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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. P00274233	)	

CITATION OIL & GAS CORP.'S MEMORANDUM BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

On July 6, 2020, Citation Oil & Gas Corp. ("Citation") petitioned this Council to review and vacate improper permit conditions included in the following seven minor air source permits issued by the Wyoming Department of Environmental Quality (the "DEQ"), Air Quality Division ("AQD"): Permit Nos. P00275427, P00275428, P00275429, P00275430, P00275431, P002754232, and P00275433. Citation and DEQ subsequently agreed to a stay of proceedings with the hope of reaching an early resolution in lieu of hearing. Attempts to resolve this matter have been unsuccessful and Citation, therefore, respectfully submits this brief in support of its Motion for Summary Judgment pursuant to Chapter 2, Section 11(a) of the Rules of the Wyoming Department of Environmental Quality ("DEQ") and moves for summary judgment pursuant to Rule 56 of the Wyoming Rules of Civil Procedure.

FACTUAL BACKGROUND

In March 2018, Citation completed a voluntarily audit pursuant to the Audit Privilege and Immunity Provisions in the Wyoming Environmental Quality Act (Wyo. Stat. Ann. §§ 35-11-1105 through 1106). A voluntary environmental audit is designed under the statutes to identify and prevent noncompliance and improve compliance with the Wyoming Environmental Quality Act. Wyo. Stat. Ann. § 35-11-1105. An owner conducting a voluntary environmental audit is afforded the environmental audit privilege, created to protect the confidentiality of communications relating to the audit. *Id.*

In accordance with the requirements of Wyo. Stat. Ann. § 35-11-1105, Citation provided its audit report to DEQ and voluntarily disclosed all potential areas of noncompliance discovered during the audit. In the following months, Citation worked diligently with AQD to ensure the audit findings were appropriately addressed through proper corrective actions. Citation subsequently submitted applications for minor source air permits for its well sites and associated tank batteries. Consistent with its understanding of discussions with DEQ, Citation clearly noted in each of the permit applications that Citation was requesting permitting for existing sources and emphasized that Citation was not proposing any modifications to these sources.[1]

In April 2020, AQD produced Permit Application Analysis documents for each of Citation's applications. Each Analysis explained AQD's determination that the relevant facility had been modified and the "basis" for AQD's determination. The Dallas Dome Tank Battery Analysis, for example, provided:

[1] Each application provided, "Pursuant to the audit discourses of Citation Oil & Gas Corp. (Citation), including without limitation the initial audit disclosure of March 21, 2018 and subsequent correspondence and meetings, Citation is submitting this New Source Review air permit application for the approval of an existing site. As a result of Citation's audit and the State of Wyoming's approval, this application authorizes the site based on operations as existing today; no construction applications or modifications to existing permits are being proposed. Existing equipment that is on site but out of service is not included in this application and will remain out of service unless and until authorized." *Purpose of Application*.

Dallas Dome Tank Battery, Permit No. P0027427, Facility ID No. F003333

> The facility was modified on October 1, 2014 with the addition of the Barber 89 well and again on November 1, 2014 with the addition of the Barger 49R and 88 wells. An application for these modifications was never submitted. Since the 2010 C6 S2 Guidance was not followed at the time this facility was modified, the modifications at the Dallas Dome Tank Battery must comply with the requirements under the 2018 C6 S2 Guidance . . . Per the 2018 C6 S2 Guidance Presumptive BACT requirements for fugitive emissions, Citation Oil & Gas Corporation shall follow the fugitive emission monitoring requirements under 40 CFR part 60, Subpart OOOOa for fugitive VOC emissions from a production site as published in the federal register on June 3, 2016 …

Permit No. P0027427, *Permit Application Analysis Document*. Each of the Application Analysis documents contained nearly identical information and are attached as **Exhibit A**.

In June 2020, AQD issued Citation seven minor air source permits. As suggested in the Permit Application Analysis documents, each of the seven permits contained burdensome and improper permit conditions requiring Citation's compliance with Presumptive Best Available Control Technology ("PBACT") requirements for new or modified sources pursuant to AQD's 2018 *Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance*. Specifically, these conditions rely on the 2018 Guidance to impose 40 CFR part 60, Subpart OOOOa requirements for Leak Detection and Repair ("LDAR") on Citation's existing facilities, which would not otherwise be subject to these federal requirements.[2] Citation timely petitioned this Council for review of the seven permits.

STATEMENT OF LEGAL STANDARD

The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Chapter 2, Section 2. The Wyoming Rules of Civil Procedure

[2] Of note, the permits also appear to contain duplicative requirements for leak assessments. For example, Permit Condition 9 imposes quarterly requirements with one quarter being an optical gas imaging instrument; Permit Condition 13, however, requires compliance with Subpart OOOOa semi-annual LDAR.

instruct the EQC to grant summary judgment when the pleadings, the discovery, and disclosure materials on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wyo. R. Civ. P. 56; *James v. Taco John's Int'l, Inc*., 2018 WY 96, ¶ 7, 425 P.3d 572, 576 (Wyo. 2018); *Rollins v. Wyo. Tribune-Eagle*, 152 P.3d 367, 369 (Wyo. 2007).

Summary judgment, in the administrative context, serves the purpose of eliminating hearings where only questions of law are involved. *See Rino v. Mead,* 55 P.3d 13, 17 (Wyo. 2002). As the party moving for summary judgment, Citation bears the initial burden of establishing a prima facie case that no genuine issue of material fact exists, and that summary judgment should be granted as a matter of law. *Bogdanski v. Budzik*, 2018 WY 7, ¶ 18, 408 P.3d 1156, 1160 (Wyo. 2018). The burden then shifts to Respondent who must provide "competent evidence admissible at trial showing there are genuine issues of material fact." *Jones v. Schabron*, 2005 WY 65, ¶ 10, 113 P.3d 34, 37 (Wyo. 2005). In doing so, Respondent "must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings." *Bogdanski*, 408 P.3d at 1161.

The DEQ is the state agency that, through its AQD, implements and enforces certain provisions of the Clean Air Act through a State Implementation Plan ("SIP") approved by the Environmental Protection Agency ("EPA"). Wyo. Stat. §§ 35-11-101 et seq.; 42 U.S.C. § 7410. Under this regulatory scheme, the state of Wyoming is charged with the primary responsibility for achieving and maintaining the national primary and secondary ambient air quality standards within the state. 42 U.S.C. § 7407; Wyoming Air Quality Standards and Regulations ("WAQSR"), Ch. 2. AQD's authority to regulate sources of air pollution is governed by the Wyoming Environmental Quality Act. Wyo. Stat. § 35-11-201 *et seq*. AQD implements the

Wyoming Environmental Quality Act through the Wyoming Air Quality Standards and Regulations ("WAQSR"), which are promulgated as authorized by the Wyoming Administrative Procedure Act. Wyo. Stat. Ann. §§ 16-3-101 through 16-3-115.

Chapter 6 of the WAQSR establishes the permitting requirements for all sources constructing or operating in Wyoming. Section 2 of Chapter 6 covers "general air quality permitting requirements for construction and modification as well as minor source permits to operate." WAQSR Ch. 6 § 1(a). Under these regulations, permitting is required for all new sources or modifications of existing sources.[3] WAQSR defines a "modification" as:

> [A]ny physical change in, or change in the method of operation of, an affected facility which increases the amount of any pollutant (to which any state standards applies) emitted by such facility or which results in the emission of any such pollutant not previously emitted.

Id., at Ch. 1 § 3.

If a modification occurs and triggers minor source permitting, the facility must propose emission controls based on the "best available control technology" or BACT. Chapter 6 Section 2 does not define BACT for purposes of minor source permitting, but states that BACT must include "consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." *Id.* at § 2(c)(v). Consistent with federal regulatory requirements, BACT is defined for purposes of major source permitting as:

> [A]n emission limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation . . . which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application or production processes and available methods, systems, and techniques[.]

Id., at Ch. 6 § 4(a).

[3] Unless AQD determines that the source is "insignificant in both emission rate and ambient air quality impact." WAQSR Ch. 6 § 2 (k)(viii).

In 1997, AQD drafted a guidance document specifically tailored to oil and gas production facilities intended to supplement the WAQSR Chapter 6 Section 2 permitting program. The *Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance* ("guidance document"), describes a permitting procedure for Wyoming's oil and gas producers that allows for the construction and startup of facilities prior to the issuance of an Air Quality permit. Specifically, oil and gas producers must install specific pollution control equipment and follow operational procedures which AQD has determined, when taken together, meet BACT requirements. This is referred to as the Presumptive BACT or PBACT permitting process. Because BACT aims to balance technology availability and environmental improvement with economic conditions and cost considerations, what constitutes BACT changes over time. As a result, the guidance document has been revised eight times since 1997 to encompass updated PBACT requirements.

The most recent version of the guidance document was revised by AQD in 2018 ("2018 Guidance") and provides an overview of the most recent PBACT requirements for new sources or sources that are recently modified. As expressly stated in the 2018 Guidance, 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, p. 2 (emphasis in original).

One of the new PBACT provisions outlined in the 2018 Guidance is a monitoring requirement for fugitive Volatile Organic Compound ("VOC") emissions for new and modified sources located in the statewide area ("SWA"). Specifically, the 2018 Guidance asserts that AQD considers the requirements of 40 CFR Part 60, Subpart OOOOa ("Subpart OOOOa") as PBACT—regardless of whether these facilities would otherwise be subject to the federal

requirements. In other words, for **new or modified** facilities located in the SWA modified **on or after February 1, 2019,** fugitive VOC emissions from a production site "shall follow the semi-annual monitoring frequency" outlined in Subpart OOOOa. 2018 Guidance, p. 13.

Subpart OOOOa applies to facilities within the oil and gas industries—including well sites and storage tanks—that commenced construction, modification, or reconstruction after September 18, 2015.[4] 40 C.F.R. § 60.5365a. Affected well sites (defined to include separate tank batteries) that are not low-production well sites must conduct semi-annual monitoring of all fugitive emissions components utilizing optical gas imaging or Method 21. *Id*. § 60.5397a(g). Earlier this year, EPA expressly excluded low production well sites—defined as sites with total production below 15 barrels of oil equivalent—from fugitive monitoring requirements on grounds such monitoring is not cost-effective. 85 Fed. Reg. 57,398, 57,418 (Sept. 15, 2020).

Critically, the Subpart OOOOa fugitive emissions monitoring requirements apply to all "fugitive emissions components," which are defined as:

> [A]ny component that has the potential to emit fugitive emissions of methane or VOC at a well site or compressor station, including but not limited to valves, connectors, pressure relief devices, open-ended lines, flanges, covers and closed vent systems . . . thief hatches or other openings on a controlled storage vessel.

40 C.F.R. § 60.5430a. There are literally thousands of these components at a well site. In addition to the quantity of equipment requiring inspection, the burden of implementing the semi-annual monitoring requires, among other things, developing a fugitive emissions monitoring plan with specified elements, purchasing equipment, training or hiring employees or contractors, and traveling to discrete or remote locations.

[4] The parties do not dispute that none of Citation's facilities commenced construction, modification, or reconstruction after September 15, 2015 and therefore are not subject to Subpart OOOOa. Even if they were subject to Subpart OOOOa, Citation anticipates that the majority of these wells would be classified as low-production well sites and therefore would not be required to comply with any fugitive emissions monitoring.

In addition to the new SWA fugitive emissions requirements, the 2018 Guidance also alters the definition of "modification." The 2018 Guidance defines modification as:

> [O]nce production streams or production equipment associated with another well or wells is added to or tied into it. The date modification occurs to an existing facility is the First Date of Production for the added well or the date the production streams associated with an additional well or wells are tied into equipment at the existing facility.

2018 Guidance, p. 50. This definition, as discussed below, differs significantly from the WAQSR definition of "modification," and AQD is utilizing this new definition as justification for imposing certain fugitive emissions monitoring requirements on operators like Citation.

A general statement of policy (such as the 2018 Guidance) is distinct from a binding regulation (such as the Chapter 6, Section 2 permitting provisions). A policy statement is not a binding rule and is not "valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been filed with the registrar of rules and made available for public inspection as required by" the WAPA. Wyo. Stat. §§ 16-3-102(b), 103; 5 U.S.C. § 553; *Mountain Reg'l Servs., Inc. v. State ex rel. Dep't of Health*, 326 P.3d 182, 185 (Wyo. 2014); *United States v. Richter*, 796 F.3d 1173, 1203 (10th Cir. 2015) (citations omitted). "Agencies can exercise only those powers authorized by statute." *Tarver v. City of Sheridan Bd. of Adjustments*, 327 P.3d 76, 83 (Wyo. 2014) (citations omitted). "Any agency decision that falls outside the confines of the statutory guidelines articulated by the legislature is contrary to law and cannot stand." *Tri Cty. Tel. Ass'n, Inc. v. Wyoming Pub. Serv. Comm'n*, 910 P.2d 1359, 1361 (Wyo. 1996) (citing Wyo. Stat. § 16-3-114(c)(ii)(C)). "Such decisions are arbitrary and capricious." *Id*.

ARGUMENT

Each of the seven permits AQD issued to Citation in June 2020 impose 2018 PBACT requirements, including the federal Subpart OOOOa fugitive emissions monitoring requirements that would not otherwise be applicable to Citation's facilities. AQD takes the position that the definition of "modification" in the 2018 Guidance includes the facilities at issue here, and therefore the conditions contained in the recently issued permits are proper. To the contrary, the imposition of 2018 PBACT requirements and thus the fugitive emissions monitoring requirements are, as a matter of law, improper.

First, the determination is, on its face, arbitrary and capricious. AQD cannot utilize non-binding, interpretive guidance as a mechanism to expand the definition of "modification" and circumvent current standards and regulations.

Second, even if AQD were to treat these facilities as modified at some point in the past, AQD still improperly imposes current PBACT requirements under the terms of its 2018 Guidance. Assuming the facilities were modified as AQD alleges, the modifications occurred years before the February 1, 2019 effective date of the 2018 Guidance. AQD's application of the most recent guidance document is based on an unwritten "policy" requiring compliance with the PBACT requirements articulated in the guidance in effect at the time AQD receives an application—not at the time a modification actually occurred. This unwritten policy is in direct conflict with the plain language of the 2018 Guidance and violates the Wyoming Administrative Procedure Act.

Both of these arguments share the underlying reality that AQD's actions result in serious due process violations. Wyoming law does not allow an agency to use interpretive guidance to circumvent WAPA and impose added regulatory burdens on regulated entities. Moreover, the

application of an unwritten policy that falls outside both regulations and guidance to impose current PBACT requirements on facilities—regardless of when they might have been modified—provides no notice to regulated entities and results in a blatant due process violation. DEQ's powers are constrained and any attempt to exercise such unfettered power is per se arbitrary and capricious.

I. AQD'S CONCLUSION THAT CITATION'S FACILITIES WERE MODIFIED IS ARBITRARY AND CAPRICIOUS AND CANNOT BE ENFORCED THROUGH NON-BINDING GUIDANCE.

AQD premised its determination that Citation's facilities were "modified" solely on the assertion that either an addition, recompletion, workover, or fracture treatment of certain well(s) occurred at the production sites. *See Permit Application Analysis Documents*, Permit Nos. P0027427-33. Those assertions *alone*, however, simply cannot form the basis for AQD's finding that a "modification" occurred. Instead, a "modification" under WAQSR is limited to a "physical change in, or change in the method of operation of, an affected facility **which increases the amount of any air pollutant**." WAQSR Ch. 1 § 3 (emphasis added). That is, pursuant to the AQD's own standards and regulations, the finding that a facility has been modified must be predicated on an event that **increases emissions**.

In imposing permit conditions on these facilities AQD relied on nothing more than the assertion that certain work occurred on Citation's facilities. *See Permit Application Analysis Documents*, Permit Nos. P0027427-33. But that is only half of the necessary inquiry. AQD failed to take the requisite next step in its modification determination and assess whether the alleged work performed on Citation's facilities actually increased "the amount of any air pollutant" as required by WAQSR Ch. 1 § 3.

AQD justifies its failure to take that second step by pointing to its 2018 Guidance. The 2018 Guidance contains a definition of "modification" that is wholly inconsistent with the

agency's current rules.[5] The 2018 Guidance definition adds that a modification occurs "once production streams or production equipment associated with another well or wells is added to or tied into" an existing facility. 2018 Guidance, p. 50. This definition is a sea change in the scope of "modification" under WAQSR. That is, the 2018 Guidance definition simply assumes an increase in emissions, it does not require it. It appears to be AQD's position that, regardless of whether an increase in emissions occurs, it has the unilateral authority to impose additional regulatory burdens on operators like Citation by relying solely on its 2018 Guidance. That position is wholly inconsistent with the law and cannot stand.

A. The 2018 Guidance cannot create additional regulatory requirements.

AQD's reliance on the 2018 Guidance in this context results in significant additional regulatory burdens. But AQD's guidance documents are not rules or regulations promulgated pursuant to the Clean Air Act or the Wyoming Environmental Quality Act. Rather, the guidance documents are nonbinding authority that AQD has adopted internally, and not through notice-and-comment rulemaking under the Wyoming Administrative Procedure Act.

"An agency's rules and regulations 'have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action.'" *Tayback v. Teton Cty. Bd. of Cty. Commissioners*, 2017 WY 114, ¶ 25, 402 P.3d 984, 990 (Wyo. 2017) (internal citation omitted). "The failure of an agency to abide by its rules is per se arbitrary and capricious." *Guier v. Teton Cty. Hosp. Dist.*, 2011 WY 31, ¶ 35, 248 P.3d 623, 636 (Wyo. 2011). In creating its guidance, AQD did not follow the procedures outlined in the WAPA for a formal rulemaking, nor did it file the guidance with the registrar of rules. In fact, per its own

[5] In granting permits, DEQ through its AQD may impose conditions it deems necessary to accomplish the purpose of the Environmental Quality Act, so long as those conditions are not inconsistent with the existing rules, regulations and standards. Wyo. Stat. § 35-11-801(a).

terms, the guidance is "interpretive policy" that "is not binding on the agency, the regulated community, or any person; it is for informational purposes and does not create any rights, responsibilities, or liabilities for the Division, members of the regulated community, or any other person." 2018 Guidance, p. 1.

If AQD is permitted to unilaterally expand its definition of "modification" without first fulfilling its statutory notice-and-comment requirement to enforce its new definition, AQD would acquire the unfettered power to govern without statutory or regulatory authority, oversight, or due process. The rule-making provisions of the Wyoming Administrative Procedure Act, which AQD seeks to avoid, "were designed to assure fairness and mature consideration of rules of general application…. There is no warrant in law for [an agency] to replace the statutory scheme with a rule-making procedure of its own invention." *NLRB v. WYMAN*, 394 U.S. 759, 764, 89 S. Ct. 1426, 1429 (1969).[6]

Similarly, the guidance definition of "modification" creates substantial uncertainty for operators like Citation in understanding their obligations under the law. As discussed more below, it is AQD's "responsibility to promulgate clear and unambiguous standards[.]" *United States v. Trident Seafoods Corp*., 60 F.3d 556, 559 (9th Cir. 1995). AQD's varying definitions of "modification" undermines the fundamental principle that an agency must give a regulated entity adequate notice of prohibited or required conduct. *See Wis. Res. Prot. Council v. Flambeau Mining Co*., 727 F.3d 700, 707-708 (7th Cir. 2013). This requirement, rooted in the basic principles of due process, is intended to prevent the imposition of civil penalties—such as those resulting from an operator's violation of a permit condition—in the absence of notice to the

[6] "In situations where the Wyoming Administrative Procedure Act contains provisions similar to those of the federal Administrative Procedure Act, we have recognized the persuasive authority of federal precedent." *Mountain Reg'l Servs*., 326 P.3d at 184, n.2.

regulated entity of its obligations. AQD's use of the 2018 Guidance to impose additional requirements in contravention of existing rules, expand the definition of modification, and hold operators to a higher standard of compliance than the law authorizes is the exact type of unconstrained power that the law precludes, and is per se arbitrary and capricious. *See Guier*, 248 P.3d at 636.

B. The 2018 Guidance is not an interpretive rule.

Similarly, AQD cannot assert that the definition of "modification" outlined in the 2018 Guidance is merely an "interpretative rule" that is not subject to the formal rulemaking procedures outlined in WAPA. Under Wyoming law, an interpretative rule does not have to comply with WAPA's formal rulemaking procedures. An interpretative rule "is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. Interpretative rules are statements as to what the agency thinks a statute or regulation means." *Mt. Reg'l Servs.*, 326 P.3d at 184 (quoting Bernard Schwartz, *Administrative Law* § 4.6, 158-59 (2d ed. 1984)). In determining whether an interpretative rule can circumvent the formal rulemaking process, courts will look to "whether the interpretation itself carries the force and effect of law . . . or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

Here, the definition set forth in the 2018 Guidance is not "fairly encompassed" within the definition of modification set forth in the WAQSR. While the work AQD claims was performed on these facilities may constitute a "physical change," there is nothing tying the alleged work to "increases" in the "amount of any air pollutant." WAQSR Ch. 1 § 3. The 2018 Guidance's broad change to the meaning of modification—critically, an uncorroborated assumption of an increase

in emissions rather than an actual increase in emissions—does not fall within the definition of an interpretative rule. Ultimately, if AQD seeks to apply this new definition as if the 2018 Guidance document were equivalent to a duly promulgated rule or regulation having the force of law, AQD cannot also escape WAPA's procedural requirements by labeling this definition a mere interpretation. *See Appalachian Power Co.,* 208 F.3d at 1024.

Under Wyoming law, an interpretive rule "genuinely leaves the agency and its decisionmakers free to exercise discretion." *Mt. Reg'l Servs*., 326 P.3d at 185 (internal citations omitted). In this case, however, Citation's facilities were deemed to have undergone a modification without any regard to whether emissions actually increased at the facilities. Neither the permit application before the agency, nor anything in the Permit Application Analysis documents, reference even the potential for an increase in emissions. But based on the "interpretation" as set forth in the guidance, AQD imposed a regulatory requirement, including burdensome federal fugitive emission monitoring requirements.

Ultimately, the guidance documents are just that—guidance. The definition of modification prescribed in WAQSR Ch. 1 § 3, the only definition carrying the force and effect of law, specifically limits a modification to a change that results in greater emissions. That definition's meaningful limitation cannot simply be avoided by reliance on a guidance definition.[7] AQD's use of interpretative guidance to impose added regulatory burdens on regulated entities like Citation is contrary to law, arbitrary, and capricious. *See Tri Cty. Tel. Ass'n, Inc*. v, 910 P.2d at 1361. As such, any permit conditions imposing such requirements on Citation's facilities must be vacated and removed from each of the permits at issue.

[7] The limitation imposed by WAQSR's definition of modification is significant because when operators change their facilities in ways that do not impact emissions, there is no additional risk to the environment, and thus no justification for placing additional regulatory burdens on the facility.

II. IF AQD INTENDS TO TREAT CITATION'S FACILITIES AS MODIFIED, THEN PURSUANT TO ITS OWN GUIDANCE, IT MUST APPLY PRIOR YEARS' GUIDANCE AND ASSOCIATED PBACT REQUIREMENTS.

Even if AQD were to treat Citation's facilities as modified, which for the reason above it cannot, the 2018 Guidance still does not apply to these facilities. Citation submitted its applications for existing facilities in January 2020. According to the Permit Application Analysis documents, AQD chose to apply the 2018 Guidance to these facilities because "[prior years' version of the] Guidance was not followed at the time [these facilities were] modified" and therefore "the modifications at the [facilities] must comply with the requirements under the 2018 C6 S2 Guidance." *Permit Application Analysis Documents*, Permit Nos. P0027427-33. It appears AQD's unwritten "policy" is to apply the guidance, and thus impose the PBACT requirements in place at the time a permit is submitted, as opposed to when the facility was modified. Such an unwritten "policy," however, is not only inconsistent with applicable regulations which are void of any mandate to apply existing requirements to alleged modifications at minor sources that occurred in the past, but wholly inconsistent with the applicability criteria outlined in the guidance documents themselves.

The 2018 Guidance provides "Presumptive BACT 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, p. 2. As illustrated below, none of the facilities at issue were "modified" or had their FDOP on or after February 1, 2019:

- Dallas Dome Tank Battery, Permit No. P0027427, Facility ID No. F003333
  - Date of alleged modification: **Oct. 1, 2014 & Nov. 1, 2014**
  - Guidance that AQD should have applied: 2010 C6 S2 Guidance
  - Guidance that AQD applied: 2018 C6 S2 Guidance

- Embar 3 Tank Battery, Permit No. P0027428, Facility ID No. F006413

- Date of alleged modification: **Nov. 29, 2005 & July 25, 2011**
- Guidance that AQD should have applied: 2010 C6 S2 Guidance
- Guidance that AQD applied: 2018 C6 S2 Guidance

- NWD 1 Tank Battery, Permit No. P0027429, Facility ID No. F004577
  - Date of alleged modification: **May 31, 2014**
  - Guidance that AQD should have applied: 2013 C6 S2 Guidance
  - Guidance that AQD applied: 2018 C6 S2 Guidance

- NWD 2 Tank Battery, Permit No. P0027430, Facility ID No. F004576
  - Date of alleged modification: **March 24, 2014**
  - Guidance that AQD should have applied: 2013 C6 S2 Guidance
  - Guidance that AQD applied: 2018 C6 S2 Guidance

- Tensleep 1 Tank Battery, Permit No. P0027431, Facility ID No. F004571
  - Date of alleged modification: **September 2, 2012**
  - Guidance that AQD should have applied: 2010 C6 S2 Guidance
  - Guidance that AQD applied: 2018 C6 S2 Guidance

- Tensleep 2 Tank Battery, Permit No. P0027432, Facility ID No. F004572
  - Date of alleged modification: **August 10, 2010**
  - Guidance that AQD should have applied: 2010 C6 S2 Guidance
  - Guidance that AQD applied: 2018 C6 S2 Guidance

- Embar 1 Tank Battery, Permit No. P0027433, Facility ID No. F004573
  - Date of alleged modification: **September 20, 2008**
  - Guidance that AQD should have applied: 2007 C6 S2 Guidance
  - Guidance that AQD applied: 2018 C6 S2 Guidance

See Permit Application Analysis Document, Permit Nos. P0027427-33.

Even if these facilities were modified on the dates alleged by AQD, the appropriate years' guidance for each facility must apply. Notably, every guidance document preceding the 2018 Guidance omits any SWA fugitive emissions monitoring requirements from the proscribed PBACT.[8] Accordingly, had AQD complied with the terms of its own guidance, the fugitive monitoring requirements would still be inapplicable.

[8] Similarly, even if these facilities were modified as AQD alleges, the facilities nevertheless complied with BACT at the time of those "modifications." Each facility was equipped with flares, serving as the appropriate control technology under the previous years' guidance.

AQD cannot simply decide it will enforce the most recent PBACT requirements on operators without notice and based on unwritten internal policy. If such conduct were allowed, AQD would again escape the confines of WAPA. WAPA, like the federal Administrative Procedure serves to protect against this exact type of unlawful exercise of power: "The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232, 94 S. Ct. 1055, 1073 (1974).[9] DEQ, and its AQD, are bound like every other agency by the due process protections inherent in WAPA's statutory scheme. *See Mekss v. Wyoming Girls' School, State of Wyoming*, 813 P.2d 185, 201-02 (Wyo. 1991).

Also informed by these "basic principles of due process, it is a cardinal rule of administrative law that a regulated party must be given 'fair warning' of what conduct is prohibited or required of it." *Wis. Res. Prot. Council*, 727 F.3d at 707-708; *see also Bazzi v. Gacki*, 2020 U.S. Dist. LEXIS 111066, *22-23 (explaining agencies must provide 'fair notice' of its rules before imposing civil penalties); *see also Howmet Corp. v. EPA*, 614 F.3d 544, 553 (D.C. Cir. 2010) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.") (internal quotations omitted).

"[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." *Trident Seafoods Corp*., 60 F.3d at 559 (alterations in original) (internal quotation marks omitted). "[R]eliance on policies underlying a statute cannot be treated as a substitute for the agency's

[9] *See* footnote 4.

duty to promulgate clear and definitive regulations." *Id.* Accordingly, AQD's rules and regulations must give an operator fair warning of the conduct it prohibits or requires. If AQD seeks to implement permit conditions—conditions which if violated will result in civil penalties—then operators like Citation are entitled to fair notice of such policies. AQD's attempt to avoid that obligation and impose additional obligations on operators like Citation based on an unwritten internal policy is arbitrary and capricious in violation of WAPA.

Accordingly, all permit conditions imposing fugitive emission monitoring requirements based on the application of the 2018 Guidance should be vacated and removed from the seven permits at issue here.

CONCLUSION

Citation respectfully asks this Council to vacate each of the permit conditions imposing fugitive emissions monitoring requirements in Permit Nos. P00275427, P00275428, P00275429, P00275430, P00275431, P002754232, and P00275433. There is no evidence in the record to support AQD's determination that the facilities were modified consistent with the regulatory definitions. Further, AQD's reliance on it 2018 Guidance to impose additional obligations on Citation is in violation of its own standards and regulations and therefore per se arbitrary and capricious. Finally, AQD's unwritten internal policy to apply guidance in place at the time an application is received is also arbitrary and capricious in violation of the WAPA. Because there exists no genuine issue as to any material fact, Citation is entitled to judgment as a matter of law.

Dated December 1, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this December 1, 2020, 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:

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