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**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** )

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**DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
MEMORANDUM IN SUPPORT OF RESPONSE AND CROSS MOTION  
FOR SUMMARY JUDGMENT**

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## TABLE OF CONTENTS

|   |     |
|---|-----|
| TABLE OF AUTHORITIES .....  | iii |
| INTRODUCTION.....   | 1   |
| LEGAL FRAMEWORK.....  | 3   |
| I.    Permitting Requirement .....  | 4   |
| II.   Modifications .....   | 8   |
| III.  Environmental Audit.....  | 9   |
| FACTUAL BACKGROUND .....  | 10  |
| STANDARD OF REVIEW .....  | 13  |
| ARGUMENT .....  | 15  |
| I.    Citation’s facilities were modified.....  | 15  |
| II.   The Division appropriately applied PBACT from the 2018 Guidance<br>to Citation’s permits..... | 20  |
| CONCLUSION .....  | 23  |

## TABLE OF AUTHORITIES

### Cases

|   |    |
|---|----|
| <i>Abraham v. Great Western Energy, LLC</i> ,<br>2004 WY 145, 101 P.3d 446 (Wyo. 2004) .....                            | 14 |
| <i>Amoco Prod. Co. v. Wyo. State Bd. of Equalization</i> ,<br>882 P.2d 866, 872 (Wyo. 1994) .....                       | 22 |
| <i>Little Medicine Creek Ranch, Inc. v. D’Elia</i> ,<br>2019 WY 103, 450 P.3d 222 (Wyo. 2019) .....                     | 14 |
| <i>Powder River Basin Res. Council v. Wyo. Dep’t of Env’tl. Quality</i> , 2010 WY 25,<br>226 P.3d 809 (Wyo. 2010) ..... | 18 |
| <i>Roussalis v. Wyoming Medical Center, Inc.</i> ,<br>4 P.3d 209 (Wyo. 2000) .....                                      | 14 |
| <i>Thornock v. PacifiCorp</i> ,<br>2016 WY 93, 379 P.3d 175 (Wyo. 2016) .....   | 14 |

### Statutes

|   |              |
|---|--------------|
| 42 U.S.C. § 7407 .....                        | 3            |
| Wyo. Stat. Ann. § 35-11-102 .....             | 3            |
| Wyo. Stat. Ann. § 35-11-104 .....             | 3            |
| Wyo. Stat. Ann. § 35-11-109 .....             | 3            |
| Wyo. Stat. Ann. § 35-11-110 .....             | 3            |
| Wyo. Stat. Ann. § 35-11-1105 .....            | 9, 10, 22    |
| Wyo. Stat. Ann. § 35-11-1106 .....            | 10, 22       |
| Wyo. Stat. Ann. § 35-11-201 .....             | 3, 4         |
| Wyo. Stat. Ann. § 35-11-201through -214 ..... | 3            |
| Wyo. Stat. Ann. § 35-11-801 .....             | 1, 5, 20, 22 |

**Rules**

*Rules Wyo. Dep't of Env'tl. Quality, Air Quality – Permitting, ch. 6, § 1* ..... 4

*Rules Wyo. Dep't of Env'tl. Quality, Practice and Procedure, ch. 2, § 17* ..... 13

*Rules Wyo. Dep't of Env'tl. Quality, Air Quality – Common Provisions, ch. 1, § 3* ..... 7, 9, 17

*Rules Wyo. Dep't of ENvtl. Quality, Air Quality - Permitting, ch. 6, § 4* ..... 6

Wyo. R. Civ. P. 56 ..... 13

## INTRODUCTION

This matter arises from Citation Oil & Gas Corp.'s (Citation) July 6, 2020, petitions to the Environmental Quality Council (Council) to review and vacate certain permit conditions included in seven minor air source permits: P0027427, P0027428, P0027429, P0027430, P0027431, P0027432, and P0027433. The facts surrounding Citation's permit applications are essentially uncontested, and both parties agree that the Council can resolve the issues in this appeal as a matter of law.

During the Department of Environmental Quality (Department), Air Quality Division's (Division), review of Citation's permit applications, the Division discovered that Citation had previously modified each facility by addition, recompletion, workover, or fracture treatment of certain wells without seeking a permit. Accordingly, the Division, as it must under Wyo. Stat. Ann. § 35-11-801(e), reviewed the applications for "a demonstration that the applicant will apply the best available control technology [BACT] to the oil and gas production and exploration activity." The applicant did not make such a demonstration for these modifications. When an applicant chooses not to make this demonstration, the Division requires the applicant to follow the presumptive best available control technology or PBACT. Obviously, the best available technology improves over time, and the Division updates its view of PBACT periodically which it publishes for the public in a guidance document. In accord with its routine practice, the Division placed conditions in Citation's permits requiring it to follow the current PBACT. Citation appeals from the imposition of these conditions in its permits.

Citation first asserts that it did not modify these facilities because the Wyoming Air Quality Standards and Regulations (Air Quality Rules) define a modification as a change which increases the amount of any air pollutant emitted by the facility, and these changes did not increase emissions. But, the Air Quality Rules also require applicants who plan to make a change that may increase emissions to submit a permit application before commencing construction. If the applicant can demonstrate that the change will not increase emissions or that the new emissions will be insignificant, a permit is not required. Some changes, like the ones identified by the Division here, by their very nature increase or have the potential to increase emissions. In fact, the modifications discovered by the Division are specifically identified in the current guidance in the definition of a “Modified Facility.” Citation did not demonstrate that these changes did not increase emissions in its permit applications. Nor did Citation make such a demonstration when it was given the opportunity to comment on the proposed permit which contained the conditions at issue. Accordingly, the Division appropriately determined, based on the information in the permit applications and the nature of the changes, that the facilities had been modified several years before Citation submitted its permit applications.

Citation next asserts that even if its facilities were modified, the Division must apply the PBACT guidance in effect at the time of those modifications, rather than the Division’s current PBACT guidance. Of course, Citation could have ensured that the Division applied the old guidance by applying for its permits when it made the modifications, but it chose not to do so. Alternatively, Citation could have completed its own BACT analysis and submitted it with the 2019 permit applications, but it chose not to do that either. Having

failed to take either of these alternative courses, Citation should not be heard to complain now. The Division, by statute and rule, must require the best available control technology when it grants a permit, and the best control technology available now is set forth in the Division's current guidance. To require something less would be both unlawful and unfair to other operators who must meet those same requirements. Accordingly, the Division properly conditioned Citation's permits using the current PBACT. Because the Division properly determined that Citation modified its facilities and properly conditioned Citation's permits, the Council should affirm the permit conditions and dismiss Citation's petitions with prejudice.

### **LEGAL FRAMEWORK**

The Department, through the Division, is the agency of Wyoming state government responsible for administering and enforcing the air quality title of the Act, the Air Quality Rules, and related permits. Wyo. Stat. Ann. §§ 9-2-2013 and 35-11-104, -109, and -110. 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; *Rules Wyo. Dep't of Env'tl. Quality, Air Quality*, ch. 2. The Wyoming Environmental Quality Act (Act) establishes a statutory scheme that is designed in part to enable the State of Wyoming to prevent, reduce, and eliminate pollution; to preserve and enhance the State of Wyoming's air, water, and land resources; and to allow the State of Wyoming to plan the development, use, reclamation, and enhancement of its air, land, and water resources. Wyo. Stat. Ann. § 35-11-102. The Division's authority to regulate sources of air pollution is governed by the Act. Wyo. Stat. Ann. § 35-11-201

through -214. The air quality article of the Act states that “[n]o person shall cause, threaten or allow the discharge or emission of any air contaminant in any form so as to cause pollution which violates rules, regulations and standards adopted by the [Environmental Quality C]ouncil.” Wyo. Stat. Ann. § 35-11-201. The Division implements the Act through the Air Quality Rules.

## **I. Permitting Requirement**

Chapter 6 of the Air Quality Rules establishes the permitting requirements for all sources constructing and operating within Wyoming. *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 6, § 1(a). Chapter 6, Section 2 outlines permit requirements for construction, modification, and operation of minor sources, and it requires operators to submit permit applications if the changes they propose to make at a facility have the potential to increase emissions. Chapter 6, Section 2(a)(i) states that “[a]ny person who plans to construct any new facility or source, modify any existing facility or source, or to engage in the use of which **may cause** the issuance of or an increase in the issuance of air contaminants into the air of this state **shall obtain a construction permit** from the State of Wyoming, Department of Environmental Quality before any actual work is begun on the facility.” *Id.*, ch. 6, § 2(a)(i) (emphasis added). If the applicant can demonstrate in its application that the proposed change will not increase emissions or that the new emissions will be insignificant, a permit is not required. The Air Quality Rules provide that “[a]pproval to construct or modify shall not be required for ... [s]uch other minor sources which the Administrator determines to be insignificant in both emission rate and ambient air quality impact.” *Id.*, ch. 6 § 2(k)(viii).



When granting permits, “the director may impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules, regulations and standards.” Wyo. Stat. Ann. § 35-11-801(a). Similarly, “The Administrator of the Division of Air Quality may impose any reasonable conditions upon an approval to construct, modify, or operate[.]” *Id.*, ch. 6, § 2(f).

A permit application must follow the application requirements in Section 801 of the Act and Chapter 6 of the Air Quality Rules. *See* Wyo. Stat. Ann. § 35-11-801(e); *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 6, § 2. The Air Quality Rules provide that “The application shall be made on forms provided by the Division of Air Quality and each application shall be accompanied by site information, plans descriptions, specifications, and drawings **showing** the design of the source, **the nature and amount of the emissions**, and the manner in which it will be operated and controlled.” *Id.*, ch. 6, §2(b) (emphasis added). Under the Act, permit applications for oil and gas exploration or production wells must contain, at a minimum, “a demonstration that the applicant will apply the best available control technology to the oil and gas production and exploration activity.” Wyo. Stat. Ann. § 35-11-801(e). The Air Quality Rules also specify that “[n]o approval to construct or modify shall be granted unless the applicant shows, to the satisfaction of the Administrator of the Division of Air Quality that: “[t]he proposed facility will utilize the Best Available Control Technology with consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility.” *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 6, § 2(c)(v).

Chapter 6, Section 2 does not define best available control technology (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.*, ch. 6, § 2(c)(v). BACT is defined for purposes of major source permitting as “an 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.*, ch. 6, § 4(a). According to the *2018 Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance (2018 Guidance)*, “BACT is a process, not an emission limit. Regulations do not set a minimum emission threshold below which BACT does not need to be considered. (DEQ Ex. 1 at 9).<sup>1</sup> The BACT process results in an emission limit and operational requirements.

The Division created a guidance document to advise owners and operators of the agency’s current understanding of BACT. (*Id.*, at 1). The 2018 Guidance is the current version of a guidance document initially published by the Division in 1997 and revised nine times since. (*Id.*) The Division regularly updates this guidance document to reflect the Division’s constantly changing understanding of BACT for oil and gas production

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<sup>1</sup> The 2018 Guidance can also be accessed through the Department’s website at [http://deq.wyoming.gov/media/attachments/Air%20Quality/New%20Source%20Review/Guidance%20Documents/FINAL\\_2018\\_Oil%20and%20Gas%20Guidance.pdf](http://deq.wyoming.gov/media/attachments/Air%20Quality/New%20Source%20Review/Guidance%20Documents/FINAL_2018_Oil%20and%20Gas%20Guidance.pdf)

facilities. (See DEQ Ex. 5 at ¶ 22). The 2018 Guidance also provides an overview of the most recent PBACT guidance for new sources or sources that are recently modified.

PBACT applies in two scenarios: (1) when an operator starts using the facility or modifies a facility prior to issuance of the permit (if specific control requirements are met); or (2) when the applicant does not complete a BACT analysis in the application submitted to the Division. (See DEQ Ex. 1 at 9). If an applicant does not include a BACT analysis with its permit application the Division applies PBACT. (DEQ Ex. 5 at ¶ 41). Some companies choose to utilize PBACT rather than complete a BACT analysis because it is more economic and efficient for companies to follow PBACT than to expend their resources to conduct a site-specific BACT analysis. (DEQ Ex. 5 at ¶ 25). When it updates PBACT, the Division conducts an economic reasonableness and technical practicability analysis with stakeholder and public input. (DEQ Ex. 5 at ¶ 24). The 2018 Guidance states that 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.” (DEQ Ex. 1 at 2).

As a part of its PBACT provisions, the 2018 Guidance requires monitoring for fugitive<sup>2</sup> Volatile Organic Compound (VOC) emissions for new and modified sources located in the statewide area (SWA). The 2018 Guidance calls for new or modified facilities located in the SWA to conduct semiannual monitoring for fugitive VOC

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<sup>2</sup> Fugitive emissions” “means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.” See *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 1, § 3.

emissions from production sites in accordance with 40 CFR part 60, Subpart OOOOa (as published in 81 Fed. Reg. 35824-941 (June 3, 2016)). (DEQ Ex. 1 at 18).

This section of the Code of Federal Regulations is usually referred to as Quad Oa. Some facilities are specifically required to comply with Quad Oa, while others, like the facilities at issue here, are not. However, some facilities that are not required to follow Quad Oa, may be required to follow specific portions of Quad Oa where it represents PBACT. Such is the case here with regard to the fugitive emissions monitoring provisions of Quad Oa.<sup>3</sup>

## II. Modifications

Chapter 6, Section 2 of the Air Quality Rules states “[a]ny person who plans to construct any new facility or source, **modify** any existing facility or source, or to engage in the use of which **may cause the issuance of or an increase in the issuance of air contaminants into the air** of this state shall obtain a construction permit from the State of Wyoming, Department of Environmental Quality before any actual work is begun on the facility.” *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 6, § 2(a)(i) (emphasis added). The Air Quality Rules define a modification as a “physical change in, or change in the

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<sup>3</sup> Condition 13 of Citation’s permits provides that, “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 (Federal Register Vol. 81 pg 35824-35941).” *See, e.g.*, Citation Permit P0027427, Condition 13. (Citation Petition for hearing on P0027427). Of course, Citation could have asked the Division to “[use] an alternative method for monitoring fugitives.” (DEQ Ex. 1 at 18). The Division has numerous examples of companies that have submitted detailed fugitive emissions monitoring programs, however, Citation did not submit an alternative monitoring program to the Division or ask to use an alternative monitoring method. (DEQ Ex. 5 at ¶ 46).

method of operation of, an affected facility which increases the amount of any air pollutant[.]” *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 1, § 3. When the Division evaluates a proposed change to an emission unit at a minor source facility to ascertain whether it will increase emissions, it only considers the change itself. (DEQ Ex. 5 at ¶ 18). Some changes by their very nature increase emissions or they have the potential to increase emissions. (DEQ Ex. 5 at ¶ 29). In the 2018 Guidance, the Division has described “Modified Facility” by providing examples of the types of changes to an existing facility that qualify as modifications. For example, “[a]n existing facility becomes modified once production streams or production equipment associated with another well or wells is added to or tied into it.” (DEQ Ex. 1 at 55). A facility may also be modified by “[i]ncreasing the production rate by fracturing, recompletion of a current production zone or additional production zones, or the introduction of artificial lift methods[.]” *Id.*

### **III. Environmental Audit**

An owner or operator has the ability to conduct an environmental audit under Wyo. Stat. Ann. § 35-11-1105. An environmental audit is a “voluntary, internal and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this [A]ct, or of management systems related to the facility or activity, that is designated to identify and prevent noncompliance and to improve compliance with this [A]ct.” Wyo. Stat. Ann. § 35-11-1105(a)(i). The audit must be completed within 180 days after being initiated. *Id.* As part of the environmental audit process, companies must create an audit implementation plan “that corrects past

compliance, improves current compliance, and prevents future non-compliance.” *Id.* at (a)(ii)(C).

An environmental audit report is usually privileged. *Id.* at (c). An owner or operator who conducts a voluntary environmental audit is shielded from the Department seeking civil penalties for the violations reported. Wyo. Stat. Ann. § 35-11-1106(a). However, the environmental audit privilege does not shield an owner or operator from coming into compliance with the current laws. *See Id.* §§ 35-11-1105 and -1106. Nor does it grandfather past noncompliance. *Id.* Instead, if an environmental audit reveals past noncompliance, the owner or operator must bring its operations into compliance.

### **FACTUAL BACKGROUND**

Citation conducted a voluntary environmental audit in March 2018. (Citation Mem. at 2). In accordance with Wyo. Stat. Ann. § 35-11-1105(a)(ii), Citation submitted an environmental audit report to the Division that sufficiently outlined the noncompliance that was discovered at its facilities and created a plan to fix those deficiencies. Citation Mem. at 2). Subsequently, Citation submitted minor source air permit applications for the facilities subject to this appeal. *Id.* Citation noted that it was submitting the applications “based on operations as existing today; no construction applications or modification to existing permits are being proposed.” *Id.* Citation did not include a BACT analysis in any of its permit applications.<sup>4</sup> (DEQ Ex. 5 at ¶ 40; *See* DEQ Ex. 2).

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<sup>4</sup> Citation also declined to submit a BACT demonstration after the issuance of the permits. (DEQ Ex. 5 at ¶ 40).

The Division conducted permit application analyses on the seven permit applications. (DEQ Ex. 5 at ¶ 34; Citation Mem. at 2; Ex. A attached to Citation Mem.). During its review of the applications, the Division discovered that Citation had previously modified all seven of the facilities but did not go through the required permit application process at the time of these modifications. *Id.* Citation modified its oil and gas facilities by adding wells, recompleting wells, working over wells, or fracture treating wells. Specifically, these modifications were:

- Dallas Dome Tank Battery: “This 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 Barber 49R and 88 wells. An application for these modifications was never submitted.”
- Embar 1 Tank Battery: “This facility was modified on September 20, 2008 with the addition of the LBB 386 well; however, an application for the modification was never submitted.”
- Embar 3 Tank Battery: “This facility was modified on November 29, 2005 with the recompletion of the LBB DSU 211 well and on July 25, 2011 with the workover of the LBB DSU 211 well. An application for the modifications was never submitted.”
- NWD 1 Tank Battery: “This facility was modified on May 31, 2014 with the addition of the NWD 42 well; however, an application for the modification was never submitted.”

- NWD 2 Tank Battery: “This facility was modified on March 24, 2014 with the addition of the NWD 43 well; however, an application for the modification was never submitted.”
- Tensleep 1 Tank Battery: “This facility was modified on September 2, 2012 with the workover of the LBB 178H well; however, an application for the modification was never submitted.”
- Tensleep 2 Tank Battery: “This facility was modified on August 10, 2010 with the fracture treating of the LBB DSU C-052236 172 well; however, an application for the modification was never submitted.”

(DEQ Ex. 5 at ¶¶ 35-36; Ex. A attached to Citation Mem. at 4, 13, 21, 29, 37, 45, and 53).

The Division provided notice to Citation, by letters, dated April 24, 2020, explaining that the proposed permits would go out for public comment, as required by Chapter 6, Section 2(m). (DEQ Ex. 5 at ¶ 44; DEQ Ex. 4). The letters explained that the Division had completed its initial evaluation of Citation’s permit applications and recommended that Citation review the proposed permit conditions. (*Id.*) These letters were sent by certified mail to Citation with links to the application analysis documents which set forth the proposed conditions. The Division did not receive any comments on the proposed conditions during the public comment period, including from Citation. (DEQ Ex. 5 at ¶ 45). Citation did not comment on the proposed permits at any time until after the final



permits had been issued. (DEQ Ex. 5 at ¶ 46).<sup>5</sup>

In June 2020, after the close of the public comment period, the Division issued seven final minor air source permits to Citation. (Citation Mem. at 3). The seven permits contained conditions (specifically conditions 7 through 13) requiring Citation’s compliance with current PBACT requirements for new or modified sources pursuant to the 2018 Guidance. (DEQ Ex. 5 at ¶ 48; Citation Petition for hearing on P0027427, *et seq.*). The Division’s application of current PBACT requirements to Citation’s permits was not unusual. It is common practice for the Division to apply the current requirements and standards at the time a permit application is submitted. Other operators around the State who have taken advantage of PBACT have been subject to the guidelines in place when their permit application was submitted. (DEQ Ex. 5 at ¶ 49).

### STANDARD OF REVIEW

The Council may resolve contested cases through summary disposition under Rule 56 of the Wyoming Rules of Civil Procedure. *Rules Wyo. Dep’t of Env’tl. Quality, Practice and Procedure*, ch. 2, § 17. Under Rule 56, a court or agency “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter for law.” Wyo. R. Civ. P. 56(a). “A material fact is one which, if proved, would have the effect of establishing or refuting an essential

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<sup>5</sup> The Division understands that although the notice was properly sent to Citation, the company misplaced the document and relevant personnel within the company did not review it. The Division understands that this was a mistake, but nevertheless, the Division can only act on the information it actually receives from a company, and here Citation provided no feedback on the proposed permits before they were issued.

element of the cause of action or defense asserted by the parties.” *Thornock v. PacifiCorp*, 2016 WY 93, ¶ 10, 379 P.3d 175, 179 (Wyo. 2016) (citation omitted). The materiality of facts must be determined in reference to “the pertinent legal standard[s] for the asserted claim and for the corresponding defense to that claim.” *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 228 (Wyo. 2000) (internal quotation marks and citation omitted). In deciding whether genuine issues of material fact are present, the Council must review the record “from the vantage point most favorable to the party opposing the motion” and “give that party the benefit of all favorable inferences that may fairly be drawn from the record.” *Thornock*, ¶ 10, 379 P.3d at 179 (citation omitted). “If the evidence leads to conflicting interpretations or if reasonable minds might differ, summary judgment is improper.” *Abraham v. Great W. Energy, LLC*, 2004 WY 145, ¶ 12, 101 P.3d 446, 452 (Wyo. 2004).

“The party requesting summary judgment 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.” *Little Medicine Creek Ranch, Inc. v. D’Elia*, 2019 WY 103, ¶ 14, 450 P.3d 222, 227-28 (Wyo. 2019) (citation omitted). Once the moving party makes this showing, “the burden shifts to the party opposing the motion to present evidence showing that there are genuine issues of material fact.” *Id.* “The party opposing the motion must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings.” *Id.*

## ARGUMENT

The Division imposed proper permit conditions on the seven minor air source permits issued to Citation in June 2020. The Division correctly determined that Citation previously modified its facilities. As a result, the company was required by statute and the Air Quality Rules to demonstrate that it will apply BACT to the modified facility or be subject to PBACT. The Division also properly imposed PBACT requirements from the 2018 Guidance based on these modifications. There is no law that authorizes the Division to apply old control technology retroactively. Instead the law mandates the Division must require the best available control technology at the time it issues the permit. Citation's arguments to the contrary miss the mark and should be rejected by the Council.

### **I. Citation's facilities were modified.**

During its review of the permit applications, the Division discovered that Citation had previously added wells, recompleted, worked-over, or fracture treated certain well(s) at its facilities. Citation does not dispute that it made these changes to its facilities. The Division presumes that these actions increase emissions because they have the potential to increase oil and gas production. (DEQ Ex. 5 at ¶ 37; DEQ Ex. 1 at 55). Wells indisputably emit or have the potential to emit pollution and, therefore, adding a well generally increases or has the potential to increase emissions. (DEQ Ex. 5 at ¶ 38). The same is true for the other activities. (*Id.*). In fact, this is so well known and accepted that the 2018 Guidance

points to these specific activities as examples of modifications.<sup>6</sup> (DEQ Ex. 1 at 55).

Citation asserts that the Division erred because it presumed, in conformity with the definition of “Modified Facility” in the 2018 Guidance, that the changes made at the facilities would increase emissions rather than making a specific assessment of each change. (Citation Mem. at 10). Specifically, Citation contends that the Division “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.” *Id.* But Citation misplaces the burden of demonstrating the effect of a proposed change. It is the applicant’s burden to submit information in its permit application showing “**the nature and amount of the emissions**, and the manner in which it will be operated and controlled.” *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 6, § 2(b) (emphasis added). Citation failed to demonstrate the nature and amount of the emissions associated with the changes it previously made in its permit applications. Absent such information demonstrating the counterintuitive proposition that adding a well or

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<sup>6</sup> Citation contends that the definition of “Modified Facility” in the 2018 Guidance represents a “sea change” in the scope of modification under the Air Quality Rules. (Citation Mem. at 11). But the 2013 Guidance makes the same presumption. See [http://deq.wyoming.gov/media/attachments/Air%20Quality/New%20Source%20Review/Guidance%20Documents/2013-09\\_%20AQD\\_NSR\\_Oil-and-Gas-Production-Facilities-Chapter-6-Section-2-Permitting-Guidance.pdf](http://deq.wyoming.gov/media/attachments/Air%20Quality/New%20Source%20Review/Guidance%20Documents/2013-09_%20AQD_NSR_Oil-and-Gas-Production-Facilities-Chapter-6-Section-2-Permitting-Guidance.pdf). That version of Guidance in its definition of “Modified Facility” provided in pertinent part “An existing facility becomes modified once 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.” This language is identical in the 2018 Guidance.

taking these other actions would not increase emissions, the Division properly determined that Citation had modified its facilities.

Citation asserts that by acting on the presumption that certain activities by their very nature generally increase emissions, the Division has unilaterally expanded the definition of “modification” in Chapter 1 § 3. Not so. The definition of “modification” remains exactly as it exists in the rules. The Division has simply determined over many years of experience that certain activities, as a matter of fact, increase emissions. It is this factual determination, which Citation has not attempted to rebut, that certain activities presumptively meet the definition of “modification” that is memorialized in the 2018 Guidance. Accordingly, Citation’s real argument with the Division is not that the Division changed the definition of “modification” or somehow improperly promulgated a new rule, but rather that Citation would prefer it if the Division would ignore the obvious effects of these activities.

Having failed to demonstrate in its permit applications the nature and amount of the emissions associated with the modifications, Citation now attempts to show the changes did not increase emissions. (Citation Mot. to Stay Permit Provisions at 6). First, the Air Quality Regulations require the Division to evaluate the effect of the specific change. The Air Quality Rules define a modification as a “physical change in, or change in the method of operation of, an affected facility which increases the amount of any air pollutant[.]” *Rules Wyo. Dep't of Env'tl. Quality, Air Quality*, ch. 1, § 3. As is apparent from the use of the word “which” linking the change at issue to the increase, it is the effect of the specific change to the facility that dictates whether a modification has occurred, not whether other

changes at the facility that might be made concurrently result in an overall reduction in emissions. When the Division evaluates a proposed change to an emission unit at a minor source facility to ascertain whether it will increase emissions, it only considers the change itself. (DEQ Ex. 5 at ¶¶ 18 and 28; *and see Powder River Basin Res. Council v. Wyo. Dep't of Env'tl. Quality*, 2010 WY 25, ¶ 6, 226 P.3d 809, 813 (Wyo. 2010) (Courts “defer to an agency's interpretation of its own rules and regulations unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules.”)).

Here the only physical or operational changes at the various facilities revealed during the Division’s analysis were the modifications at issue. Citation claims that production at the facilities has been steadily decreasing, but its Director of Environmental Health and Safety, Mr. Redweik, admits that the changes, at issue here, increased production and emissions track production. (Redweik Aff. at ¶¶ 5 and 6). In spite of this acknowledgement, Mr. Redweik asserts that these production increases were insignificant (Redweik Aff. at ¶ 5). But significance is not the test for a modification. If emissions increased as a result of the specific change, then that change is a modification under the Air Quality Rules.

Second, this emissions information was not provided to the Division at the time it was analyzing Citation’s 2019 permit applications. (DEQ Ex. 5 at ¶ 39). At the time of its application submittal, Citation did not submit anything to the Division to rebut the presumption that the prior facility modifications did not increase emissions. (DEQ Ex. 5 at ¶ 39; *See* DEQ Ex. 2). The Division can only make decisions based on the information provided by the permit applicant.

Citation also asserts that its permit applications were “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 they exist today; no construction applications or modifications to existing permits are being proposed.” (Citation Mem. at 2). Regardless of what the cover letter to a permit application states, the Division has a responsibility to review the permit application in full. *See Rules Wyo. Dep't of Env'tl. Quality, Air Quality*, ch. 6, § 2(c). After reviewing Citation’s applications, the Division discovered Citation’s unpermitted additions, recompletions, workovers, and fracture treatments of wells. (DEQ Ex. 5 at ¶¶ 34-36). Citation cannot avoid applicable requirements by simply asserting that it did not intend to reveal that it had modified its facilities.

Ultimately, Citation’s assertions that it is being unfairly subjected to added regulatory burdens based on the 2018 Guidelines should be rejected. It is being subjected to appropriate regulatory burdens arising from its own decisions to modify its facilities and its failure to seek a permit for those modifications when they were made. It had the opportunity and the burden to show the Division that its modifications did not increase emissions when it submitted its permit applications or during the public comment period and it simply failed to do so. Accordingly, the Department and the Division are entitled to judgment as a matter of law confirming the Division’s determination that the facilities were modified and thereby subject to the permitting requirements of the Air Quality Rules.

## **II. The Division appropriately applied PBACT from the 2018 Guidance to Citation's permits.**

Citation maintains that if the Division treats Citation's facilities as modified, then pursuant to the Division's own guidance, it must apply prior years' guidance and associated PBACT requirements. (Citation Mem. at 15). But Citation points to no rule of law which allows the Division to require less than the best available control technology at the time the permit application is granted. In fact, the opposite is true.

Permit applications for oil and gas exploration or production wells must contain, at a minimum, "a demonstration that the applicant will apply the best available control technology to the oil and gas production and exploration activity." Wyo. Stat. Ann. § 35-11-801(e). The Air Quality Rules also specify that "[n]o approval to construct or modify shall be granted unless the applicant shows, to the satisfaction of the Administrator of the Division of Air Quality that: '[t]he proposed facility will utilize the Best Available Control Technology with consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility.'" *Rules Wyo. Dep't of Env'tl. Quality, Air Quality*, ch. 6, § 2(c)(v). As is apparent, the Division cannot grant a permit unless the facility will utilize the control technology that is both the "best" and "available." The Division cannot simply ignore available control technologies because the applicant failed to seek a permit for many years. Doing so would violate the plain language of the statute and the rule.

What qualified as BACT a decade ago, in 2010, is not the same as what qualifies as BACT today. (DEQ Ex. 5 at ¶ 42; *See* DEQ Ex. 3). Emission thresholds have lowered,



required controls have changed, and controls needed today are at 6 ton per year VOC threshold instead of double digits back in 2010. (*Id.*; DEQ Ex. 3 at 6) The Division's current guidance document outlines its current understanding of what is the "best" and "available" control technologies. The Division provides this understanding to assist those owners and operators who choose to construct or modify oil and gas production facilities prior to initiating the permitting process, or who do not complete a BACT analysis as part of the permit application. (DEQ Ex. 5 at ¶ 23). Citation chose not to conduct a BACT analysis. (DEQ Ex. 5 at ¶ 40; DEQ Ex. 2). As a result, Citation, whether by intention or inadvertence, placed the burden on the Division to decide what the best available control technology would be for the modified facilities. The Division has done the work to make that decision and it published that work in the 2018 Guidelines for the benefit of Citation and other companies. Citation has made no effort in these proceedings to demonstrate that PBACT is not the "best" control technology or that it is not "available" for these facilities.

Citation contends that applying the current PBACT is inconsistent with the 2018 Guidance, which provides that "[p]resumptive 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." (DEQ Ex. 1 at 2). However, as Citation pointed out in its brief, the 2018 Guidance is merely guidance and it is not binding on the agency or the public at large. (Citation Mem. at 12). More importantly, the applicability date in the 2018 Guidance cannot preempt the Division's statutory and regulatory duty to ensure the operator will apply the best available control technology at the facility when the permit is granted.

Citation has also made limited references to its environmental audit. Pursuant to Wyo. Stat. Ann. § 35-11-1105(a)(ii)(C), if a company conducts an environmental audit and finds potential noncompliance, the company is required to correct past noncompliance, improve current compliance, and prevent future noncompliance. After conducting its audit, Citation submitted permit applications to the Division. While Citation's environmental audit protects the company from civil penalties under Wyo. Stat. Ann. § 35-11-1106 for its past noncompliance, it does not grant the company permission to avoid compliance today. Nor does it in any way grandfather noncompliant practices or facilities. The Division determined based on the Act, the Air Quality Rules, and the 2018 Guidance that current compliance with the best available control technology requirement, in the absence of a BACT demonstration, is PBACT. Nothing about the environmental audit has any effect on that determination.

Finally, Citation contends that the Division's actions result in serious due process violations due to the agency's use of the guidance document and lack of notice to regulated entities. Procedural due process usually consists of notice and an opportunity to be heard. *See, e.g., Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 882 P.2d 866, 872 (Wyo. 1994) ("procedural due process is satisfied if a person is afforded adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner."). Both are present here. Citation cannot claim that it did not have notice of the requirement in both Section 801(e) of the Act and the Air Quality Regulations that it apply the best available control technology at any modified facility. And Citation does not claim that it did not have notice of the publically available 2018 Guidance which is available on the Department's

website. Citation also received specific notice that the Department intended to apply PBACT to the modified facilities when it was provided the proposed permit. It had a meaningful opportunity to be heard in response before the final decision was made during the public comment period, but it did not submit any response. Accordingly, Citation received all the process it was due.

Ultimately, Citation had two viable options for avoiding the PBACT. First, Citation could have applied for minor source permits when it first modified its facilities. Alternatively, Citation could have included a BACT analysis in the seven applications and demonstrated that at these specific facilities something other than PBACT was the best available control technology. Having failed to avail itself of either option, Citation should not now be spared from complying with the pollution control requirements the Division applies equally to other oil and gas operators. Accordingly, the Department and the Division are entitled to judgment as a matter of law confirming the Division's determination that the current PBACT represents the best available control technology for these modified facilities.

### **CONCLUSION**

For the foregoing reasons, the Department and the Division request that the Council grant its motion for summary judgment, deny Citation's motion for summary judgment, affirm the permit conditions, and dismiss Citation's petition with prejudice.

Dated this 21st day of December, 2020.



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Memorandum in Support of Response and Cross Motion for Summary Judgment* was served upon the persons listed below, on this 21st day of December, 2020, addressed as follows:

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