

STATE OF WYOMING
BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL

IN THE MATTER OF:)
)
PETITIONER JACKSON HOLE) DOCKET NO.: _____
)
CONSERVATION ALLIANCE, ET AL.)
)
PERMIT NO: P0036295)
)

APPEAL OF AIR QUALITY PERMIT P0036295 AND REQUEST FOR STAY

Jackson Hole Conservation Alliance and the Teton Village Association (collectively, the “Petitioners”), by and through their undersigned attorneys, submit this notice of appeal and request for a stay of the Air Quality Permit P0036295 issued by Administrator Nancy E. Vehr of the Wyoming Department of Environmental Quality, Air Quality Division (“AQD” or the “Administrator”) to Arbor Works Tree Service (“Arbor”), dated February 29, 2024 (the “Permit”), for failure to comply with the Wyoming Environmental Quality Act and to impose legally enforceable terms and conditions on Arbor’s construction and initial operation of a portable air curtain burner (the “Burner”).

I. Petitioners

1. The Petitioners filing this appeal are:

Jackson Hole Conservation Alliance
625 South Cache Street
Jackson, WY 83001

The Teton Village Association
P.O. Box 866
Teton Village, WY 83025

The Petitioners are represented in this matter by Eric Waeckerlin, Affie Ellis, and Courtney Shephard of Brownstein Hyatt Farber Schreck, LLP, 1807 Capitol Avenue, Suite 203, Cheyenne, Wyoming 82001. Correspondence and information related to this appeal should be served on the undersigned counsel.

II. Standing

2. The Petitioners have standing to appeal the issuance of the Permit:
 - a. Devra Davis is a member of Petitioner Jackson Hole Conservation Alliance (“JHCA”). Ms. Davis and other JHCA members will be harmed by the Burner as authorized by the Permit because operating the Burner will degrade the air quality of the area, impede the visibility of the natural surroundings, and poses a significant fire risk to JHCA members—all of which present imminent threats to the environment and the values JHCA has worked towards for more than four decades to preserve. The declaration attached as Exhibit A describes Ms. Davis and JHCA’s interests in the Permit and standing to bring this appeal.
 - b. Jim Terry is a member of Petitioner Teton Village Association (“TVA”). Mr. Terry and other TVA members will be harmed by the Burner as authorized by the Permit because operating the Burner will degrade the air quality of the area, impede the visibility of the natural surroundings, and poses a significant fire risk to the residents and businesses that the TVA represents—all of which present imminent threats to TVA and their members. The declaration attached as Exhibit B describes Mr. Terry and the TVA’s interests in the Permit and standing to bring this appeal.
 - c. Both JHCA and TVA submitted comments to AQD during the public comment period.

d. JHCA and TVA members also participated in and provided comments to AQD during the public hearing on July 7, 2023.

III. The Council Has Authority to Review This Appeal

3. The Wyoming Environmental Quality Act (the “Act”) grants the Wyoming Environmental Quality Council (the “Council”) the authority to “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” Wyo. Stat. Ann. § 35-11-112(c)(ii). It further states the Council shall “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit” otherwise required by the Act. *Id.* § 35-11-112(a)(iv) (emphasis added).

4. “Where authorized by the [Act], appeals to the Council from final actions of the Administrators or Director shall be made within thirty (30) days of notification of such action.” WY Rules and Regulations 020.0008.1 § 8(a).

5. The Permit is a final agency action. *See Bennett v. Spear*, 520 U.S. 154, 156 (1997) (an agency’s action is final if it marks the “consummation of the agency’s decisionmaking process” and if the action is one “from which legal consequences will flow.”).

6. AQD issued the final Permit on February 29, 2024. Thus, this appeal is timely filed.

IV. Background

A. The Permit and the Location

7. A true and correct copy of Arbor’s application (described below) is attached as Exhibit C and the Permit is attached as Exhibit D.

8. The Permit authorizes Arbor to “install and operate a portable air curtain burner at various locations throughout Wyoming.” Exhibit D at p. 1. According to the application, Arbor plans to use the Burner to incinerate logs, wood chips, stumps, and firewood biproducts. Exhibit

C at p. 3. The Burner will be located on state-owned property in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, Township 42 North, Range 117 West, 6th P.M., in Teton County, Wyoming. Exhibit D at p. 1.

B. The Permit Application

9. On February 23, 2023, Arbor filed an application for a new source review permit (“Application”). *See* Exhibit C.

10. The Application states that if approved, Arbor would sell its largest wood chipper and truck, to be “replaced with a self-loading grapple truck; all material would be hauled unchipped to tracked[sic] 6 and burned in the Air Burner. Additional wood chips from other tree crews would be added to the burner and additional chippers would be sold if more large woody material is needed to maintain an efficient burn.” Exhibit C at p. 3. The Application does not provide further detail about Arbor’s planned activity, such as volume, frequency or other details about anticipated wood burning, estimated emissions associated with necessary transport and handling activities, intended hours of operation, or anticipated length of operation at the location—all of which are concerns discussed in more detail below.

11. Among other things, the Application states Arbor plans to operate an Air Burner S-223 to burn wood waste stored on “Tract 6,” which Arbor has a temporary use permit to use. Exhibit C at p. 3.

12. According to the temporary use permit from the State of Wyoming Board of Land Commissioners attached to the Application, Tract 6 is state-owned land located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, Township 42 North, Range 117 West, 6th P.M. Temporary Use Permit No. TUP-03344 (the “TUP”), attached as Exhibit E.

13. Importantly, the TUP included with the Application only authorizes Arbor to use the land as a “temporary stockpile site for woodchips and firewood” from August 1, 2022 until August 1, 2027. Exhibit E at p. 1.

14. The TUP included with the Application does not authorize Arbor to construct, locate, or relocate any improvements on the property. More specifically, the TUP does not authorize Arbor to construct or operate the Burner on the property.

15. The Burner is an open-top box. As wood debris are burned in the box, a generator diesel-fired engine powers a fan which directs air across the top of the box. The air curtain on top of the box is intended to reduce the amount of particulate matter, i.e., smoke, escaping from the box, but only when operated under the right conditions, including a specific, required temperature and air flow velocity.

16. In addition, the Burner manual attached as Exhibit F states on page 9: “The unit should not be operated when the wind speeds reach 20 MPH as the potential to carry hot embers is significantly increased. As an operator you should always be aware of wind speed and direction. Increased [sic] wind speed will affect the integrity of the ‘air curtain’ and will cause hot embers to travel farther.” (emphasis added).

C. AQD Permit Application Analysis

17. AQD provided its “Permit Application Analysis” on April 13, 2023 (“Permit Application Analysis”). The Permit Application Analysis is attached as Exhibit G.

18. The Permit Application Analysis estimates emissions from the Burner using U.S. Environmental Protection Agency (“EPA”) Document AP-42 and based on 180 days of operation. Exhibit G at p. 2. Based on these two factors, AQD provided its “best estimate for emissions from the proposed operation” in tons per year (“tpy”) in Table 2. *Id.*

19. The Permit Application Analysis explains that a 75 horsepower (“hp”) portable generator diesel-fired engine will be used to continuously burn fuel to power the Burner and provides engine emission factors in units of grams per horsepower-hour (g/hp-hr) in Table 1. Exhibit G at p. 2. It further states the major pollutants from diesel combustion are nitrogen oxides

("NOx"), carbon monoxide ("CO"), volatile organic compounds ("VOCs"), and particulate matter ("PM"). *Id.*

20. With respect to the generator diesel-fired engine, the Permit Application Analysis estimates it will operate "no more than 1,080 hours [sic] per year" and that the "Division considers this to represent BACT." Exhibit G at pp. 2–3. The Permit Application Analysis does not quantify the emissions associated with operation during the 1,080 hours, and does not otherwise discuss why AQD assumed 1,080 hours per year of operation, or provide any further analysis of its Best Available Control Technology ("BACT") determination.

21. The Permit Application Analysis also generally describes the process of the Burner and concludes that, when operated in accordance with the operation manual, the Burner represents BACT for this type of operation. Exhibit G at p. Like its BACT determination for the generator diesel-fired engine, the AQD analysis does not discuss in detail its BACT determination for the Burner. For example, the Permit Application Analysis does not contain any mention or comparisons to other available technology, nor does it consider potential alternative technologies or other environmental or economic impacts and tradeoffs between the Burner and some other process, technology, or control device.

22. The Permit Application Analysis is missing critical information, and/or discussion, including but not limited to: (1) the lack of an air dispersion modeling analysis or associated discussion about modeled impacts; (2) discussion or determination about contribution (or lack thereof) to the National Ambient Air Quality Standards ("NAAQS") for 1-hour nitrogen dioxide ("NO₂"), PM 2.5, or PM 10; (3) comparison to other potential control technologies, or other meaningful analysis of why the Burner and the generator diesel-fired engine represent the "best" control technology; (4) discussion of potential contribution, or other analysis of potential impacts,

to the Class 1 airshed in Grand Teton National Park located only a few miles away; (5) any quantification or meaningful evaluation of potential fugitive dust or PM emissions; (6) evaluation of actual or potential operating hours of the Burner; (7) discussion or other consideration of potential emissions from truck traffic and/or operation of other gas or diesel-fired engines necessary to the operation (e.g., the self-loading grapple truck); and (8) analysis of the fire risk of operating the Burner.

23. Despite the missing analyses and information described above, the Permit Application Analysis proposed certain permit conditions. Exhibit G at pp. 4–5.

D. JHCA, TVA, and Other Public Comments

24. AQD received numerous comments about the Permit Application and the Permit Application Analysis. *See* public comment file attached as Exhibit H. Many of the comments sought additional information on the potential for air degradation in the immediate vicinity of the Burner, voiced concerns about fire hazards, and one comment noted DEQ’s denial of a similar request for the same company in Sublette County.

25. JHCA submitted comments (attached as Exhibit I) regarding the proposed location of the Burner in a highly scenic area with significant human and wildlife activity in winter and summer months. The group expressed concern about the impact of air emissions from the Burner to human and wildlife in the area, and to the aesthetic values of the Teton Range. JHCA also cited a peer reviewed paper that stated air curtain burners do not eliminate CO or PM emissions or smoke in comparison to open burning. AQD did not provide adequate responses to these concerns.

26. TVA also submitted comments (attached as Exhibit J), which included an independent air dispersion modeling analysis conducted by Air Resource Specialists (“ARS”).

27. Among other findings, ARS determined that NO_x emissions from the Burner would not meet the NAAQS for NO₂, the source would potentially exceed major source limits for

CO, and the Permitting Application Analysis was otherwise incomplete, which in turn, deprived interested parties of the ability to adequately comment on a full and complete application package. *See Exhibit J at pp. 3–5.*

28. TVA and ARS made the following additional comments, the majority of which AQD either did not address or did not adequately address (see Section IV.E, below):

- a. The AQD emissions analysis appeared to rely on an assumption of six hours of operation per day and 180 days of operation per year (*see Exhibit J at pp. 3–4*), but AQD did not propose any terms limiting the hours or days of operation. Likewise, AQD did not propose any terms regarding the maximum volume or frequency of wood waste that may be burned per day to ensure the emissions limits are met.
- b. The proposed permit terms did not include robust monitoring, recordkeeping, and reporting provisions to verify compliance with operating limits or otherwise ensure safe operation.
- c. The AQD analysis did not include a complete emissions inventory and notably did not consider: ash and dust generated by the Burner; fugitive dust and other emissions associated with trucking materials to the site or between the stockpile and the Burner; or emissions from the generator diesel-fired engine that continuously powers the fan in the Burner.
- d. The emissions analysis lacked a complete emissions inventory meaning that, if the CO emissions from WDEQ Analysis Table 2 are extrapolated to full-time operation, potential CO emissions would exceed 100 tpy, making the Burner and associated equipment on Tract 6 a major source.

- e. The proposed permit terms did not include a requirement to conduct opacity testing on a weekly basis.

29. Ultimately, ARS and TVA requested a second 30-day public review and comment period once AQD corrected the highlighted deficiencies. AQD did not provide another 30-day review and comment period, and as discussed next, decided not to address many of TVA's concerns in a meaningful way.

E. Summary of Terms and Conditions in the Permit and Response to Comments

30. AQD issued the Permit dated February 29, 2024. The Permit and attachments speak for themselves, but some of the more notable aspects of the Permit are discussed below.

31. The Permit authorizes the construction of the Burner "as described in the application." Exhibit D at p. 1.

32. The Permit requires Arbor to "obtain an operating permit in accordance with Chapter 6, Section 2(a)(iii) of the WAQSR 120 days after startup in order to operate this facility." Exhibit D at p. 1. However, the Permit also allows operation of the Burner for 120 days after startup without an operating permit. *Id.* As a result, the Permit is more than a construction permit—it is also an operating permit (or at least a temporary operating permit). *See id.* at p. 2 (granting the Application to "install and operate" the Burner).

33. Permit Condition 12 (Exhibit D at p. 2) allows Arbor to relocate the Burner from the initial location on state-owned land within the SE¼SE¼ of Section 36, Township 42 North, Range 117 West, 6th P.M. under the following conditions:

- a. Permit Condition 5 requires Arbor to notify AQD "as soon as practicable prior to start of operation of the air curtain burner at any location" and provide the burn date(s), estimated burn duration, and a map showing the proposed burn location and nearest residence/business. Exhibit D at p. 2. But no term limits the actual emissions from the

Burner (or any other source), restricts the hours of operation, requires assessment of fire risk, or requires recordkeeping or reporting of emissions-related data, whether on Tract 6 or elsewhere.

b. Permit Condition 6 allows Arbor to submit a “self-issuance” relocate permit for each new location. Exhibit D at p. 2. Neither the Permit nor the AQD Portable Facility Relocate Form requires Arbor to conduct a new air dispersion modeling analysis or to otherwise assess the potential emissions or other impacts (including the potential fire hazard) from operating at any new location.

34. Permit Condition 8 states: “the visible emissions from the air curtain burner during steady state operations shall not exceed 10% opacity . . . the burner will be considered to be in steady state operations after 30 minutes of operation from ignition.” Exhibit D at p. 2 (emphasis added). Permit Condition 9 requires Arbor to conduct a quarterly Method 9 observation to demonstrate compliance with Permit Condition 8. Exhibit D at p. 2. Thus, at least for the first 30 minutes of each startup (which could be each day or even multiple times each day), emissions from the Burner are effectively unlimited. And opacity is only required to be evaluated four times per year.

35. Permit Condition 11 requires Arbor to construct and operate the Burner “in accordance with manufacturer’s specifications.” Exhibit D at p. 2. As noted in Paragraph 16, above, one particularly important manufacturer specification limits operation of the Burner to conditions of less than 20 MPH winds. Yet, nothing in the Permit imposes any enforceable condition in this respect. Similarly, there is nothing in the manufacturer’s specifications or the Permit that imposes an enforceable limitation on the hours of operation.

36. Permit Condition 12 requires the Burner to be located “in accordance with proper land use planning as determined by the appropriate state or local agency charged with such responsibility.” Exhibit D at p. 2. But, as discussed above, the TUP included with the Application¹ does not authorize the siting or operation of a Burner or other emissions source (engines); rather, it authorizes only the stockpiling of wood. In this respect, Permit Condition 12 appears void *ab initio*—i.e., imposes a condition with which the permittee cannot comply.

37. In its responses to public comments (attached as Exhibit K), AQD provided a memorandum from Ramboll addressing part of the analyses provided by ARS. The Ramboll memorandum is Appendix A within Exhibit K. Ramboll disagreed with ARS’s conclusion on the potential NO₂ NAAQS violation (Exhibit K, Appendix A at 1), but did not address or discuss compliance with the PM 2.5 or PM 10 NAAQS. In fact, Ramboll appears to agree with ARS on several of the permit deficiencies, labeling them as “analysis gaps” and “limitations of analysis.” See Exhibit K, Appendix A at p. 2. These gaps/limitations include: lack of a complete emission inventory; inability to evaluate NO_x (or other) emissions from the generator diesel-fired engine used to ignite and continuously maintain burning; a single year of meteorological data; lack of a cumulative NAAQS impact analysis; lack of modeling of the generator diesel-fired engine emissions; and a missing evaluation of PM emissions. *Id.*

V. Relevant Legal Requirements Governing the Permit and AQD’s Decision²

38. Petitioners restate and incorporate all of the foregoing allegations as though fully set forth herein.

¹ The Permit does not include a revised or amended TUP.

² Petitioners reserve their rights to identify additional legal authorities and requirements following review of the complete record.

39. As an agency of the Wyoming Department of Environmental Quality (“DEQ”), AQD has an overarching obligation to protect public health, welfare, and the environment by preventing, reducing, and eliminating pollution across its numerous program and activities, including issuing permits. *See* Wyo. Stat. Ann. § 35-11-102.

40. Each new facility or source which may emit air contaminants must obtain a construction permit from AQD. WY Rules and Regulations 020.0002.6 § 2(a)(i).

41. Permanent facilities or sources required to obtain a construction permit also must obtain an operating permit. WY Rules and Regulations 020.0002.6 § 2(a)(ii). Minor sources must obtain an operating permit from AQD for operation after a 120-day start up period. WY Rules and Regulations 020.0002.6 § 2(a)(iii).

42. Portable sources must obtain a permit to operate for each new location, as well as a new construction permit for each new location that is a new source or facility and for each new or modified portable source of facility.³ WY Rules and Regulations 020.0002.6 § 2(a)(iv).

43. The Wyoming air quality statutes impose the following requirements on all operating permits:

- a. “Every permit issued under the operating permit program shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the department no less often than every six (6) months, the results of any required monitoring, and other conditions as are necessary to assure compliance

³ Petitioners note there are no regulations or other guidance defining a “portable source” or offering instruction about permitting portable sources vs. permanent sources. Petitioners also note the general lack of record evidence about how long Arbor intends to operate the Burner on Tract 6, but note that Arbor has had the right to use Tract 6 for six years up to this point and there is nothing to suggest this will not be a permanent location for the Burner.

with applicable requirements established pursuant to this article and the Clean Air Act.”
Wyo. Stat. Ann. § 35-11-206(a) (emphasis added).

b. “Every permit issued under the operating permit program shall set forth inspection, entry, monitoring, compliance certification and reporting requirements to assure compliance with the permit terms and conditions. Monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section.” *Id.* § 35-11-206(c) (emphasis added).

44. AQD is responsible for issuing construction and operating permits, and issued the Permit. The Administrator, acting in her official capacity, makes final decisions for AQD, including in cases like this governing permit terms and conditions and permit issuance. *See* WY Rules and Regulations 020.0002.1 § 3(a) (defining “Administrator” as the “Administrator of the Division of Air Quality, Wyoming Department of Environmental Quality.”).

45. Chapter 2 of the Wyoming Air Quality Standards and Regulations (“WAQSR”) sets forth Ambient Standards for various pollutants, including PM and NO₂. *See generally* WY Rules and Regulations 020.0002.2. The EPA requires that each State Implementation Plan (“SIP”) “set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, . . . will result in . . . [i]nterference with attainment or maintenance of a [NAAQS].” 40 C.F.R. § 51.160(a) (emphasis added); *see also id.* § 51.160(b). AQD developed guidance to aid in evaluating air quality impacts from minor air pollution sources, including whether such minor sources will contribute to an exceedance of a NAAQS. *See* Wyoming Department of Environmental Quality/Air Quality Division Guidance for Conducting Near-Field Modeling Analyses for Minor Sources (Jan. 2018).⁴

⁴ Available at https://www.providenceoriz.com/wp-content/uploads/2016/01/wyoming_Modeling_Guidelines.pdf (last visited March 28, 2024).

46. On March 6, 2024, EPA promulgated a new annual primary NAAQS for PM 2.5 of 9.0 µg/m³. Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202 (March 6, 2024).

47. Chapter 9 of the WAQSR standards and requirements governing visibility impairments and PM applies to “all Class 1 areas” and “to sources in Wyoming the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such [Class 1] area.” WY Rules and Regulations 020.0002.9 § 2(b) (emphasis added).

48. Chapter 10 of the WAQSR generally governs smoke management and, among other things, discusses fire hazards and specifically regulates emissions from wood waste burners. *See generally* WY Rules and Regulations 020.0002.10. Included in the smoke management regulations are operational requirements for wood waste burners like installing and maintaining a thermocouple or other temperature measurement and recording device, and maintaining daily written logs for several parameters. *Id.* at 020.0002.10 § 3.

VI. Petitioners’ Claims⁵

49. Petitioners restate and incorporate all of the foregoing allegations as though fully set forth herein.

50. The Wyoming Administrative Procedure Act (“Wyoming APA”), Wyo. Stat. Ann. § 16-3-114(c)(ii), instructs the reviewing body, in this case the Council, to “[h]old unlawful and set aside agency action findings and conclusions found to be”:

- a. “Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;”
- b. “Without observance of procedure required by law;” and

⁵ Petitioners reserve their rights to add additional claims once the full administrative record is available.

- c. “Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.”

51. AQD issued the Permit in violation of the aforementioned provisions of the Wyoming APA, and contrary to the Act, Wyo. Stat. Ann. § 35-11-101 *et seq.*, the applicable implementing rules and regulations set forth in the WAQSR, applicable AQD and other guidance, and applicable federal Clean Air Act rules and regulations for, at a minimum, the following reasons:

A. Failure to Issue a Legally and Practicably Enforceable Permit

52. The Permit does not contain sufficient legally and practicably enforceable terms and conditions in contravention of state and federal law. At minimum, the Permit failed to include:

- a. Terms and conditions required for wood waste burners by WY Rules and Regulations 020.0002.10 § 3;
- b. A maximum number of operating hours per day or a maximum number of operating days per year;
- c. A maximum volume of wood that may be burned per day;
- d. Terms and conditions imposing parametric limits sufficient to ensure proper operation and adequate combustion, including minimum temperature and optimal air velocity;
- e. Terms and conditions sufficient to ensure adequate monitoring, recordkeeping, and reporting of parametric limits;
- f. An opacity threshold for operations between zero and 30 minutes after startup, or other discussion in the permitting record regarding why emissions control during the first 30 minutes of startup, which could occur multiple times each day, is not required to ensure applicable standards and other permit standards or conditions will be met;

- g. Enforceable emissions limits, including limits on operating time, to ensure emissions of NO_x and PM will not contribute to, or interfere with, the applicable NAAQS or other cumulative NAAQS impact analysis;
- h. Enforceable emissions limits, including limits on operating time if necessary, to ensure emissions of CO will not exceed major source thresholds (*see also* Section VI.B, below, regarding failure to consider CO emissions);
- i. Enforceable requirements to measure and monitor wind speeds to ensure compliance with manufacturer specifications;
- j. An enforceable prohibition from starting up the Burner or requirement to cease operations if wind speeds exceed a specified a rate; monitoring, recordkeeping and reporting requirements to ensure this condition will be met; and an enforceable condition governing time in which to accomplish such cessation (*see also* Section VI.C, below, for discussion about area winds);
- k. Setback requirements from homes, businesses, recreation or community areas, habitats, trees, grasses, shrubs, or water sources, particularly to prevent fire hazards and/or water quality or other degradation from biochar stockpiles;
- l. A minimum distance between the Burner and any fuel source, including the temporary woodchips and firewood stockpile or other location prescriptions to ensure safe operation and to prevent other foreseeable environmental degradation;
- m. Any terms and conditions regarding the number of personnel that must be onsite while the device is operating;
- n. Any requirements for training of personnel;

- o. Any terms and conditions regarding emergency response or a protocol or standard operating procedure in the event the Burner causes a fire;
- p. Any terms and conditions regarding emergency response equipment that must be maintained at the site at all times;
- q. Any requirements, including best management practices, regarding safe handling and disposal of the ash and other byproducts from the Burner;
- r. Monitoring, recordkeeping, and reporting provisions sufficient to verify compliance with operating limits or how and when to report any malfunctions or emergencies;
- s. A requirement for AQD to approve any new proposed location prior to Arbor relocating the Burner or operating the device at the new location;⁶
- t. A requirement to conduct air dispersion modeling or otherwise assess potential impacts to any proposed new location; or
- u. A requirement to provide public notice and an opportunity to comment prior to relocating the Burner to a new location.

B. Missing Data and Other Information Necessary to Make a Rational Permitting Decision

53. The available administrative record supporting AQD's decision is missing critical pieces of information and analyses, and does not support issuance of the Permit with the listed terms and conditions. At a minimum, the deficiencies include:

- a. No PM 2.5 or PM 10 NAAQS modeling or determinations, including an incomplete emissions inventory of PM emissions from fugitive dust, truck traffic, and other engines;

⁶ The Portable Facility Relocate Form does not require AQD's approval.

- b. Missing emissions inventory and modeling that would allow a comprehensive assessment of emissions from the site, including the Burner, associated equipment and generator diesel-fired engine, reasonably foreseeable truck traffic, and stockpiles of ash and biochar;
- c. A material disconnect between modeled hours of operation to estimate NO₂ emissions (six hours) and the apparent ability and authorization of the Burner (and associated engines) to operate full time (24/7), or at a minimum more than six hours per day;
- d. Missing analysis regarding whether CO emissions identified in Table 1 would exceed the 100 tpy “major source” threshold if the Burner actually operated more than six hours per day, or discussion of why other permit terms and conditions were not necessary to ensure the Burner and associated equipment would not be a major source of CO;
- e. A detailed explanation of why AQD determined the Burner and its generator diesel-fired engine are BACT, including comparisons to other available technology, consideration of potential alternative technologies, or analysis of environmental or economic impacts and tradeoffs between the Burner and its engine vs. other processes, technologies, or control devices;
- f. Lack of discussion or analysis regarding truck traffic emissions that are reasonably foreseeable and should be at least addressed or discussed in the permitting decision notwithstanding acknowledged limits on AQD’s authority to impose emission standards for these sources; and

g. Lack of consideration or discussion of potential Regional Haze impacts given the Burner's proximity to Grand Teton National Park, a Class I airshed.

C. Failure to Ensure Safe Operation

54. AQD has a general obligation to protect public health, welfare, and the environment when issuing permits. *See* Wyo. Stat. Ann. § 35-11-102.

55. There is insufficient information in the record for AQD to have made an informed decision that the installation and operation of the Burner will not present a fire hazard or is otherwise adequately protective of the public welfare.

56. The Burner manual states: "The unit should not be operated when the wind speeds reach 20 MPH as the potential to carry hot embers is significantly increased. As an operator you should always be aware of wind speed and direction. Increased [sic] wind speed will affect the integrity of the 'air curtain' and will cause hot embers to travel farther."⁷ Exhibit F at p. 9 (emphasis added).

57. The closest National Weather Service weather station to Tract 6 is located at the Jackson Hole Airport. Wind data gathered at the airport during 2023 shows speeds regularly exceeded 20 MPH. *See* 2023 NWS Wind Speed Data Compilations for the Jackson Hole Airport (attached as Exhibit L).

58. Extreme wind events also occur in the area, as is typical of mountainous terrain. For example, in February 2017, a severe windstorm snapped seventeen transmission poles and ten utility poles in the Teton Village area. *See* "Storm blows out Village power," Jackson Hole News & Guide (Feb. 7, 2017) (attached as Exhibit M).

⁷ Petitioners note that the word "farther" implies that the Burner, even when operated during optimal wind conditions, still kicks off embers,

59. The Permit contains no requirement for Arbor to monitor or measure wind speeds at the proposed Burner location. The Permit further fails to prohibit Arbor from operating when wind speeds are 20 MPH or higher, or to cease operations and secure hot ash when wind speeds reach 20 MPH.

60. Due to the lack of sufficient legally and practicably enforceable terms and other deficiencies discussed herein, the Permit, itself, authorizes the operation of an activity in a manner that affirmatively presents a fire hazard and fire risk to Petitioners.

D. Failure to Ensure the Burner Will be Located in Accordance with Proper Land Use Planning Requirements, including the TUP

61. Chapter 6, Section 2 of the WAQSR prohibits granting any permit unless the “proposed facility will be located in accordance with proper land use planning as determined by the appropriate state or local agency charged with such responsibility.” Wyoming Rules and Regulations 020.0002.6 § 2(c)(iv).

62. In response to comments about the location, AQD stated: “The applicant provided a copy of temporary use permit TUP-03344 issued by the Wyoming Board of Land Commissioners. Therefore, the Division is satisfied that the air curtain burner will initially be located in accordance with proper land use planning.” Exhibit K at p. 3.⁸

63. However, the TUP included with the Application explicitly states that it authorizes no improvements and the only approved use of the property is a “[t]emporary stockpile site for woodchips and firewood.” Exhibit E at p. 1. The TUP does not allow a portable air curtain burner to be located on the property and thus, at least on this record, AQD inaccurately concluded that the “air curtain burner will initially be located in accordance with proper land use planning.”

⁸ To the extent the TUP was amended by the Wyoming Board of Land Commissioners after Arbor submitted its Application, that amendment is not in the publicly available documentation for this Permit and the Petitioners have not had the opportunity to evaluate it.

E. Failure to Adequately Consider and Address Public Comments

64. Chapter 6, Section 2 of the WAQSR requires the Administrator to consider “all comments, including those presented at any hearings held” prior to reaching a decision on any application. WY Rules and Regulations 020.0002.6 § 2(m).

65. The responses to public comments attached to the Permit indicate the Administrator did not adequately consider all comments. Eighteen written comments were submitted and an additional seven comments were presented at the public hearing. However, in issuing the Permit and responding to comments, AQD did not adequately consider the following comments, and therefore, entirely failed to consider multiple important aspects of the issue and requested action. *See Wilson Advisory Comm. v. Bd. of Cnty. Comm’rs*, 292 P.3d 855, 870 (Wyo. 2012) (citing United States Supreme Court law holding an agency’s decision are arbitrary and capricious if it fails to consider an important aspect of the problem) (internal citations omitted).

- a. The high fire risk of permitting an open burning device in a fire-prone area;
- b. The volume of wood waste that the Burner may incinerate;
- c. The number of days and hours the Burner may operate;
- d. Failure of the emissions inventory to consider truck traffic associated with transporting wood waste to the Burner and ash away from site for disposal;
- e. Smoke and dust generated by the Burner and associated truck traffic, and the impacts of smoke and dust to human health and the environment;
- f. Storage and transportation of ash generated by the Burner; and
- g. Requests for an additional public notice and comment period.

F. Failure to Provide Petitioners and the Public with an Adequate Opportunity to Comment on AQD's Review of ARS's Model and AQD's Updated Draft Permit Conditions

66. “Procedural due process principles require reasonable notice and a meaningful opportunity to be heard before government action may substantially affect a significant property interest.” *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 961 (Wyo. 1995) citing *Amoco Prod. Co. v. State Bd. of Equalization*, 882 P.2d 866, 872 (Wyo. 1994).

67. When an agency adds or considers critical new information to the record after the public comment period ends, it must reopen the public comment period. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401–02 (9th Cir. 1995).⁹

68. AQD obtained significant new information, and comments regarding missing information and data, between its Permit Application Analysis dated April 13, 2023 and the Permit dated February 29, 2024. The TVA comments submitted on May 24, 2023 point out that AQD failed to conduct any air quality dispersion modeling to estimate NO_x emissions and determine whether the proposed air curtain burner would meet the one-hour NAAQS for NO₂. TVA's consultant, ARS, conducted its own air dispersion modeling analysis that demonstrated that the emissions would not comply with the one-hour NO₂ NAAQS and shared the results with AQD. AQD then contracted with Ramboll to review the ARS analysis. Ramboll modified the ARS model and obtained different results. *See* Exhibit K, Appendix A. Even AQD's own expert, Ramboll, highlighted multiple important deficiencies with the Permit Application and the record before the agency. *Id.* at Appendix A, p. 2.

⁹ “The Wyoming Administrative Procedure Act was patterned after the Uniform Law Commissioners' Revised Model State Administrative Procedure Act, which, of course, stemmed from the Federal Administrative Procedure Act.” *Scarlett v. Town Council, Town of Jackson, Teton Cnty.*, 463 P.2d 26, 28 (Wyo. 1969).

69. The Petitioners and other interested members of the public were not provided with an opportunity to review and comment on Ramboll's changes to the ARS model, Ramboll's results, or any other new information that AQD received after completing its Permit Application Analysis. Furthermore, the Petitioners were not provided with an opportunity to review and comment on revised permit terms and conditions proposed by AQD, or AQD's decision not to address many of ARS's comments in the Permit terms.

70. TVA specifically requested a second notice and comment period. Exhibit J at p. 2.

71. The Petitioners should have been given an opportunity to review and comment on the new information and analysis prior to AQD issuing the Permit. This lack of adequate notice and an opportunity to be heard violated the Petitioners' due process rights.

VII. Reservation of Rights

72. Petitioners restate and incorporate all of the foregoing allegations as though fully set forth herein.

73. The facts and arguments presented in this appeal are based on the publicly available documents, which consist of: the Application, the Permit Application Analysis, the public comments submitted to AQD, AQD's responses to public comments, and the Permit. These documents presumably do not comprise the complete administrative record.

74. The Petitioners reserve their rights to amend or supplement this appeal with additional facts and arguments once AQD compiles, certifies, and serves the complete administrative record on the Petitioners. The Petitioners further reserve their rights to add additional claims once they have received and reviewed the complete administrative record.

VIII. Stay Pending Appeal

75. Petitioners restate and incorporate all of the foregoing allegations as though fully set forth herein.

76. The Council has broad authority to issue temporary relief, including to stay the Permit pending resolution of this appeal. The Council's authority includes the ability to "approve, disapprove, repeal, modify or suspend any . . . order of the Director or any division Administrator" and "order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified." Wyo. Stat. Ann. § 35-11-112(c)(i) and (ii).

77. A stay pending resolution of this appeal is necessary to avoid the imminent and irreparable harms¹⁰ to Petitioners described throughout this appeal, including harms to public health, welfare, air quality, and the very real and significant potential fire hazard associated with operation of the Burner under the current terms of and conditions of the Permit.

78. A stay pending resolution of this appeal would not injure Arbor because it would preserve the status quo and would not prohibit Arbor from continuing to truck and dispose of wood waste in Rexburg, Idaho or elsewhere as described in their Application.

IX. Conclusion, Request for Hearing, and Requested Relief

Based on the foregoing, the Petitioners respectfully request that this Council grant the following relief:

1. Grant Petitioners a contested case hearing on its appeal of the Permit pursuant to the Environmental Quality Act (Wyo. Stat. Ann. § 35-11-112), the Wyoming APA (Wyo. Stat. Ann. § 16-3-101), and the Council's Rules of Practice and Procedure;
2. Deny or revoke the Permit in its entirety or, in the alternative, remand the Permit to AQD for reconsideration to correct the deficiencies identified herein, including to allow for sufficient public notice and comment;

¹⁰ Petitioners reiterate that the Permit authorizes not just construction but also immediate operation.

3. Immediately stay the effectiveness of the Permit pending resolution of this appeal, and any additional reconsideration that may be ordered, consistent with the Council's authority under Wyo. Stat. Ann. § 35-11-112(c)(i) and (ii); and
4. Grant Petitioners any additional relief this Council deems just and proper.

Respectfully submitted this 29th day of March, 2024.

/s/ E. Waeckerlin

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Exhibit List:

- Exhibit A – Declaration of Devra Davis
- Exhibit B – Declaration of Jim Terry
- Exhibit C – Application
- Exhibit D – Final Permit
- Exhibit E – Temporary Use Permit
- Exhibit F – Burner Manual
- Exhibit G – Permit Application Analysis
- Exhibit H – Public Comments
- Exhibit I – JHCA Comments
- Exhibit J – TVA Comments
- Exhibit K – AQD Responses to Comments
- Exhibit L – Jackson Hole Airport Wind Speed Data
- Exhibit M – Jackson Hole News & Guide

CERTIFICATE OF SERVICE

The undersigned certifies that on March 30, 2024, the APPEAL OF AIR QUALITY PERMIT P0036295 AND REQUEST FOR STAY was served by Express Mail, Return Receipt Requested to the following:

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