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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)

**DEPARTMENT OF ENVIRONMENTAL QUALITY'S
RESPONSE TO CITATION'S MOTION TO TEMPORARILY STAY
PERMIT PROVISIONS IN PERMIT Nos. P0027427 THROUGH P0027433**

Citation Oil & Gas Corp. (Citation) asks the Environmental Quality Council (Council) to temporarily stay permit provisions in Permit Nos. P0027427 through P0027433. The Wyoming Department of Environmental Quality (Department), by and through its undersigned counsel, hereby opposes Citation's motion on the grounds that a stay is not an available remedy in these proceedings and Citation is unlikely to succeed on the merits. Accordingly, Citation's motion to temporarily stay permit provisions in Permit Nos. P0027427 through P0027433 should be denied.

BACKGROUND

Citation conducted a voluntary environmental audit in March 2018. (DEQ Mem. at 10). 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. (DEQ Mem. at 10). Subsequently, Citation submitted minor source air permit applications for the facilities subject to this appeal. (*Id.*; DEQ Ex. 5 at ¶ 31).¹ 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.” (DEQ Mem. at 10). Citation did not include a best available control technology (BACT) analysis in any of its permit applications.² (DEQ Ex. 5 at ¶ 40; *See* DEQ Ex. 2).

The Division conducted permit application analyses on the seven permit applications. (DEQ Ex. 5 at ¶ 34; Citation Mem., Ex. A). 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. (DEQ Ex. 5 at ¶¶ 34-36). Citation modified its oil and gas facilities by adding wells, recompleting wells, working over wells, or fracture treating wells. Specifically, these modifications were:

¹ The DEQ Exhibits referenced in this Pleading are attached to the Department’s *Response and Cross Motion for Summary Judgment*.

² Citation also declined to submit a BACT demonstration after the issuance of the permits. (DEQ Ex. 5 at ¶ 40).

- 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).

Because Citation had modified these facilities, 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 to the oil and gas production and exploration activity.” Citation did not make such a demonstration for these modifications. (DEQ Ex. 5 at ¶¶ 39-40; *See* DEQ Ex. 2). When an applicant chooses not to make this demonstration, the Division requires the applicant to follow the presumptive best available control technology or PBACT. (DEQ Ex. 5 at ¶ 41). In accord with its routine practice, the Division placed conditions in the proposed permits requiring Citation to follow certain applicable portions of the current PBACT. (DEQ Ex. 5 at ¶¶ 22, 41, and 49).

Specifically, the applicable PBACT in the current Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance (2018 Guidance) requires new or modified facilities located in the statewide area (SWA) to conduct semi-annual monitoring for fugitive Volatile Organic Compound (VOC) 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. Citation could have asked the Division to “[use] an alternative method for monitoring fugitives.” (*Id.*) However, Citation did not submit an alternative

monitoring program to the Division or ask to use an alternative monitoring method. (DEQ Ex. at ¶ 46).

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) of the Air Quality Rules. *Rules Wyo. Dep't of Env'tl. Quality, Air Quality*, ch. 6, § 2(m). The letters, sent by certified mail, explained that the Division had completed its initial evaluation of Citation's permit applications and recommended that Citation review the proposed permit conditions. (DEQ Ex. 5 at ¶ 44; DEQ Ex.4). The letters included links to the application analysis documents, which set forth the terms of the proposed permit conditions. (*Id.*) The permit application analyses included the proposed conditions that were ultimately included in Citation's final permits. (DEQ Ex. 5 at ¶ 45; Citation Mem., Ex. A). Sometimes these conditions change based on comments provided to the Division during the public comment period. (DEQ Ex. 5 at ¶ 45). However, the Division did not receive any comments on the proposed conditions during the public comment period, including from Citation. (*Id.*) Citation did not comment on the proposed permits at any time until after the final permits had been issued. (DEQ Ex. 5 at ¶ 46).³

In June 2020, after the close of the public comment period, the Division issued seven final minor air source permits to Citation. (DEQ Mem. at 13). The seven permits contained

³ 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.

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 ¶¶ 47-48).

The Division’s application of current PBACT requirements to Citation’s permits was not unusual. It is both required by law and 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).

COURSE OF PROCEEDINGS

In June 2020, the Division issued the final seven minor air source permits to Citation. (Citation Mem. at 3). On July 6, 2020, Citation filed seven petitions to the Council seeking to have certain permit conditions modified. (Citation Petition for Hearing P0027427, *et seq.*). Citation subsequently requested the Division grant a stay of permit conditions 7 through 13. The Division denied the request to stay the permit provisions.⁴ On December 2, 2020, Citation filed its *Motion to Temporarily Stay Permit Provisions*.

⁴ 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[.]” *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 6, § 2(f). Air Quality Permits are considered final actions. *See* Wyo. Stat. Ann. § 35-11-208; *Rules Wyo. Dep’t of Env’tl. Quality, Practice and Procedures*, ch. 1, § 8. While the Administrator may “make recommendations to the director regarding the issuance, denial, amendment, suspension or revocation of permits,” nothing in the Act or Rules authorizes the Administrator to stay the effectiveness of permit conditions once the permit has been granted. Wyo. Stat. Ann. § 35-11-110(a)(vi).

In its *Motion to Temporarily Stay Permit Provisions*, Citation asserts that it will suffer irreparable harm if it is required to comply with permit conditions that it believes are improper. (Citation Mot. at 4). Citation argues that it is likely this Council will modify the permits and vacate the conditions. *Id.* Lastly, Citation contends that compliance with the permit conditions during the pendency of this appeal undermines the administrative process. *Id.*

LEGAL STANDARD

The Council has promulgated rules of Practice and Procedure which specifically provide for and limit the availability of temporarily relief during an appeal. *See Rules Wyo. Dep't of Envtl. Quality, Practice and Procedure*, ch. 1, § 8. Those rules provide:

(c) **Where a hearing is requested under subsection (b) of this section**, the Council may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if:

(i) All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(ii) The persons requesting that relief show that there is a substantial likelihood that they will prevail on the merits of the final determination of the proceeding;

(iii) Such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources; and

(iv) The relief sought is not the issuance of a permit where a permit has been denied by the Director, except that continuation under an existing permit may be allowed where the operation has a valid permit issued under W.S. § 35-11-406.

Id. (emphasis added).

Subsection (b) refers to actions involving surface coal mining operations. *See Id.*, ch. 1, § 8(b); ch. 9, § 2. The Council’s rules do not authorize temporary relief pending appeal in any other case. Nor did the Council incorporate Rule 65 of the Wyoming Rules of Civil Procedure governing injunctions and restraining orders when it adopted the rules governing contested case hearings. *See Id.*, ch. 2, § 2. Accordingly, temporary relief is only authorized by the rules in actions involving surface coal mining operations

Whether authorized by the rules or not, Citation essentially seeks a temporary injunction relieving it of the burden of complying with the permit conditions during the pendency of this appeal.

The purpose of a temporary injunction is to preserve the status quo until the merits of an action can be determined. And a temporary injunction rests upon an alleged existence of an emergency, or a special reason for such an order, before the case can be regularly heard. Also, the award of a temporary injunction is an extraordinary remedy which will not be granted except upon a clear showing of probable success and possible irreparable injury to the plaintiff, lest the proper freedom of action of the defendant be circumscribed when no wrong has been committed.

Weiss v. State ex rel. Danigan, 434 P.2d 761, 762 (Wyo. 1967) (citations omitted); *see also CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp.*, 2009 WY 113, ¶¶ 8-10, 215 P.3d 1054, 1057-58 (Wyo. 2009).

ARGUMENT

I. The Council’s Rules do not allow temporary relief from an air permit.

Citation asks the Council to provide relief that the Council itself has already chosen not to extend in these circumstances. Notably, Citation fails to cite any provision in the rules authorizing the Council to grant such equitable relief in these circumstances. (*See*

Citation Mot. at 2). Chapter 1, Section 8 of the Council's rules of Practice and Procedure provides for temporary relief only in actions involving surface coal mining operations. There is no provision in the rules for temporary relief for any other type of permit, including an air permit. Resolution of the pending motion is just this simple. This is not the type of case where the Council has authorized temporary relief under any circumstances and, therefore, the motion must be denied.

II. Citation is not entitled to a preliminary injunction.

Even if the Council had authorized temporary relief in these circumstances under the traditional standards for granting a temporary injunction, Citation's motion would still fail, because Citation is not likely to succeed on the merits. Accordingly, Citation's motion should be denied.

A. The Division correctly determined that Citation modified its facilities.

Citation claimed that it did not modify the facilities at issue in this case 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 result in an increase in emissions. (Citation Mot. at 6). However, the Air Quality Rules require applicants who plan to make a change that may increase emissions to submit a permit application. *Id.*, ch. 6, § 2(a). Some changes, like the ones identified by the Division, by their very nature increase or have the potential to increase emissions. In fact, the modifications identified by the Division are so well known that they are specifically identified in the current guidance under the definition of a "Modified Facility." (DEQ Ex. 1 at 55).

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

Having failed to demonstrate in its permit applications that the modification would not increase emissions, Citation now attempts to show there were no increases in emissions at the facility as a result of the actions previously performed. (Citation Mot. to Stay Permit Provisions at 6). Specifically that the changes resulted in emissions on a year-over-year basis not exceeding previous annual emissions associated with the historic oil production. (Citation Mot. at 6; Redweik Aff. at ¶ 6). Citation's Director of Environmental Health and Safety, Mr. Redweik, admits that the changes, at issue here, increased production and that emissions track production. (Redweik Aff. at ¶¶ 5 and 6). In spite of this acknowledgement, however, Mr. Redweik asserts that these production increases were insignificant. (Redweik Aff. at ¶ 5). But significance is not the test for a modification. 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. It does not matter if the increase was insignificant or not.

Citation had the burden to demonstrate that these changes did not increase emissions in its permit applications and failed to do so. Citation also failed to make such a demonstration when it was given the opportunity to comment on the proposed permit which contained the conditions at issue. The Division can only make decisions based on the information provided to it by the permit applicant. Accordingly, the Council is likely to find that the Division appropriately determined that the facilities had been modified, based on the information in the permit applications and the nature of the changes.

B. The Division appropriately determined that PBACT from the 2018 Guidance applies to Citation’s facilities.

Citation claims 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. (Citation Mem. at 9). 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.

The Division, by statute and rule, must require the best available control technology when it grants a permit, and the current best control technology available is set forth in the Division’s current guidance. 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). The Division **cannot** grant a permit unless the facility will utilize the control technology that is both the “best” and “available.”

Citation chose not to conduct a BACT analysis. (DEQ Ex. 5 at ¶ 40; DEQ Ex. 2). Moreover, Citation could have asked the Division to “[use] an alternative method for monitoring fugitives.” (DEQ Ex. 1 at 18). 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). 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.

What qualified as BACT a decade ago is not the same as what qualifies as BACT today. (DEQ Ex. 5 at ¶ 42). 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. (DEQ Ex. 5 at ¶¶ 22 and 23). The Division cannot 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.

Accordingly, Citation has not demonstrated that it is likely to succeed on the merits of its claims and, therefore, Citation is not entitled to temporary relief from the permit conditions.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Council deny Citation's motion to temporarily stay permit provisions in Permit Nos. P0027427 through P0027433.

Dated this 22nd day of December, 2020.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response to Citations's Motion to Temporarily Stay Permit Provisions in Permit Nos. P0027427 through P0027433* was served upon the persons listed below, on this 22nd day of December, 2020, addressed as follows:

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