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

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

**SIERRA CLUB'S
MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**

I. INTRODUCTION

On November 16, 2009, Respondent Medicine Bow Fuel & Power, LLC
("Medicine Bow") filed its Motion and Memorandum in Support of Summary Judg-

ment. In support of their Motion, Medicine Bow relies in part on the Affidavit of Katrina Winborn (Affidavit) to support Wyoming Department of Environmental Quality's ("DEQ's") decision. The Affidavit, at ¶ 11, in turn purports to incorporate by reference her expert report (Report) that was prepared in anticipation of litigation. The Report is not contained in the Administrative Record. Nor is the analysis and argument contained in ¶ 9 found in the Administrative Record. The Report itself is not a sworn affidavit, nor is it a declaration made under penalty of perjury; it is an unsworn statement.

Sierra Club therefore requests that the Council strike: 1) the Report; 2) all sentences of ¶ 11 of the Affidavit but the first; 3) the second sentence of ¶ 9 of the Affidavit, and (4) those portions of Medicine Bow's memorandum of law that refer to the Report, *see, e.g.*, pp. 14, 17, 21, 23-26, 28-29.

II. ARGUMENT

Under the Wyoming Rules of Civil Procedure, a party moving for summary judgment may do so with or without affidavits in support. *See* W.R.Civ.P. 56(a), (b); *see also* Fed.R.Civ.P. 56(a), (b) (same). That rule then commands that,

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

W.R.Civ.P. 56(e); *see also* Fed.R.Civ.P. 56(e)(1) (same).

A. The Report is Inadmissible as Hearsay

Under Wyoming’s evidentiary rules, hearsay is inadmissible unless it falls under an exception. W.R.Evid. 802. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” W.R.Evid. 801. A statement includes a “written assertion” and a declarant is a “person who makes a statement.” *Id.*

The Report is clearly a written assertion, and thus a statement, of Ms. Winborn’s opinion, and because Ms. Winborn created it, she is a declarant. The Report was not made while testifying at trial or a hearing, and has been offered to prove the truth of what she asserts – that it was reasonable for the DEQ to use the PM10 surrogate policy. Thus, the report constitutes hearsay and would be inadmissible in evidence. Therefore the Report may not be set forth as a fact in an affidavit in support of summary judgment.

B. The Report is Unsworn and Therefore May Not Be Considered

A number of cases, interpreting the substantially same federal rule, have held that unsworn documents attached to an affidavit are not to be considered in a summary judgment motion. In one case, a plaintiff attached hand-written statements by co-workers that were neither sworn nor notarized as exhibits to her affidavit in response to a summary judgment motion. *Watts v. Kroger Co.*, 955 F. Supp. 674, 680 (N.D. Miss. 1997), *rev’d in part on other grounds* 170 F.3d 505 (specifically affirming as to striking of unsworn exhibits attached to affidavit). The court struck the exhibits, finding they were not competent evidence. *Id.* at 681. In another case,

the court found that because unsworn statements cited to in the plaintiff's statement of material facts were not sworn affidavits, unsworn declarations under penalty of perjury, or otherwise admissible, they would not be considered. *Atkins v. Potter*, 2002 WL 1803755 at *1 (N.D. Ill. 2002). Another federal district court held that an unsworn opinion letter of an expert witness without an affidavit verifying its authenticity was inadmissible and could not be considered. *Maldonado v. Millstone Enterprises, Inc.*, 2007 WL 983208 at *5 (D. Md. 2007).

As stated in the Wyoming Civil Procedure Rule, motions may only be supported by affidavit and those affidavits may only be supplemented by depositions, answers to interrogatories, or further affidavits. Further, papers referred to outside the affidavit must be attached as a sworn or certified copy. The Report is not an affidavit; it is not an answer to an interrogatory; it is not a deposition; and it is not a sworn or certified document. Thus, the Report may not be considered in ruling on Medicine Bow's motion for summary judgment.

C. The Report and Portions of ¶¶ 9 and 11 are Impermissible Post-Hoc Rationalizations.

According to the DEQ Rules of Practice and Procedure, in a hearing in a contested case “[t]he Council shall make a written decision and order in all cases, which decision shall contain findings of fact and conclusions of law *based exclusively on the record*” DEQ RPP Ch. 2 § 12. While Ms. Winborn's opinion may be admitted through testimony at a hearing, the Report is not currently part of the record on which DEQ based its decision. And though the Council reviews the decision

de novo,¹ this review concerns not whether the permit should be issued, but the adequacy of DEQ's decision. Both the Report and the indicated portions of ¶ 9 and ¶ 11 are little more than a classic post-hoc rationalization offered in an attempt to clean up after the lack of analysis done by DEQ. Further, the Report is not even DEQ's own analysis, making the Report not only a post-hoc rationalization, but one offered by the party who stands to have its permit remanded due to what they seem to realize is a failure of DEQ to fulfill its duty. The offered "facts" are in fact argument concerning a point of analysis never actually performed by DEQ. Therefore, the Council should find the Report, all sentences but the first of ¶ 11, and the second sentence of ¶ 9 of the Affidavit, outside of the evidence which may be considered during summary judgment and strike them.

III. CONCLUSION

For the reasons stated above, Protestants request that the Council strike: 1) the Report; 2) all sentences of ¶ 11 of the Affidavit but the first; 3) the second sentence of ¶ 9 of the Affidavit, and (4) those portions of Medicine Bow's memorandum of law that refer to the Report, *see, e.g.*, pp. 14, 17, 21, 23-26, 28-29.

¹ *See, e.g., In the Matter of Basin Electric Power Cooperative Dry Fork Station Air Permit CT-4631*, Docket No. 07-2801 (EQC Aug. 21, 2008, Order Denying Basin Electric Power Cooperative Inc.'s Motion to Dismiss Appeal at 7) ("Upon filing a petition for review of the agency's action with this Council, a full evidentiary, *de novo* hearing is required for further appellate review.").

Dated this 30th day of November, 2009.

/s/ Shannon Anderson
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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing *Sierra Club's Memorandum In Support Of Motion To Strike* and associated documents via electronic mail on this the 30th day of November, 2009 to the following:

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