of these facilities because it "has simply determined over many years of experience that certain activities, as a matter of fact, increase emissions." Cross Mot. at 17. DEQ's presumption is inappropriate for two reasons: (1) a legally binding determination that certain activities always trigger construction permitting must be made pursuant to rule, not generally applicable guidance; and (2) DEQ's position that any emissions increase, no matter how small or over what period of time, triggers construction permitting is arbitrary and would result in absurdity. *See e.g.*, *Oakley*

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[3] A modification is defined to include both a physical change *and* an increase in the amount of any pollutant. WAQSR Ch. 1, § 3. It should be emphasized that the language in WAQSR Chapter 6, Section 2(a)(i) referencing the use of a facility "which may cause the issuance of or an increase in the issuance of air contaminants" is simply not at issue in this case. Accordingly, to the extent DEQ relies upon that language to now argue it resulted in permitting obligations is nothing more than impermissible post-hoc rationalization. *See e.g., SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *National Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193 (D.D.C. 1996) ("The rule is that an agency must defend its actions on the basis on which they were originally taken, not on some new basis that is developed in litigation to justify the decision."), The permit analysis documents and final permits issued by the AQD refer to modifications as the basis for imposing BACT—not the language in the latter portion of Chapter 6, Section 2(a)(i), and DEQ cannot now assert AQD relied on that language in making its decision.

v. State, 715 P.2d 1374, 1380 (Wyo. 2010) (noting that the court "seeks to avoid absurd results otherwise occasioned by strained interpretations.").

First, DEQ does not rebut Citation's assertion that the definition of "Modified Facility" in the 2018 Guidance document presumes that certain activities *per se* result in the emissions increase necessary to trigger a "modification" as defined in the regulations. Cross Mot. at 16. As set forth in Citation's opening brief, this type of presumption results in obligations on regulated parties that must be subject to WAPA notice-and-comment rulemaking. *See* Citation Br. at 11-14; Wyo. Stat. § 16-3-103 ("Prior to an agency's adoption . . . of all rules other than interpretative rules or statements of general policy" certain statutory requirements must be met, including the governor approving and signing the rule prior to it being filed with the registrar of rules). *See also Mt. Reg'l Servs. v. State ex rel. Dep't of Health*, 2014 WY 69, ¶ 6.

Here, DEQ asserts that the definition of modification in the regulation comports with the 2018 Guidance document because certain activities "by their very nature" increase emissions, and therefore constitute a modification. Cross Mot. at 9. Further, DEQ asserts that it is the AQD's policy that it "considers the introduction of production streams from new wells or additional wells to be a modification of an existing facility." Cross Mot. at Ex. 5, ¶ 10. Critically, DEQ cannot point to any rulemaking wherein such a "policy" is formally articulated, nor can it establish that such a policy was adopted in accordance with the requirements set forth in WAPA.

Furthermore, DEQ cannot assert that such a policy is beyond the scope of formal rulemaking because it constitutes an interpretive rule or general statement of policy. The 2018 Guidance document and AQD's general approach in assessing these activities establish an apparently irrebuttable presumption that certain activities result in an emissions increase. Such

an approach to determining whether a modification has occurred mirrors the characteristics of a rule, rather than an interpretive rule or a general statement of policy. *See* Schwartz, Administrative Law, § 58, p. 154 ("Substantive rules are issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations"); *Wyoming Mining Ass'n v. State*, 748 P.2d 718, 724 (Wyo. 1988) ("[I]nterpretive rules and general statements of policy do not establish binding norms which are finally determinative of anyone's rights."). Notably, the DEQ fails to explain how it accounts for discretion in its modification decisions when certain activities "by their very nature" constitute a modification—and the agency failed to seek further information from Citation once it determined it would be evaluating the permit applications under the umbrella of construction permits.

Second, what constitutes an "emission increase" resulting from a change is not defined in the regulations and DEQ appears to assert that any increase, regardless of amount and regardless of the time period of the increase, would constitute a modification. Cross Mot. at 18 ("But significance is not the test for a modification. If emissions increased as a result of the specific change, then that change is a modification under the Air Quality Rules."). Yet nowhere does DEQ set forth what constitutes an "emissions increase" that results in a "modification" that ultimately triggers construction permitting.

WAQSR Chapter 6, Section 4, which sets forth the construction permitting requirements for major modifications, provides a clear process for determining whether an emissions increase would result in major source permitting. In order to trigger permitting for major modifications, a change must result in both a "significant emissions increase" and a "significant net emissions increase." WAQSR Ch. 6, § 4(a). Under this rubric, a source follows detailed tests for assessing the significance of the emissions increase, including consideration of a baseline period before

which the change occurred—generally a two-year period of representative operations within 10 years of the change—and the ton-per-year increase on an annual basis after the change. WAQSR Ch. 6, § 4(b)(J).

These requirements, which are generally consistent with EPA regulations, provide sources with both a clear baseline period against which to compare emissions after the change, and an annualized ton-per-year emissions threshold that triggers major source permitting. Although neither party is asserting that major source permitting applies here, these regulations are illustrative of the importance of determining what constitutes an emissions increase in the context of air permitting, rather than simply blindly asserting that any emissions increase—regardless of significance or amount of time—triggers regulatory obligations.[4] Indeed, the failure to define what constitutes an emissions increase raises serious policy issues. Is an emission increase for five minutes adequate to trigger a modification? A week? month? Six months? Is an increase in emissions that does not endure for even a year adequate to trigger construction permitting requirements? While Citation is aware of the provision that gives the Administrator the broad authority to exempt from permitting "[s]uch other minor sources which the Administrator determines to be insignificant in both emission rate and ambient air quality impact," WAQSR Ch. 6, § 2(k)(viii), this does not provide meaningful guidance by which

[4] This is consistent with how other states address minor source permitting. For example, in the state of Utah, there are meaningful limits on what constitutes construction for purposes of minor source permitting. There, construction means any physical change or change in the method of operation including fabrication, erection, installation, demolition, or modification of a source which would result in a change in *actual emissions*. U.A.C. R307-101-2 (emphasis added). Actual emissions is further defined: "Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operations." Likewise, in the state of Colorado, sources that emit less than the predetermined ton-per-year emission thresholds are not required to obtain a construction permit.

sources can make a determination that a planned change would trigger minor source permitting. *See e.g., Rissler & McMurray Co. v. Environmental Quality Council (In re Bessemer Mt.)*, 856 P.2d 450, 451 (Wyo. 1993) (court held EQC should undergo formal rulemaking for the phrase "very rare or uncommon" because the phrase is "too amorphous," and that, without appropriate criteria or factors adopted by administrative rulemaking, classifications made on an ad hoc basis would be inherently arbitrary and capricious).

In this case, the facilities subject to this appeal are tank batteries that serve older vertical wells—some of which were drilled as early as 1900—and have been in production decline for decades. Redweik Dec. ¶ 2. Citation added a well at four of the facilities at issue in this appeal, performed a workover of a well at two facilities, and fracture treated a well at one facility. *Id.* ¶ 4. A well workover involves remedial treatment and is conducted to extend the life of the well, while a fracture treatment involves "fractures in the rock formation around the wellbore that will hopefully stimulate the flow of natural gas or oil." *Id.* ¶¶ 5-7. At older facilities, these activities at any single well are designed to maintain existing production at the broader facility—not to increase production on a consistent basis. *Id.* ¶ 7. Indeed, production increases lasted a matter of weeks or months and quickly declined to below pre-change levels. *Id.* ¶¶ 9-11. While DEQ makes much of Citation's acknowledgment that emissions track production, these increases were not sustained over a period of time that approached even a year. *Id.* Based on the foregoing, DEQ's presumption that these activities always result in emissions increases—and its refusal to even consider a demonstration to the contrary—is arbitrary and should be rejected.

II. AQD's Application of the Presumptive Best Available Control Technology as Outlined in its 2018 Guidance is Arbitrary and Capricious.

AQD improperly presumed that Citation's facilities were modified. That alone ends the inquiry and makes DEQ's remaining arguments irrelevant. However, even if these facilities had

been modified, AQD's application of the PBACT as proscribed in its 2018 Guidance document is nevertheless inappropriate.

A. AQD's Selective Enforcement of its 2018 Guidance is Impermissible.

Without providing any legal support for its assertions, DEQ claims that "Citation chose not to conduct a BACT analysis" and in doing so, "placed the burden on the Division to decide what the best available control technology would be" for Citation's facilities. Cross Mot. at 21. DEQ claims AQD "has done the work to make that decision" and that work is reflected in AQD's 2018 Guidance which outlines its understanding of the current "'best' and 'available' control technologies." *Id*. On those grounds, DEQ then makes the unsupported jump to the conclusion that, if an operator fails to make a BACT demonstration in its application, AQD is entitled to blindly impose the PBACT requirements in effect at the date it receives a permit application and not the date of the modification as directed by the 2018 Guidance document.

That is not the case. Throughout its motion, DEQ appears to use the 2018 Guidance document as both a shield and a sword. When the guidance provides language that is helpful, DEQ leans on the guidance to justify its actions. For example, in its first argument DEQ looks to the 2018 Guidance document's definition of "Modified Facility" to justify AQD's blanket assumption that modifications occurred. In doing so, DEQ uses the 2018 Guidance document to avoid AQD's obligation to meaningfully evaluate whether an increase in emissions occurred. For that argument, when the administrative guidance is helpful, DEQ relies on the 2018 Guidance as controlling.

But here, when the 2018 Guidance document conflicts with DEQ's position, suddenly it becomes simply suggestive. That is the position DEQ takes in defending AQD's decision to completely ignore the 2018 Guidance document's clear mandate that the PBACT "permitting

requirements under this Guidance apply to facilities with associated wells that have a first date of production (FDOP) on/after **February 1, 2019** and to facilities with a modification occurring on/after **February 1, 2019**." 2018 Guidance document, p. 2 (emphasis in original). Instead of providing any explanation for the decision to ignore these threshold dates, DEQ simply reminds this Council that, "as Citation pointed out in its brief, the 2018 Guidance is merely guidance and it is not binding on the agency or the public at large." Cross Mot. at 2. DEQ does not address why it believes AQD can pick and choose which provisions of the 2018 Guidance document it is going to treat as having the force and effect of law, and which it will simply ignore.

AQD cannot have it both ways. It is not at liberty to impose additional regulatory burdens on operators on an ad hoc basis lest the agency violate due process principles. DEQ grossly oversimplifies the requirements of due process in its Motion. Due process is not simply a concept of notice and opportunity to be heard. Citation was of course aware of—i.e. on notice of—the relevant rules, regulations, statutes, and 2018 Guidance document. What Citation didn't have notice of, however, was AQD's arbitrary practice of imposing additional regulatory burdens based on AQD's unwritten, informal policies.

AQD, like all other agencies, is constrained by the Wyoming Administrative Procedure Act, which serves to protect against this type of unlawful exercise of power and to help "avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232, 94 S. Ct. 1055, 1073 (1974). "[T]he responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibility have intended, but what [was] said." *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (alterations in original) (internal quotation marks omitted).

AQD cannot simply rely on its internal, unwritten policies "as a substitute for [its] duty to promulgate clear and definitive regulations." *Id.* Due process requires that Citation, and all other operators, receive fair warning of the conduct AQD prohibits or requires. If AQD seeks to impose additional burdens through the application of its 2018 Guidance document, it must first comply with its statutory notice-and-comment requirement to enforce those requirements. AQD's determination that it will unilaterally impose the PBACT requirements in place at the time of an application—without regard to the date of a modification—is an ad hoc determination that is not justified by any express rule, regulation, or statutory provision, and is in direct contravention of AQD's own administrative guidance.

The 2018 Guidance document could not be clearer about which facilities will be subject to its PBACT permitting requirements. Citation's facilities are not included in those affected facilities. It is undisputed that all the alleged "modifications" to these facilities occurred well before the February 1, 2019 effective date. Thus, by its own terms, the 2018 Guidance document does not, and cannot, apply to these facilities. Because the 2018 Guidance document is the only version of the Guidance document that contains fugitive emissions monitoring requirements for sources located in the statewide area, had AQD complied with the terms of its Guidance document, the permit conditions at issue would not have been imposed. AQD's attempt to avoid its obligation to provide fair notice of the conduct it prohibits or requires, based on unwritten internal policies, is arbitrary and capricious.

B. AQD's Blind Application of the 2018 Guidance's PBACT Requirements Ignores the Requisite Considerations in a BACT Determination.

Beyond the due process implications of AQD's selective enforcement of internal policies, AQD's blanket application of the PBACT in its 2018 Guidance document based on its unilateral

determination that a modification occurred runs contrary to the principles and required considerations underlying BACT determinations. As the Division itself acknowledges, the determination of the best and available control technology must include "consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." WAQSR, ch. 6, § 2(c)(v). The determination necessarily requires the Administrator to take "into account energy, environmental, and economic impacts and other costs" and determine what is "achievable for such source or modification through application or production processes and available methods, systems, and techniques[.]" *Id.*, ch. 6, § 4(a).

AQD's policy of unilaterally imposing 2018 PBACT on all applications received after the 2018 Guidance document was issued—regardless of date of modification—leads to absurd results and entirely fails to account for the particular circumstances of certain facilities. Here, the facilities at issue are decades old, low-producing wells. To now require Citation comply with regulations that came into effect years after these changes occurred, without any cost analysis or consideration of the impact these requirements will have on Citation's ability to continue operating these facilities generally, fails on its face to include the "technical practicability and economic reasonableness" considerations that BACT necessitates. AQD's failure to make those requisite considerations during the permit process, and its default imposition of regulatory burdens—especially absent any legal support for its position that it is entitled to exercise such unfettered power—is inherently arbitrary and capricious and cannot stand.

CONCLUSION

For the reasons above and those set forth in Citation's Memorandum Brief in Support of Motion for Summary Judgment, Citation requests that this Council grant Citation's motion for summary judgment, deny DEQ's motion for summary judgment, and revoke Conditions 7

through 13 of the seven permits at issue in this appeal. In the alternative, and to the extent the Council determines that a remand to AQD is necessary, Citation requests the Council require AQD make modification determinations, including an assessment of emissions increases from Citation's facilities, based on objective and transparent criteria, such as a ton-per-year basis; and, if a modification did occur, apply PBACT that was in effect as of the year the modification occurred.

Dated January 12, 2021.

Matt J. Micheli, P.C., WY Bar No. 6-3839
Macrina M. Jerabek, WY Bar No. 7-5757
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
P.O. Box 1347
Cheyenne, WY 82003-1347
Telephone: (307) 778-4200
Facsimile: (307) 778-8175
mjmicheli@hollandhart.com
mmjerabek@hollandhart.com

ATTORNEYS FOR PETITIONER CITATION OIL & GAS CORP.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this January 12, 2021, in accordance with the requirements of Chapter 2, Section 4(a) of the Department of Environmental Quality Rules of Practice and Procedure, this Citation Oil Corp.'s Motion for Summary Judgment was filed via hand delivery on:

Chairman of the Environmental Quality Council,
2300 Capitol Ave.
Hathaway Bldg. 1st, Room 136
Cheyenne, WY 82002

and served via registered mail, return receipt requested, on the following, and delivered by hand as well:

Todd Parfitt
Director of the Department of Environmental Quality
200 West 17th Street
Cheyenne, WY 82002

Nancy E. Vehr
Administrator of the Air Quality Division
Department of Environmental Quality
200 West 17th Street
Cheyenne, WY 82002

James Kaste
Deputy Attorney General State of Wyoming
123 Capitol Building
Cheyenne, WY 82002

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