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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

SIERRA CLUB'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The Sierra Club hereby moves for Partial Judgment on Claims I & V based upon the pleadings. Two material facts are undisputed after the pleadings, and each alone is sufficient to void Medicine Bow's air permit as a matter of law. First, the applicant concedes that its proposed facility could emit 150.16 tons of sulfur dioxide (SO_2) per year from flaring due to anticipated malfunction events, in addition to 256.9 tons per year from cold startups, and that it failed to include these emissions in calculating the facility's potential to emit (PTE). Permittee's Response to Appeal ¶41-42 (hereinafter "Medicine Bow Resp."). Failing to account for these emissions is a clear violation of the law, and enables Medicine Bow to avoid the essential requirement that it apply the Best Available Control Technology (BACT) to these significant emissions. Wyoming Air Quality Standards and Regulations, Ch. 6, §4 (hereinafter "WAQSR");

In re Tallmadge Generating Station, 2003 WL 21500414 at *8 (E.A.B. 2003) ("automatic exemptions for excess emissions ... during startup and shutdown periods cannot be reconciled with the directives of the CAA [Clean Air Act].")

Medicine Bow also concedes that it did not model the impacts of fugitive particulate matter (PM) emissions on 24-hour timeframes. Medicine Bow Resp. ¶42. Without including these significant emissions, which are 71% higher than the emissions it considered, the company has not demonstrated that its project complies with Wyoming's short-term air quality standards, as required by 6 WAQSR §4(b)(i)(A)(1). Because only matters of law remain in dispute with respect to these two issues, the Environmental Quality Council should grant judgment on the pleadings on these two claims.

These failures surpass mere paperwork glitches. These are illegal attempts to avoid core permitting requirements imposed on new major source of air pollution. Because Medicine Bow and DEQ failed to account for emissions during anticipated malfunctions and startups, significant SO_2 emissions will not be controlled in accordance with the Clean Air Act's BACT requirements. Additionally, the new facility may cause an exceedance of air quality standards for particulate matter that are set to protect public health.

These transgressions must not be taken lightly; pollution from coal-fired power plants kills people. *See North Carolina v. TVA*, 593 F.Supp.2d 812, 822 (W.D.N.C. 2009) ("Court finds that, at a minimum, there is an increased risk of incidences of premature mortality in the general public associated with [particulate matter pollution from coal-fired power plants]."); *Ohio Power Co. v. EPA*, 729 F.2d 1096, 1098 (6th Cir. 1984) ("there is now no longer any doubt that high levels of pollution sustained for periods of days can kill."); *Sierra Club v. TVA*, 592 F.Supp.2d 1357, 1371 (N.D. Ala. 2009) ("there is no level of primary particulate matter concentration at

which it can be determined that no adverse health effects occur."); 70 Fed. Reg. 65,983, 65,988 (Nov. 1, 2005) ("emissions reductions resulting in reduced concentrations below the level of the standards may continue to provide additional health benefits to the local population.").

II. STANDARD OF REVIEW

Judgment on the pleadings is appropriate when "all material allegations of fact are admitted in the pleadings and only questions of law remain." *Newport Int'l Univ., Inc. v. State, Dept. of Educ.*, 186 P.3d 382, 386 (Wyo. 2008) (quoting *Box L Corp. v. Teton County*, 92 P.3d 811, 813 (Wyo. 2004)); *see also Ecosystem Res., L.C. v. Broadbent Land & Res., L.L.C.*, 158 P.3d 685, 687 (Wyo. 2007); *Greeves v. Rosenbaum*, 965 P.2d 669, 671 (Wyo. 1998); WYO. R. CIV. P. 12(c). Judgment on the pleadings is akin to summary judgment, which provides a party with swift relief in the absence of any genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. WYO. R. CIV. P. 56(c). Like summary judgment, a judgment on the pleadings avoids needless court proceedings when justiciable issues of law are apparent.

III. BACKGROUND

The purpose of the Clean Air Act is to protect the nation's air resources and citizens' health and welfare. 42 U.S.C. § 7401(b); *see also* WYO. STAT. § 35-11-102. Consistent with this purpose, proposed facilities in areas of reasonably healthful air quality (i.e., attainment areas) must obtain a Prevention of Significant Deterioration (PSD) permit before beginning construction, in order to ensure the project will not cause a decline in air quality. *See generally*

WAQSR Ch. 6 §4. Together with the Wyoming Environmental Quality Act, WYO. STAT. § 35-11-201 *et seq.*, WAQSR codifies Wyoming's Clean Air Act State Implementation Plan.

Sulfur dioxide and particulate emissions have direct and deleterious effects on human health and safety; avoiding this harm is among the primary aims of the federal Clean Air Act and the Wyoming Environmental Quality Act. "SO_2 causes a wide variety of health and environmental impacts ... Particularly sensitive groups include people with asthma who are active outdoors and children, the elderly, and people with heart or lung disease." EPA, *Health and Environmental Impacts of SO_2*, http://www.epa.gov/air/urbanair/so2/hlth1.html); *see also* WYO. STAT. § 35-11-102; 42 U.S.C. § 7401(b). Particulate emissions are similarly harmful to human health and welfare. PM can trigger a wide variety of respiratory problems, as well as heart attacks. *See* EPA, *Particulate Matter*, http://www.epa.gov/particles/health.html.

On December 31, 2007, Medicine Bow Fuel & Power ("Medicine Bow", "Company", or "Applicant") submitted a revised Application for a PSD permit for an underground coal mine and industrial gasification and liquefaction plant that will produce transportation fuels. Protest and Petition for Appeal ¶1 (hereinafter "Pet."); Medicine Bow Resp. ¶1. On March 4, 2009, the Wyoming Department of Environmental Quality (DEQ) issued Medicine Bow a PSD permit (No. CT-5873). Pet. ¶4; Medicine Bow Resp. ¶4.

The permit authorizes Medicine Bow to emit more than 36.6 tons of sulfur dioxide per year (SO_2). Pet. ¶7; Medicine Bow Resp. ¶7. However, significant SO_2 emissions from startups and malfunctions will add enormously to Medicine Bow's environmental toll, yet they were disregarded in the permitting process. The permitting analysis did not include the project's anticipated, real-world emissions of 150 tons of SO_2 each year during malfunctions, on top of 256.9 tons per year (tpy) from cold startups. *See* Medicine Bow Resp. ¶41-42. These omitted

emissions amount to over ***eleven times*** the amount of sulfur dioxide the facility is actually permitted to emit.

The fugitive PM emissions Medicine Bow failed to model are a significant portion of a project's total particulate emissions. Medicine Bow and DEQ failed to consider 250 tpy of PM emissions from haul roads, coal storage and processing, and area sources. *See* Section IV(B). The unmodeled fugitive PM is 71% greater than the point source emissions that Medicine Bow modeled. *Id.*

IV. DISCUSSION

A. Medicine Bow Admits it Failed to Include Hundreds of Tons of Sulfur Dioxide Emissions in the Facility's Potential to Emit.

There is no material issue of fact in dispute: Medicine Bow admits that it neglected to include significant emissions of sulfur dioxide in its potential to emit calculation. The law is well-established that PTE calculations must include startup, shutdown, and malfunction (SSM) emissions. EPA has had a "long-standing position that automatic exemptions for excess emissions ... during startup and shutdown periods cannot be reconciled with the directives of the CAA [Clean Air Act]." *In re Tallmadge*, 2003 WL 21500414 at *8.

The magnitude of a project's potential to emit (PTE) is critical to the permitting analysis because it determines whether the proposed facility must employ the Best Available Control Technology (BACT) and demonstrate compliance with Wyoming Ambient Air Quality Standards and increments. 6 WASQR §4(b)(ii)(A); §4(b)(i)(E); *see also* 40 C.F.R. § 52.21(b)(23). By ignoring a large category of emissions during SSM events, Medicine Bow estimates the Facility will emit 36.6 tons of sulfur dioxide each year. Medicine Bow Resp. ¶40. This estimate is conveniently 3.4 tons shy of the 40 tpy threshold that triggers the BACT and

modeling requirements. *See* 6 WAQSR § 4(a)("significant"); 40 C.F.R. § 52.21(b)(23);. Medicine Bow narrowly avoided these requirements by illegally underestimating the facility's overall pollution footprint.

1. The Clean Air Act and Wyoming Regulations Require that Medicine Bow Count SSM Emissions in its Potential to Emit

Wyoming regulations define potential to emit as follows: "'Potential to emit' means the **maximum capacity of a stationary source to emit a pollutant under its physical and operational design**." WAQSR 6 §4(a)("potential to emit") (emphasis added); *see also* 40 C.F.R. § 51.165(a)(iii). EPA guidelines clarify that PTE is a "worst-case" accounting of the maximum amount of emissions a facility could emit, given its physical and operational design. EPA Memorandum from Steven Riva to William O'Sullivan, *Accounting for Emergency Generators in the Estimate of Potential to Emit*, at 2 (Feb. 14, 2006) (hereinafter "Riva Memo"; attached as Exhibit 1). Further, "[t]he definition of 'potential to emit' under the new source regulations is **extremely important**." EPA Memorandum from Terrell E. Hunt and John S. Seitz to Regional Counsels, *Guidance on Limiting Potential to Emit in New Source Permitting* (June 13, 1989) (attached as Exhibit 2) (emphasis added).

Wyoming's regulations plainly require an applicant to account for its SSM emissions. "Projected actual emissions...shall include... **emissions associated with startups, shutdowns, and malfunctions**." 6 WAQSR §4(a)("projected actual emissions")(i)(B) (emphasis added). Projected actual emissions are closely related to PTE. Projected actual emissions applies to major modifications of existing sources whereas PTE applies to new sources. New sources not yet operating have projected actual emissions that are equal to the unit's PTE. 6 WAQSR §4(a)("actual emissions")(iii). Read together, the two regulations require an applicant to include SSM emissions in its PTE calculation.

The EPA's Environmental Appeals Board (EAB) [1] has repeatedly underscored the requirement that SSM emissions must be included in a project's PTE calculation. The EAB remanded a permit from the Michigan Department of Environmental Quality, *inter alia*, because the permit exempted the proposed natural-gas-fired power plant from emissions limitations during SSM events. *In re Tallmadge*, 2003 WL 21500414 at *8-*9.

> Startup and shutdown of process equipment are **part of the normal operation** of a source and should be accounted for in the planning, design, and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods.

Id. (quoting EPA Memorandum from John B. Rasnic to Linda M. Murphy, *Automatic or Blanket Exemptions for Excess Emissions During Startup, and Shutdowns Under PSD*, at 2 (Jan. 28, 1993) (attached as Exhibit 3))(emphasis added); *see also* EPA Memorandum from Steven A. Herman and Robert Perciasepe to Regional Administrators, *State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,* at 1 (September 20, 1999) (hereinafter "Herman Memo"; attached as Exhibit 4) (stressing that startup and shutdown are "part of the normal operation of a source."). EPA has had a "long-standing position" that automatic exemptions for excess emissions during startup and shutdown periods cannot be reconciled with the directives of the CAA." *In re Tallmadge*, 2003 WL 21500414 at *8.

Emissions from startup, shutdown and malfunction events are expected, regulated emissions, and courts consistently reject attempts to ignore them. States cannot exempt SSM events from their State Implementation Plan (SIP). *E.g., Michigan DEQ v Browner*, 230 F.3d 181, 183 (6th Cir. 2000) (affirming an EPA ruling that disapproved Michigan's SIP revisions

[1] State courts often look to decisions from the EAB for guidance, affording the EPA's highest decisionmaking authority significant deference. *See, e.g., United States v. S. Indiana Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1009

because they impermissibly failed to limit SSM emissions). Emissions of hazardous air pollutants, regulated under CAA section 112, during SSM events cannot be exempted from regulation. *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008). Individual permits may not exempt SSM events from BACT limits. *E.g., In re RockGen Energy Center*, 8 E.A.D. 536 (E.A.B. 1999) (PSD permits may not contain blanket BACT exemptions for SSM emissions); *In re Tallmadge*, 2003 WL 21500414. Moreover, exceeding emissions allowances though startup, shutdown, and malfunction events is a PSD permit violation. *E.g.*, *In re Indeck-Elwood, LLC*, 2006 WL 3073109 at *33 (E.A.B. 2006). "EPA has, since 1977, disallowed automatic or blanket exemptions for excess emissions during startup, shutdown, maintenance, and malfunctions by defining most periods of excess emissions as 'violations' of the applicable emission limitations." *Id.*

All emissions – not just selected ones – count towards a facility's potential to emit. "For purposes of the definition [of 'major source'], *all* emissions of listed pollutants are counted from a group of sources within a plant boundary ... This is to assure that emissions from the facility *as a whole* are adequately controlled." *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1359 (D.C. Cir. 1995) (fugitive emissions must count towards a facility's emissions totals).

EPA has consistently advised states over the last twenty years that an applicant must include SSM emissions in its potential to emit. *See In re Tallmadge*, 2003 WL 21500414 at p *8-9 (collecting sources). EPA stated its position again in its comments on Medicine Bow's draft permit: "the regulations do not provide exemptions for excluding startup emissions from a facility's Potential to Emit (PTE)." EPA Comments on Medicine Bow's PSD Application at 3. In memoranda, EPA has advised "to determine PTE, a source must estimate its emissions based on the worst-case scenario **taking into account startups, shutdowns and malfunctions**." Riva

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(S.D. Ind. 2003).

Memo at 2 (emphasis added). Startup and shutdown emissions are "reasonably foreseeable" emissions. Herman Memo at 3. Given these emissions are foreseeable, "EPA views all excess emissions as violations of the applicable emission limitation." *Id.* at 1.

Sulfur dioxide malfunction emissions are so serious that EPA singles them out, along with lead, as permit violations that must be enforced. For excess pollution arising from some unavoidable malfunctions, state agencies can opt not to impose monetary penalties, but they must penalize facilities for permit violations caused by SSM emissions of sulfur dioxide. Herman Memo at 2. "Where a single source ... has the potential to cause an exceedance of the NAAQS or PSD increments, as is often the case for sulfur dioxide and lead, EPA believes approaches other than enforcement discretion [i.e., imposition of a penalty] are not appropriate." *Id.*, Attachment at 1.

Wyoming regulations and authorities across the board require that PTE calculations include SSM emissions, and there is no authority instructing applicants that they may exclude these emissions from a source's PTE. SSM emissions are, after all, still emissions of dangerous pollutants. Thus, startup, shutdown, and malfunction emissions must be included in a new source's potential-to-emit (PTE) as a matter of law.

2. Medicine Bow Admits it Failed to Count Sulfur Dioxide Emissions from Startup and Malfunction Events

Medicine Bow concedes that it failed to count its sulfur dioxide startup and malfunction emissions in its potential to emit, despite acknowledging that it will emit significant amounts of SO_2 during these events. The Company acknowledges that the facility's potential to emit SO_2 from flares during anticipated malfunctions is 150.16 tons per year. Medicine Bow Resp. ¶ 42. Medicine Bow also concedes that emissions from cold starts will be 256.9 tons per year. *Id.* ¶

41. The Company further admits that these startup emissions, if counted in the facility's potential to emit, would exceed the significance threshold. *Id.* ¶ 43.

Medicine Bow nevertheless contends that startup and malfunction emissions are non-routine and do not need to be included in its PTE. *Id.* ¶¶ 41, 42. This defies the law as well as common sense. A significant source of sulfur dioxide emits at least 40 tons per year above a baseline of zero; turning the key to start Medicine Bow's plant would alone emit more than ***six times*** this amount. Medicine Bow explained that these startups will occur every three or four years. DKRW letter to DEQ, July 31, 2008 at 2 (cited in Medicine Bow Resp., Attachment 1, at p. 1). A massive amount of emissions every three to four years cannot be ignored. Averaging 256.9 tons per year over four years yields over 64 tons per year, which alone would place the source over the major source threshold.

Because Medicine Bow concedes it did not include its sulfur dioxide startup and malfunction emissions in its PTE, there is no disputed issue of fact remaining. The only issue remaining is one of law, and therefore the claim is ripe for this Council to rule. No undiscovered facts could alter the fact that Medicine Bow's permit was based on a drastic underestimate of the facility's potential to emit sulfur dioxide. EPA and the Courts have repeatedly insisted that SSM events are not regulation-free zones. The Sierra Club therefore requests that the Council enter final judgment on this claim and remand the permit to account for SSM emissions in its potential to emit.

3. Medicine Bow's Claim that its SSM plan is BACT for the Flares is Irrelevant to this Motion and Untrue

While repeatedly denying that the Facility will be a major source of sulfur dioxide emissions, the Company argues in the alternative that it nevertheless complied with BACT. Medicine Bow Resp. ¶46. The Council should ignore this argument because it irrelevant to the

question presented of whether Medicine Bow and DEQ properly determined the Facility is a minor source of sulfur dioxide emissions. Additionally, since Medicine Bow strongly disputes that Facility is a major source of sulfur dioxide emissions, it is unlikely that it has already complied with BACT requirements that its major source designation would trigger.

To the extent the Council chooses to examine Medicine Bow's contention, the SSM plan is not BACT for the flares. There was no BACT analysis for SO_2 flares in the permit application or DEQ's application analysis. In sharp contrast, DEQ applied the five-step BACT process to sulfur dioxide emissions from the turbines and to the sulfur recovery unit in the permit application analysis. DEQ's Application Analysis at p. 23-25. Similarly, there was no BACT analysis for the flares in the VOCs, CO, or NOx section. DEQ did not apply a proper BACT analysis to Medicine Bow's proposed SSM plan. *See In re Tallmadge*, 2003 WL 21500414 at p*9-*10 ("The administrative record here, as in RockGen, is devoid of evidence that the permit issuer (here MDEQ) considered ways to eliminate or reduce excess emissions during startup and shutdown, as it is obliged to do to ensure compliance with the CAA.") (citing *In re Rockgen Energy Center,* 8 E.A.D. at 536).

B. Medicine Bow Admits That It Failed to Include the Project's Fugitive Particulate Emissions in the Model to Demonstrate Compliance with Air Quality Standards

Medicine Bow concedes that it did not include fugitive PM emissions in its modeling of the facility 24-hour impacts. Medicine Bow Resp. ¶62. There is no question that such emissions contribute to overall PM emissions. *See e.g.,* EPA Comments on Medicine Bow's PSD Application at 9 ("Haul road PM10 emissions should be included in short-term PM10 NAAQS/WAAQS and increment modeling. These ... are source emissions that affect the PM10 NAAQS/WAAQS and increment."). By neglecting to model them, Medicine Bow failed to

demonstrate its compliance with Wyoming statutory requirements and therefore violated the law. *See* WYO. STAT. §35-11-801(a); 6 WAQSR §4(b)(i)(A)(1); *E.g., In Re Masonite Corp.*, 5 E.A.D. 551, 1994 WL 615380 at *15 (E.P.A. 1994) (citing 54 Fed. Reg. 48870 (Nov. 28, 1989)) ("The P.S.D. requirements...apply to each regulated pollutant that a "major" source emits in "significant" amounts...The regulations do not distinguish between stack and fugitive emissions for this purpose [NAAQs and increment consumption]"). This issue requires no further factual development.

In order to obtain a PSD permit, facility owners must show "that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter." 42 U.S.C. § 7475(a)(3); 6 WAQSR §4(b)(i)(A)(I); *see* 2 WAQSR §2(a)-(b) (providing 24-hour standards for both PM10 and PM2.5, and requiring PM measurement); 6 WAQSR §4(b) (providing maximum 24-hour PM increment values in Table 1). These standards protect the health and welfare of Wyoming citizens by specifying the maximum amount of pollutant a source may produce in any given 24-hour period.

The state's ambient air quality standards (WAAQS) specify the maximum allowable amount of pollution in outdoor air. 2 WAQSR §1(a) ("establish[ing] standards of ambient air quality necessary to protect public health and welfare."). PSD increments are the maximum allowable increase in a pollutant's concentration above an established baseline. 6 WAQSR §4(b), Table 1. Both the WAAQS and PSD increments have annual limits and 24-hour pollution limits, and in order to receive a PSD permit, an applicant must demonstrate compliance with each. *Id.*

Medicine Bow failed to include all of the facility's PM emissions into its 24-hour emissions modeling, therefore the Company has not demonstrated compliance with either of these standards, and DEQ improperly issued it a permit.

Fugitive emissions are those that "could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." 6 WAQSR §4(a)("fugitive emissions"). Wyoming regulations and the Clean Air Act require inclusion of fugitive emissions in the permitting analysis. For example, Wyoming regulations require that applicants include fugitive emissions in calculating a new source's potential to emit and in calculating other emission benchmarks. 6 WAQSR §4(b)(i)(D) (fugitives must be included in major new source's potential to emit); *see also* 6 WAQSR §4(a)("baseline actual emissions"); 6 WAQSR §4("projected actual emissions")(i)(B); 6 WAQSR §4(b)(xv)(D)(I)(4) (plantwide applicability limits). Treatment of fugitive emissions under Wyoming regulations is very similar to the federal requirements. *E.g.*, 40 C.F.R. §51.166(b)(1)(iii).

EPA's New Source Review Manual[2] directs that applicants must include fugitive emissions in their NAAQ and increment compliance demonstration.

> The applicant must also include any quantifiable fugitive emissions from the proposed source or any nearby sources ... Common quantifiable fugitive emissions sources of particulate matter include coal piles, road dust, quarry emissions, and aggregate stockpiles.

EPA, NSR Workshop Manual at C.47 (Oct. 1990), *available at* http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf.

A source's impact analysis must be based on "maximum," or "worst-case" emissions. The EAB recently remanded a PSD permit for failure to account for worst-case emissions in the

[2] The NSR manual represents the "touchstone on agency thinking" under the Clean Air Act. *See In re N. Michigan Univ.*, PSD Appeal 08-02 at 49 (Feb. 18, 2009) (collecting cases).

air quality modeling in *In re Northern Michigan University*, PSD Appeal 08-02 at 49 (Feb. 18, 2009) (citing NSR Manual).[3]

> For both NAAQS and PSD increment compliance demonstrations, the emissions rate for the proposed new source or modification must reflect the maximum allowable operating conditions as expressed by the federally enforceable emissions limit, operating level, and operating factor for each applicable pollutant and averaging time. The applicant should base the emissions rates on the results of the BACT analysis.

Id. Medicine Bow's impact analysis does not account for the worst-case emissions because it omits a significant source of pollutants, namely, fugitive emissions.

Clean Air Act permits are remanded for failure to consider fugitive emissions. *In Re Masonite Corporation*, for example, the court remanded a PSD permit that the EPA issued to a paneling and siding manufacturer, *inter alia*, because the agency had failed to count fugitive particulate matter emissions from wood-chip handling in determining the net emissions increase of a major facility modification. 5 E.A.D. 551, 1994 WL 615380 at *15-16 (E.A.B. 1994). "The P.S.D. requirements...apply to each regulated pollutant that a 'major' source emits in 'significant' amounts...The regulations do not distinguish between stack and fugitive emissions for this purpose." *Id.* at *15.

Medicine Bow contends that it excluded fugitive particulate matter emissions in reliance on a Memorandum of Agreement[4] with the EPA. While Sierra Club has not been able to obtain a copy of this agreement to review, any attempt to avoid compliance with Wyoming regulations and the Clean Air Act would render the agreement void as a matter of law. *See Tri-County Elec. Ass'n, Inc. v. City of Gillette*, 584 P.2d 995, 1004 (Wyo. 1978). EPA clearly did not believe any

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[3] *Available at* http://yosemite.epa.gov/oa/eab_web_docket.nsf/Case~Name/06DBEC31EBFD8C3E85257562005231 8B/$File/Denying%20and%20Remanding...79.pdf

[4] The Memorandum of Agreement was not included in any portion of the record DEQ has provided thus far. Sierra Club has been unable to obtain a copy by other means.

such agreement was operative when it directed that "Haul road PM10 emissions should be included in short-term P1M0 NAAQS/WAAQS and increment modeling." *Id.* at 9. Furthermore, any such agreement from 1994 is far outdated in light of significant advances in technology in the last 15 years. *E.g.*, EPA, Revisions to the Guidelines on Air Quality Models, 70 Fed. Reg. 68218, (Nov. 9, 2005), *available at* http://www.epa.gov/scram001/guidance/guide/appw_05.pdf (EPA's 2005 Revisions recommending use of AERMOD model).

Medicine Bow's demonstration of compliance with WAAQS and the increment is entirely insufficient as a matter of law given its omission of fugitive PM. The fugitive PM emissions it ignored are significantly larger than the point source emissions that Medicine Bow actually considered. Medicine Bow employed an 11.42 g/sec PM emission rate for its long-term analysis, but only 4.21 g/sec for its short-term analysis. Medicine Bow Revised App. at Table 6.1. The omitted fugitive emissions alone are 71% higher than the emissions from point sources that Medicine Bow modeled. Medicine Bow failed to consider emissions from haul roads that amount to 110 tpy, *Id.* at Table 6.5; 61.08 tpy of PM from coal storage and processing, *Id.* at Table 3.3; and 80 tpy of area emissions from mines. *Id.* at Table 6.4. Medicine Bow cannot make the legally required demonstration by ignoring over half of the facility's actual PM emissions.

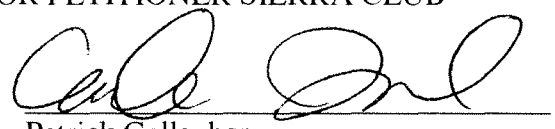
In order to construct a new major source of air pollution, applicants must demonstrate the proposed project would not contribute to significant air quality deterioration. *See* 6 WAQSR § 2(b). By neglecting to model impacts from its fugitive PM emissions, Medicine Bow did not comply with the legal requirements for a PSD permit application, and DEQ improperly issued a permit. The Sierra Club therefore requests judgment on this claim and remand of the permit with instructions to include fugitive PM emissions in the 24-hour impact analysis.

V. CONCLUSION

DEQ violated the law by approving Medicine Bow's permit that failed to account sulfur dioxide emissions from startup and malfunction events, and by neglecting to require modeling of 24-hour fugitive particulate emissions. Because the Company concedes it omitted these elements from its permit application, there is no disputed issue of fact, and the Sierra Club is entitled to judgment as a matter of law on these two claims.

Respectfully submitted this 3rd day of August, 2009

FOR PETITIONER SIERRA CLUB



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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing *Sierra Club's Motion for Partial Judgment on the Pleadings and Memorandum in Support of Motion* through electronic mail on this the 3rd day of August, 2009 to the following:

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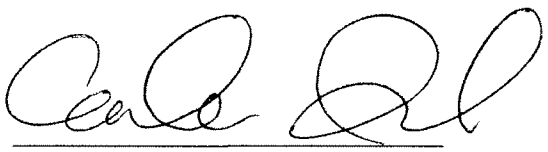

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