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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 RESPONSE IN OPPOSITION TO
SIERRA CLUB'S MOTION TO STRIKE**

COMES NOW Medicine Bow Fuel & Power, LLC (MBFP), by and through its undersigned attorneys, and hereby submits its Response in Opposition to Sierra Club's Motion to Strike:

Sierra Club has asked the Council to strike Ms. Winborn's September 16, 2009 Expert Report from Medicine Bow's Motion for Summary Judgment. Sierra Club has also moved to strike certain portions of ¶¶ 9 and 11 of Ms. Winborn's November 16, 2009 Affidavit. There is no merit to Sierra Club's motion and accordingly, its motion should be denied.

First, Sierra Club fails to cite controlling Wyoming precedent which has long held that hearsay is admissible in contested case proceedings.

Second, Sierra Club in any event fails to tell the Council that the authenticity of the Winborn report was verified under oath by Ms. Winborn in her deposition taken by the Sierra Club on November 5, 2009. See Depo. of Katrina Winborn at 26-28, attached hereto as Exhibit A and incorporated herein by this reference.

Third, the caselaw cited by Sierra Club demonstrates that the Winborn report can as a matter of law be considered on summary judgment because its authenticity was verified not only by her sworn deposition testimony but also by her November 16, 2009 Affidavit.

Finally, MBFP is a party to this contested case proceeding, and as a matter of law has a right to submit evidence on any and all issues in this matter. Wyo. Stat. § 16-3-107(j).

ARGUMENT

1. Hearsay is admissible in contested cases.

It is well established that evidentiary questions in administrative proceedings are controlled by Wyo. Stat. § 16-3-108(a), and thus, this Council is not bound by the Wyoming Rules of Evidence. See, e.g., *Casper Oil Co. v. Evenson*, 888 P.2d 221, 227 (Wyo. 1995) (Hearing examiner in a contested case proceeding is not bound by the Wyoming Rules of Evidence; *Everheart v. S&L Industrial*, 957 P.2d 847, 853 (Wyo. 1998) Hearing (same)).

In a contested case all evidence is admissible except that which is irrelevant, immaterial, or unduly repetitious. *See* Wyo. Stat. § 16-3-108(a). The Wyoming Supreme Court has cited this statute in holding that hearsay evidence is admissible in a contested case proceeding provided it is probative, trustworthy and credible. *See State ex rel. Wyo. Workers' Comp. Division v. Rivera*, 796 P.2d 447, 451 (Wyo. 1990); *see also Storey v. Wyoming State Board of Medical Examiners*, 721 P.2d 1013, 1018 (Wyo. 1986) (hearsay that is otherwise admissible under subsection (a) in the statute is admissible in an agency hearing so long as the evidence is trustworthy and credible). In *Hansen v. Mr. D's Food*, 827 P.2d 371, 374 (Wyo. 1992) (“We have held that evidence which has the earmarkings of hearsay may be admitted in administrative proceedings if it has the characteristics of trustworthiness and credibility, and is the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs.”) (citing Wyo. Stat. § 16-3-108(a)). It is admissible because Ms. Winborn’s report has the earmarkings of hearsay, it is admissible because no serious argument can be made that her report is irrelevant, immaterial or unduly repetitious.

2. Ms. Winborn’s Expert Report is admissible evidence for summary judgment purposes.

Even in a civil action pending in a district court, Ms. Winborn’s report can be considered on summary judgment motions because its authenticity has been sworn to by Ms. Winborn, not once, but twice. The very same case as cited by Sierra Club demonstrated that Ms. Winborn’s Expert Report may be considered for summary judgment purposes. For example, in *Maldonado v. Millstone Enterprises, Inc.*, 2007

WL983208 (D.ND. February 23, 2007) the court simply recognized that an expert report, without a supporting affidavit verifying its authenticity is inadmissible and cannot be considered for purposes of summary judgment. *5. Thus, an expert report is admissible and can be considered for purposes of summary judgment so long as it is attached to the expert's affidavit verifying its authenticity. Ms. Winborn's report, therefore, is a sworn statement. Ms. Winborn in her affidavit authenticates the report and incorporates it into her affidavit by reference and thus, at a matter of law, it may be considered for purposes of summary judgment. Specifically, Ms. Winborn states in her affidavit: "I have prepared a September 15, 2009 written report containing my opinions in this matter a true and accurate copy of which is attached hereto as Exhibit 1 and incorporated herein by this reference." To summarize the situation, in *Maldonado* the expert's report wasn't attached to his affidavit authenticating the same, here Ms. Winborn's report is attached to her affidavit which verifies its authenticity.

Similarly, the case of *Watts v. Kroger Co.*, 955 F. Supp. 674, 680 (N.D. Mississippi 1997) (affirmed by *Watts v. Kroger Co.*, 170 F.3d 505, 508-509 (5th Cir. 1999) provides no support for the Sierra Club's argument. In *Watts*, the affiant, the plaintiff, could not authenticate the documents attached to her affidavit because they simply were not hers and thus, as a matter of law, the plaintiff cannot authenticate those statements. Here, the report attached to Ms. Winborn's affidavit is her own report and thus, Ms. Winborn through an affidavit authenticating the same. Because she is the person for whom the exhibits can be admitted into evidence. *See Maldonado* at *5.

Finally, Ms. Winborn gave sworn deposition testimony that the report at issue was her report. See Exhibit A.

3. Council's decision must be based on this contested case proceeding.

Finally, MBFP is a party to this contested case proceeding and as a matter of law it has a right to submit evidence on all issues in this matter. Wyo. Stat. 16-3-107(j).

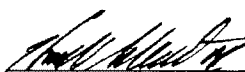
Despite this statute, Sierra Club seeks to strike portions of ¶¶ 9 and 11 of Ms. Winborn's Affidavit, arguing that the Council's written decision must be based entirely on the record. The record, however, is the record that was developed through a full evidentiary hearing before the Council and thus, the Council is not limited to the DEQ record. A party to a contested case proceeding has a right to respond and present evidence on all issues involved and thus, Sierra Club has asked for relief that is simply contrary to law.

CONCLUSION

Sierra Club's motion seeks relief which is contrary to Wyoming law and must, accordingly, be denied. MBFP, therefore, respectfully requests that the motion be denied and for further and other relief as the Council deems just and proper.

DATED this 2nd day of December 2009.

MEDICINE BOW FUEL & POWER, LLC
Permittee

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CERTIFICATE OF SERVICE

I, John A. Coppede, hereby certify that on this 2nd day of December 2009 a true and correct copy of the foregoing **MEDICINE BOW FUEL & POWER'S RESPONSE IN OPPOSITION TO SIERRA CLUB'S MOTION TO STRIKE** was served by regular mail and electronic mail to:

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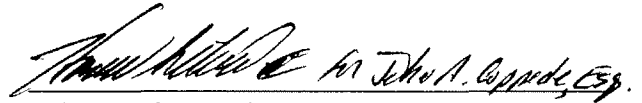
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A handwritten signature in black ink, appearing to read "John A. Coppede for John A. Coppede, Esq." The signature is written in a cursive style.

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