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BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

MEMORANDUM OF POINTS AND AUTHORITY IN OPPOSITION TO SIERRA CLUB'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

COMES NOW Medicine Bow Fuel & Power, LLC (MBFP), by and through its undersigned attorneys, and hereby submits its Memorandum of Points and Authority in Opposition to Sierra Club's Motion for Partial Judgment on the Pleadings:

The Sierra Club has filed a frivolous motion, full of inflammatory rhetoric that distorts the pleadings, ignores the permitting record and confuses complicated air quality issues. Judgment on the pleadings is a rare and drastic remedy that is arguably

procedurally inappropriate for an appeal in front of the Environmental Quality Council (Council) and in any case, is unavailable when—on the face of the pleadings—the responding parties ***have denied*** the key factual allegations. The Sierra Club in their motion, has ignored this record and relied on an incomplete description of the pleadings to argue that they should prevail on two of their claims—(Claim I) that the Wyoming Department of Environmental Quality (WDEQ) erred in finding the Facility is a minor source of sulfur dioxide for purposes of PSD permitting; and (Claim V) that the WDEQ erred in not requiring short term modeling of particulate matter (PM10). The filing of this motion not only requires the WDEQ and Medicine Bow Fuel and Power (MBFP) to needlessly expend resources responding, the motion also wastes the limited resources of the Council. The Council should summarily deny Sierra Club's motion.

I. Background

On March 4, 2008, MBFP received Permit CT-5873 (Permit) from the WDEQ to construct a commercial scale gasification and liquefaction facility (Facility) and an underground coal mine in Carbon County, Wyoming. Using unutilized coal resource, the Facility will produce gasoline for transportation fuel to be sold into the regional market. The MBFP Facility, therefore, will enhance national energy security and contribute to energy independence by providing a domestic source of gasoline.

On June 19, 2007, MBFP submitted its original permit application under Chapter 6 of the Wyoming Air Quality Standards and Regulations (WAQSR) for a PSD permit to construct a major emitting facility. On December 31, 2007, MBFP submitted a revised application to reflect the change in process technology from production of diesel to production of gasoline. The permit application was reviewed by the WDEQ which issued an analysis and draft permit on June 19, 2008.

Consistent with the requirements of WAQSR, Chapter 6, Section 2(m), the WDEQ made the draft permit available for public comment. A public hearing to accept public comment was held on August 4, 2008 in Medicine Bow, Wyoming. During the public comment process, WDEQ received many comments in favor of the permit as proposed, as well as those seeking modifications or rejection of the permit.

The WDEQ, Air Quality Division, carefully reviewed the public comments, sought additional information from MBFP, and developed responses to public comments over a period of approximately seven months. In response to the comments, WDEQ revised and added some conditions in the final Permit. On March 4, 2009, the WDEQ issued Permit CT-5873 and an accompanying Decision Document, including its analysis and response to comments. Thus, the facility application received a thorough review over a period of nineteen months. The Decision Document includes responses to the comments from Sierra Club and the EPA. Both the Permit and the Decision Document were attached to

MBFP's June 3, 2009, Response to Sierra Club's Petition.

In its Decision Document, as reflected in the Permit at Table V, the WDEQ concluded that the SO2 potential to emit (PTE) for the Facility is 36.6 tons per year (tpy). Sierra Club contends in Claim I of its Petition that the WDEQ miscalculated the PTE of the total allowable SO2 emissions and that the PTE of the Facility is 40 tpy or more of SO2 and as a result, WDEQ should have conducted a PSD analysis for Sulfur Dioxide. MBFP and WDEQ, in their Responses, denied these allegations. MBFP further explained that in any case the Permit imposes BACT on SO2emissions, even though the Facility was not deemed major for SO2 under PSD. Despite the denials of both WDEQ and MBFP in their responses, Sierra Club seeks judgment under Rule 12(c) of the Wyoming Rules of Civil Procedure for Claim I.

The Sierra Club's also seeks judgment on its Claim V that the WDEQ erred by not requiring short term modeling of fugitive emissions of PM10 prior to issuing the Permit. Sierra Club seeks this outrageous relief despite the fact that both WDEQ and MBFP disputed the Sierra Club's assertions in their Responses. Essentially, the Sierra Club is asking the Council to reverse the WDEQ's permitting decision without the benefit of any testimony or input from the agency. This remedy is simply not available under Rule 12(c).

II. Standard of Review

Wyoming Rule of Civil Procedure 12(c) under which Sierra Club seeks a partial judgment on the pleadings provides in relevant part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." As a rule of civil procedure, it is questionable whether 12(c) applies to proceedings before the Council: "The Wyoming Rules of Civil Procedure, insofar as the same may be applicable and not inconsistent with the laws of the state and these rules shall apply to matters before the Council." Rules of Practice and Procedure Applicable to Hearings in Contested Cases, § 14(a). Section 1(a) of those Rules simply provides that the Director or Applicant file a responsive pleading to the petition. Unlike the Rules of Civil Procedure which contemplate a complaint and an answer, the Rules of Practice before the Council require neither a complaint nor an answer, but instead a petition for review and a response to the petition. Use of Rule 12(c), therefore, appears inapplicable and inconsistent with the Council's Rules of Practice. On this ground alone, the Council can deny Sierra Club's motion.

Alternatively, Sierra Club's motion can be denied because its motion cannot meet the stringent standard governing the grant of a Rule 12(c) motion. The rule at issue is virtually identical to Rule 12(c) of the Federal Rules of Civil Procedure and as such the Wyoming Supreme Court recognizes that federal case law on this rule is highly persuasive. *Kimbley v.*

City of Green River, 642 P.2d 443, 445 n.3 (Wyo. 1982). As a summary proceeding, "courts have followed a fairly restrictive standard in ruling on motions for judgment on the pleadings." 5C Wright & Miller, *Federal Practice and Procedure:* Civil 3d § 1368 (2004). Wright & Miller articulate the reason for this fairly restrictive standard as follows:

> [H]asty or imprudent use of this by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his or her claim or defense. The importance of this policy has made federal judges unwilling to grant a motion under Rule 12(c) unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.

5C Wright & Miller, *Federal Practice and Procedure:* Civil 3d § 1368 (2004).

Given its drastic nature, "a motion for judgment on the pleadings is not favored and will not be granted unless the moving party demonstrates that no material issue of fact remains to be resolved and such party is entitled to judgment as a matter of law." *Lambert v. Inryco, Inc.*, 569 F.Supp. 908, 912 (W.D. Okla. 1980). *See also Rawe v. Liberty Mutual Fire Insurance Company*, 462 F.3d 521, 526 (6th Cir. 2006). In deciding a 12(c) motion, "all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973). Accordingly, granting such a motion is proper only if "no material issue of fact exists and the moving party is entitled to judgment as a matter of law." *Paskvan v. City of*

Cleveland Civil Service Commission, 946 F2d 1233, 1235 (6th Cir. 1991). In line with this restrictive standard, Wyoming courts, in deciding a motion for judgment on the pleadings, will view the facts in the light most favorable to the nonmoving party, and will not grant the motion unless "'those facts dictate that the judgment should be entered as a matter of law.'" *Ecosystem Resources, L.C. v. Broadbent Land & Resources, L.L.C.*, 158 P.3d 685, 687-88 (Wyo. 2007) (*quoting Wilson v. Town of Alpine*, 111 P.3d 290, 291 (Wyo. 2005)). Significantly, a trial on the merits is more appropriate than resolution of the case by a judgment on the pleadings if the pleadings do not resolve all of the factual issues. *Lambert*, 569 F.Supp. at 912.

III. Argument

The Pleadings Do Not Support Judgment on Sierra Club's Sulfur Dioxide Claim I

To put it simply, Sierra Club's assertions in its motion that there are no factual issues remaining regarding WDEQ's calculation of PTE for sulfur dioxide are so rooted in a misstatement of the record and a distortion of the regulatory framework it is difficult to untangle the mess without creating more confusion. Sierra Club relies on only a portion of the pleadings in framing their motion, ignoring facts that call into question the premise of their motion, and then, compound this error by relying on cases and guidance that are irrelevant to determining PTE for PSD permitting.

Sierra Club contends that all emissions that should have been included in the PTE for determination of whether the Facility is major for SO2 were not included and that all facts relevant to this point have been established in the pleadings. Sierra Club contends that the WDEQ did not consider startup, shutdown and malfunction emissions as required. This claim is contrary to the record, as it is clear from the pleadings, that DEQ did include these emissions, as required in the PTE determination.

As an initial matter, MBFP's Response to Petition in Paragraphs 35-47 denied the premise of Claim I and therefore, relying on the pleadings to resolve Claim I is unavailable as a remedy under the standard stated above. More important, the WDEQ's decision document, attached as an exhibit to MBFP's Response to Petition, and therefore, part of the pleadings establishes that at this very early stage of the proceedings, the facts are disputed and summary disposition is not available.[1]

In Section III.1. of the Decision Document, DEQ disagreed with EPA that cold start up emissions should be included in the PTE, as they are not routine, but went on to state that the agency did require MBFP to consider startup and shutdown emissions. It is worthwhile here to quote at length from the decision document at Section III.1.:

> The Division does not agree with EPA that SO2 emissions from the facility should have gone through a PSD analysis. The Division considers (Cold Startup Year Emissions) as emissions associated with commissioning (startup) activities for the plant, which are temporary in

1 Summary disposition is also unavailable because Sierra Club's own Motion goes beyond the Pleadings. On page 10 Sierra Club refers to a July 31, 2008 letter that is not part of the pleadings.

> nature and are not routine as represented in the application. It has been the Division's consistent practice to make applicability determinations based on a consideration of a facility's routine operations. ... The Division, however, did request DKRW to evaluate the facility to ensure that all routine (planned) activities were accounted. Based on this request, DKRW provided information that due to planned maintenance activities on the gasification units SO2 emissions from the facility during normal operations will increase from 32.9 tpy to 36.6 tpy of SO2. Since SO2 emissions during normal operations of the facility remain less that 40 tpy, a PSD analysis for SO2 under Chapter 6, Section 4 of the WAQSR is not required.

Similarly, in the Decision Document at Section IV.6, in response to a comment from the Powder River Basin Resource Council, the DEQ discussed BACT for SO2 emissions from the flares and again described its treatment of SO2 flare emissions:

> Emissions from the flares during startup and shutdown of the facility are addressed under the SSM plan for the facility, which was determined to represent BACT for this type of operation. Venting to the flares during non-routing events, such as malfunctions, is addressed under Chapter 1 of the WAQSR and is subject to Division approval.

These two excerpts, in conjunction with the denials in the responsive pleadings, are enough to defeat the Sierra Club's motion with regard to Claim I. The pleadings simply do not support the notion that all factual issues relevant to deciding Sierra Club's Claim I in its favor have been established in the pleadings. To reach this conclusion, the Council, without the benefit of any testimony from the DEQ decision makers, would be required to disregard the detailed analysis provided by the agency in the Decision Document. This is simply not appropriate under Rule 12(c) of the Wyoming Rules of Civil Procedure.

The EPA documents, which are outside the record, and cases cited by the Sierra Club are irrelevant to an analysis of calculating PTE for purposes of evaluating WDEQ's permitting decision. The bulk of the authority cited by the Sierra Club relates to the treatment of excess emissions from startup, shutdown and malfunction, e.g., emissions in excess of permit limits or standards. They do not support the Sierra Club's position that the regulations require the WDEQ to include those emissions in its determination of a facility's PTE.

Sierra Club's reliance on *In Re Talmadge*, is misleading. In that case, the question before the Environmental Appeals Board was not whether start up and shutdown emissions were included in the PTE, but how they were treated during operation of the facility. In its motion, Sierra Club cites this case for the proposition that "an applicant must include SSM emission in its potential to emit." Motion at 8. Nowhere does the case even mention agency error in the calculation of PTE. Similarly, most of the other cases in the brief relate to either State Implementation Plan (SIP) treatment of excess emissions or permit issues other than PTE. *See, e.g., Michigan Department of Environmental Quality v. Browner,* 230 F.3d 181 (2000) (rejecting automatic exemptions for startup/shutdown emissions in SIP). One case does mention the role of fugitives in PTE, but it is not for a PSD major source determination. *Nat'l Mining Assoc. v EPA,* 59 F.3d 1351 (1995) (discussing PTE in determining whether a facility is a major source of hazardous air pollutants).

As a threshold matter, the exhibits relied on by the Sierra Club, are outside the record and render the motion procedurally defective. EPA documents, even formal guidance documents, are not law. They are documents that interpret the laws, including regulations, implemented by the EPA, but they do not have the force and effect of law. Consequently, they are not law that the Council can rely on to evaluate the Sierra Club claims.

Even if legally-binding, the EPA documents attached as Exhibits to the Motion do not address the question of what emissions must be included in the PTE. Exhibits 3 & 4 are guidance documents on the treatment of excess emissions from startup, shutdown and malfunctions, not the initial calculation of PTE. Exhibit 2 discusses how to limit PTE, not which emissions must be included initially in the calculation for determining whether a source is major. Exhibit 1 is about PTE for emergency generators (a different source than at issue here), and is merely a letter from Region 2 of EPA to New Jersey's Department of Environmental Protection, not formal EPA guidance.

In short, even if there were no factual issues that precluded judgment on the pleadings, Sierra Club's Motion would fail. They have failed to provide any law that supports their position on the calculation of PTE.

Pleadings Do Not Support Judgment on PM10 Claim

The Pleadings, including the Decision Document, show strong areas of disputed facts between the Respondents, WDEQ and MBFP, and the Petitioner, the Sierra Club, regarding

PM10 issues. MBFP denied that the modeling required by WDEQ failed to demonstrate compliance with the NAAQS or the PSD increment. That is the fundamental question and the allegations related to this issue were denied. Thus, under the standard above, judgment is not available on Claim V under Rule 12(c). WDEQ explained its position not to require short term modeling (24-hr) of haul road dust emissions in its Decision Document at III.14:

> Current Division policy does not endorse short-term (24-hour) modeling for predicting impacts from fugitive particulate sources because of the uncertainties in the performance of the recommended EPA models. The State and EPA Region VIII entered into a Memorandum of Agreement in 1994 which allows the Division to conduct monitoring in lieu of short-term modeling for coal mine particulate concentration in the Powder River Basin, and this practice has been applied to modeling of PM10 fugitive emissions in other parts of the state.

This longstanding WDEQ position on short term modeling of fugitive particulate emissions is based on what is commonly referred to as the Simpson Amendment, found in the 1990 Amendments to the Clean Air Act. The Simpson Amendment provides states with the flexibility to use other tools for modeling coal mine fugitive dust, pending development of a more accurate model. Sec. 234 of the Clean Air Act Amendments of 1990 (PL 101-549). Finally, it is worth noting that the Permit Condition No. 47 requires control of fugitive dust from haul roads.

With its Motion on Claim V, the Sierra Club is not only asking the Council to ignore the record that contains the WDEQ's reasoning on short term modeling of fugitive emissions, thereby creating a disputed fact, but also is asking the Council to overturn a longstanding

policy of the agency without the benefit of any input from WDEQ personnel. This would be extremely disruptive of the WDEQ permitting process and is not in any way justified under Wyo. R. Civ. Proc. 12(c).

CONCLUSION

Sierra Club has fallen far short of their burden to establish a basis for judgment on the pleadings. Rather than review the entire pleadings, the Sierra Club's Motion reflects their belief that they can selectively choose from the filings and ignore the rest, in order to prevail. A motion for judgment on the pleadings requires that all factual issues are resolved such that only questions of law remain. That is not the case here and for these reasons MBFP respectfully request that the Council deny the Motion.

DATED this 17th day of August 2009

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By: _____

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CERTIFICATE OF SERVICE

I, Mary A. Throne, hereby certify that on this 17th day of August 2009 a true and correct copy of the foregoing **Memorandum of Points and Authority in Opposition to Sierra Club's Motion of Partial Judgment on the Pleadings** was served in accordance with the requirements of Chapter I, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure and Rule 5 of the Wyoming Rules of Civil Procedure, by United States mail, and electronic mail to:

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