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BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF MEDICINE BOW FUEL & POWER'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Medicine Bow Fuel & Power, LLC (MBFP), by and through its undersigned attorneys, and hereby submits it Memorandum of Points and Authority in Support of its Motion for Summary Judgment:

I. INTRODUCTION

On March 4, 2009, the Wyoming Department of Environmental Quality, Air Quality Division (WDEQ) issued Air Permit CT-5873 (Permit) to Medicine Bow Fuel & Power, LLC (MBFP or Permittee), authorizing construction of a coal-to-liquids facility, including an industrial gasification and liquefaction plant and underground coal mine (Facility), in Carbon County, Wyoming. The Facility is a major source under Chapter 6, Section 4 of the Wyoming

Air Quality Standards and Regulations (WAQSR) and thus, subject to the requirements of the Prevention of Significant Deterioration (PSD) program. On May 5, 2009, the Sierra Club filed a Protest and Petition for Hearing (Petition), alleging eight claims of error in the permit issuance. The Environmental Quality Council (Council) dismissed Claim VIII, related to greenhouse gas emissions on November 2, 2009. The Sierra Club filed a Notice of Dismissal of Claims IV and VI on November 10, 2009. For the reasons set forth below, MBFP seeks summary judgment on the remaining claims.

II. NATURE OF APPEAL

The WDEQ issued the Permit to MBFP following public comment and hearing on the draft permit, and six months of review of the public comment. With its notice of the draft permit, the WDEQ included detailed permit analysis. A Decision Document, containing the agency's rationale for final permit issuance and its response to public comments accompanied the Permit. In response to the WDEQ's analysis and the other information in the WDEQ record, the Sierra Club filed its Petition.

Regardless of their national agenda, the Sierra Club must still prove with credible evidence that the WDEQ's decision to issue the Permit failed to comply with the Wyoming Environmental Quality Act (the Act) and the requirements of the WAQSR, in order to prevail. The WDEQ record, together with the depositions and Permittee's Expert Report, in addition to the affidavits that accompany this memorandum, demonstrate the Sierra Club will not be able to meet its burden on any of the remaining claims.

Claim I, containing two parts, alleges the WDEQ failed to properly calculate the Potential to Emit (PTE) for Sulfur Dioxide (SO_2) and as a result, the agency failed to find that the Facility is major for purposes of PSD analysis. In the second prong of Claim I, Sierra Club asserts the

agency did not require MBFP to use Best Available Control Technology (BACT). The Sierra Club is wrong on both accounts. However, even if the Council finds in favor of the Sierra Club on the question of the PTE calculation, the claim still fails, since pursuant to the requirements of Wyoming's minor source BACT requirements, SO_2 emissions from the Facility are regulated, as if the Facility were major for PSD purposes.

Sierra Club's Claims II and III are related and also appear to claim a subissue. In Claims II and III, the Petition asserts generally, the calculations for the fugitive emissions of volatile organic compounds (VOCs) are underestimated and more specifically, claims the emissions of methanol, a hazardous air pollutant (HAP), are also underestimated leading to an incorrect finding that the facility is a minor source of HAPs under Section 112 of the Clean Air Act and the WAQSR. In addition, the Sierra Club challenges the finding by the WDEQ that Leak Detection and Repair (LDAR) represent BACT for fugitive emissions of VOCs and HAPs from equipment leaks. The Permit application and supplemental information provided by MBFP more than supports the WDEQ's minor source determination for HAPs, as well as the calculation of VOC emissions. The Permit further requires verification of the minor source status prior to start up of the facility, providing a redundancy of protection. LDAR is the only viable option for controlling fugitive emissions from equipment leaks, as demonstrated by the evidence produced in this matter. Thus, Sierra Club's Claims II and III must also fail.

Claim V challenges the WDEQ's longstanding policy of requiring monitoring when operational and not requiring permit applicants to conduct modeling to determine compliance with the short-term (24-hr) National Ambient Air Quality Standard (NAAQS) for fugitive particulate matter. There is nothing in the record to support Sierra Club's assertion that this Council should disregard WDEQ's expertise and determination that available short-term models

are an inherently unreliable indicator of compliance with the short-term NAAQS for fugitive emissions. Thus, this claim, too, is ripe for summary judgment.

Finally, in Claim VII Sierra Club asks the Council to ignore the law and facts to conclude that the WDEQ's decision to rely on the Surrogacy Policy for $PM_{2.5}$, to use PM_{10} as a surrogate for $PM_{2.5}$ was improper. First, the surrogacy policy is included in Wyoming's State Implementation Plan (SIP) and as a result, is binding on the WDEQ. Second, WDEQ has regulated the precursors of $PM_{2.5}$ in the permit, PM_{10} is a reasonable surrogate for emissions from gas-fired turbines, and the emissions controls would be the same for $PM_{2.5}$ as they are for PM_{10}, justifying the use of the Surrogacy Policy. There is nothing in the record to counter this conclusion, thus entitling the Respondents to Summary Judgment on Claim VII.

III. SUMMARY OF UNDISPUTED FACTS

On March 4, 2009, MBFP received Permit CT-5873 (Permit) from the WDEQ to construct commercial scale gasification and liquefaction facility (Facility) and the surface facilities associated with an underground coal mine in Carbon County, Wyoming. Using an unutilized underground 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.

The underground mine (Saddleback Hills Mine) is expected to have a maximum production rate of 8,700 tons per day of coal or approximately 3.2 million tons per year of coal as feed to the Facility. The Mine will produce coal by using underground continuous and longwall miners (the latter of which consists of multiple coal shearers mounted on a series of self-advancing hydraulic ceiling supports). The coal will leave the Mine through the East Portal where it will be conveyed to a storage area before final conveyance to the Facility. See June 19,

2008 WDEQ Permit Application Analysis at 1, a copy of which is attached hereto as **Exhibit B** hereinafter the Permit Analysis.

The coal will then be prepared into slurry, which will be pumped under high pressure into the Facility's gasifiers. The Facility will use five gasifiers with each gasifier sized to handle one-fourth of the Facility's total capacity. During normal operations, four gasifiers will be in operation with the fifth in hot standby. The gasifiers will be fueled by coal-water slurry consisting of coal, calcium carbonate, and 98% oxygen. Permit Analysis at 3.

A raw syngas will leave the gasifiers and will be mixed with process condensate in order to prevent the build-up of solids and facilitate their removal in the syngas scrubber. From the syngas scrubber the syngas is sent to a low-temperature gas clean-up (LTGC) unit. There the syngas is cooled in a series of heat exchangers. The partially condensed syngas is then separated. Upon separation, the syngas is heated and split into two streams. The syngas will enter either a "shift reactor" which will convert carbon monoxide (CO) and H_20 to carbon dioxide (CO_2), H_2 and hydrolyze carbonyl-sulfide (COS), or a reactor where the COS will be hydrolyzed to hydrogen sulfide (H_2S) and CO_2. The syngas at that point will then be routed to carbon beds followed by a unit known as the SELEXOL® acid gas removal unit. Permit Analysis at 3.

Condensate from the low-temperature gas clean-up unit will flow to a stripper which will remove all of the ammonia (NH_3), H_2S, and COS from the condensate, along with some dissolved H_2 and CO. The gas is then blended with sour flash gas and gases from the flash separators before being sent to the SELEXOL® unit. Permit Analysis at 3.

The syngas will then enter an activated carbon bed for mercury removal. The syngas will then be mixed with recycled stripped gas where it will then flow to the SELEXOL® feed/product

exchanger to be cooled. The gas will flow through two successive absorbers, the first of which will remove H_2S and the second of which will remove CO_2. The treated syngas is then sent to a methanol synthesis unit. In the methanol synthesis unit the treated syngas will be compressed and preheated and then sent to a syngas purification vessel where any remaining impurities will be removed. The resulting clean gas will then enter methanol reactors. During normal operations, the methanol will be sent to the methanol-to-gasoline (MTG) unit to produce finished gasoline. Permit Analysis at 4.

The facility will also recover CO_2. The CO_2 gas stream will exit the SELEXOL® unit where it will flow into a CO_2 recovery unit. The CO_2 will then be compressed in one of three parallel four-stage centrifugal compressor trains where it will be dried in the drying unit installed upstream of the third-stage compressor suction. Some of the CO_2 will be refrigerated to provide liquid coolant to the methanol synthesis and SELEXOL® units, and the remaining CO_2 will be compressed and sent to a pipeline customer. Permit Analysis at 4.

The facility will also recover sulfur by having the acid gas (mostly H_2S) from the SELEXOL® unit enter a sulfur recovery unit (SRU) where the gas will be treated and sent to reactors to produce elemental sulfur. The gases leaving the reactor will then be cooled to condense the elemental sulfur, which will flow to a below-ground concrete pit. Gases containing unconverted sulfur compounds will pass through a reactor that will reduce them to H_2S. The gas will then be recycled to the SELEXOL® unit or to a flare during an upset condition at the plant. Permit Analysis at 5.

To generate power, the facility will use a power block consisting of three GE 7EA gas turbines fueled by a mixture of fuel gas, LPG, syngas, and natural gas which will produce approximately 185 megawatts (MW). A heat recovery system on the gas turbine exhaust will

superheat medium, low and high pressure steam. The superheated steam will flow to a single, three-stage steam turbine, producing approximately 215 MW of additional power, for a total of 400 MW. During startup, power will be supplied by three 1.6 mw Blackstart generators. These generators will fire natural gas and will be operated until the power block can supply sufficient power for the plant. Permit Analysis at 5.

The facility will compress atmospheric air to approximately 100 pounds per square inch absolute (psia) using electric-driven compressors. The air will then be fed to an air separation unit where oxygen will be separated cryogenically. Following separation, the oxygen will be pumped to high pressure as a liquid and vaporized against a stream of condensing high pressure air. Most of the oxygen will be fed to the gasifiers with a small portion routed to the Sulfur Recovery Unit. Permit Analysis at 5.

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. The Permit Application is identified as DEQ Exhibit 15. On December 31, 2007, MBFP submitted a revised application to reflect the change in process technology from production of diesel to production of gasoline. See DEQ Exhibit 15. The permit application was reviewed by the WDEQ which issued an analysis and draft permit on June 19, 2008. See Exhibit B.

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 all the comments including those 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.

IV. STATUTORY AND REGULATORY FRAMEWORK UNDER THE CLEAN AIR ACT AND THE WYOMING ENVIRONMENTAL QUALITY ACT

Section 801 of the Act imposes on the Director of the WDEQ a duty to issue permits following proof the applicant has met the requirements of the Act and the relevant regulations. Wyo. Stat. 35-11-801(a). Under Section of 201 of the Act, no person can allow the discharge of any contaminants into the air without first complying with the requirements of the WAQSR or in this case, obtaining a permit to construct. Wyo. Stat. 35-11-201. The construction permit requirements are found in Chapter 6 of the WAQSR, which is part of Wyoming's approved State Implementation Plan (SIP) under the Clean Air Act (CAA). Through its State Implementation Plan, the WDEQ is the agency charged with developing and enforcing the requirements the CAA in Wyoming. The pre-construction permitting program is the key element in protecting air quality in Wyoming.

The CAA Amendments of 1977 established the PSD program, designed to protect areas of the country where air quality was cleaner than the requirements of the NAAQS from significant deterioration while still allowing economic development and use of the air resource.

Wyoming's PSD program was first incorporated into Wyoming's SIP in 1979; 40 CFR § 2.2630. As such, the WDEQ has been evaluating, enforcing and issuing PSD permits since the program's inception. The specific requirements of the PSD program are contained in Chapter 6, Section 4 of the WAQSR, and work in conjunction with the general requirements of Wyoming's over all pre-construction requirements of its New Source Review program, found in Chapter 6, Section 2 of the WAQSR. In other words, PSD permits are issued pursuant to the requirements of both sections of Chapter 6. Wyoming's New Source Review regulations were first approved by the EPA in 1972. 40 CFR § 2.2620.

Under Wyoming's applicable regulations, MBFP's Facility is considered a "major stationary source" since it has the potential to emit at least 100 tpy of a criteria pollutant[1] and is a listed facility. In addition to determining the Facility, as a whole is "major," the regulations require the WDEQ to further consider whether the Facility is major for individual criteria pollutants, based on whether a Facility's potential to emit (PTE) of an individual pollutant meets the significance thresholds in the regulations. The significance threshold for SO_2 is 40 tpy. WAQSR Ch. 6, § 4(a).

Under the WAQSR, whether a facility is subject to PSD or not, for criteria pollutants the permit applicant must demonstrate it will use Best Available Control Technology (BACT), to limit the emissions of pollutants. WAQSR Ch. 6, Sec. 2; WAQSR Ch. 6, Sec. 4. Both Section 2 and Section 4 require an applicant to use Best Available Control Technology taking into account the technical practicability and economic reasonableness of reducing or eliminating emissions.

[1] Sections 108 and 109 of the CAA , 42 U.S.C. § 7408 , require EPA to establish national ambient air quality standards for criteria air pollutants. The criteria pollutants include ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide and lead. Section 110 of the CAA, 42 U.S.C. § 7410, requires states to develop State Implementation Plans (SIPs) for the purpose of meeting and maintaining the NAAQS.

Thus, BACT determinations are reached through a process that is intended to be technology forcing.

A Facility may also be a major or minor source for HAPs under the Act, the WAQSR and Section 112 of the CAA. A source is major for HAPs if it has "the potential to emit ten (10) tons per year of any single hazardous air pollutant or twenty-five (25) tons per year of any combination of hazardous air pollutants," as defined in the CAA. Wyo. Stat. 35-11-203(a)(i)(B). A source that is major for HAPs may be required to apply maximum achievable control technology (MACT), depending on the source category.

The Director of the WDEQ may not propose to issue a PSD permit unless the applicant can demonstrate compliance with the WAAQS and the allowable PSD increments, as wells complying with Chapter 6, Section 2 requirements and the obligation to use BACT. WAQSR, Ch. 6, Sec 4(b). Once the Director determines the standards have been met, the draft permit goes to public notice for 30 days of public comment and the opportunity for a hearing. WAQSR Ch. 6, Sec. 2(m).

Following public comment and a public hearing, the WDEQ compiled public comments, requested additional information from MBFP and produced a decision document responding to public comments. In response to comments and supplemental information, the WDEQ made some revisions and additions to the Permit, prior to issuance on March 4, 2009.

The Environmental Quality Council is charged with hearing the appeal of any challenge to the issuance of a permit. Wyo. Stat. 35-11-112. The WDEQ, however, is the agency charged under the CAA and the Act for administering air quality requirements in Wyoming and its interpretations of its regulations are entitled to deference. *Printher v. Department of Administration and Information*, 866 P.2d 1300, 1302 (Wyo. 1994). Under the DEQ Rules of

Practice and Procedure, the hearing is a contested case proceeding requiring each party to produce evidence to support its position consistent with the contested case requirements of the Wyoming Administrative Procedure Act.

The Sierra Club, through the EQC, is not entitled to reopen the permitting process to ask this body to substitute its judgment for the expertise of the WDEQ, nor is it entitled to demand that MBFP prove again that it has met the requirements of the Act for its Permit. Under Section 801 of the Act, MBFP has already demonstrated to the satisfaction of the Director of the WDEQ that is entitled to a permit and has received a permit.

Sierra Club has filed this appeal and it bears the burden of demonstrating that the WDEQ decision to issue the Permit is contrary to the Act and the WAQSR. Sierra Club must prove the WDEQ's decision to issue the Permit does not meet the requirements of the WAQSR, generally, and the PSD permitting requirements, more specifically. In essence, Sierra Club is asking the Council to revoke an issued permit. Under the Wyoming APA, the person or entity seeking revocation of a permit or license bears the burden of establishing grounds for this drastic result. Wyo. Stat. 16-3-113. The same rationale applies here, as the actions of an agency are "presumed to be correct," with the burden falling on the challenger or the appellant to demonstrate non-compliance with the law. *Ahlenius v. Wyoming Bd. Of Professional Geologists,* 2 P.3d 1058, 1061 (Wyo. 2000). The Sierra Club thus has the burden of coming forward with initial evidence to challenge the validity of the Permit, and the ultimate burden of persuasion that the Permit issuance was in violation of the relevant air quality standards. If the Sierra Club fails to meet its burden of coming forward with evidence on any claim, the Council need not proceed to a full hearing. As presented below, it is Permittee's contention that the Sierra Club cannot meet this burden and summary judgment is appropriate on all remaining Claims.

The air quality appeal process is not simply another opportunity for a third party to comment on a now, final permit. Sierra Club participated in the public comment process and cannot use this appeal to raise allegations that should have been brought forward at the draft permit stage. Nor, can the Sierra Club use this process to simply reiterate their public comments or comments by others and ask this Council to revisit issues resolved by the WDEQ by its responses to the public comments. It is not sufficient for the Sierra Club to rely on WDEQ's alleged failure to agree with its public comments or those of other entities.

V. STANDARD FOR SUMMARY JUDGMENT

Chapter II, Section 14 of the DEQ Rules of Practice & Procedure (DEQ RPP) makes the Wyoming Rules of Civil Procedure applicable to matters before the EQC. (DEQ RPP Ch. 2, § 14). The Wyoming Rules of Civil Procedure provide that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wyo. R. Civ. P. 56(c). Summary judgment procedures set out in Wyo. R. Civ. P. 56 apply to administrative cases. *Rollins* v. *Wyoming Tribune Eagle,* 2007 WY 28, ¶ 6; 152 P.3d 367, ¶ 6 (Wyo. 2007). The purpose of summary judgment is to dispose of cases before trial that present no genuine issues of material fact. *Id.* A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense. *Id.* Where there are no genuine issues of material fact, summary judgment concerns strict application of the law. *Bd. of County Comm'rs of County of Laramie v. City of Cheyenne,* 2004 WY 16, ¶ 8; 85 P.3d 999, ¶ 8 (Wyo. 2004). The movant for summary judgment bears the "initial burden of establishing a *prima facie* case by admissible evidence. If that is done, the burden then shifts to the opposing party to

present specific facts showing that there remain genuine issues of material fact." *Cornelius v. Powder River Energy,* 2007 WY 30, ¶ 10, 152 P.3d 387, 390 (Wyo. 2007). When reviewing a summary judgment, the court considers the record in a perspective most favorable to the party opposing the motion and gives that party the benefit of all favorable inferences which may be fairly drawn from the record. *Loredo v. Solvay America*, 2009 WY 43 (Wyo. 2009).

VI. ARGUMENT

1. WDEQ Properly Calculated the Potential To Emit for Sulfur Dioxide (SO_2) and Required Best Available Control Technology (BACT) for the Facility's Sources of SO_2

WDEQ's calculation of the Facility's Potential to Emit (PTE) for SO_2 included the emissions from all routine and foreseeable activities from the operations of the Facility, including planned maintenance activities, finding that the Facility's PTE for SO_2 is 36.6 tons per year(tpy). Thus, the WDEQ found that the Facility is not a major source for SO_2, as defined in the PSD regulations, which establishes a threshold of 40 tpy to trigger PSD review (cite WAQSR).

2. WDEQ's PTE Calculation for SO_2 is Correct

Sierra Club claims that the WDEQ erred in its calculation of PTE by failing to include all SO_2 emissions from the flares and that if those emissions are included, the Facility is major for SO_2. Sierra Club further asserts in Claim I, that WDEQ and MBFP were required to conduct a top down BACT determination in accordance with Chapter 6, Section 4 of the WAQSR. WDEQ states in its Decision Document that although it did not find that the Facility is a major source of SO_2 for purposes of the PSD program, the Startup, Shutdown, Minimization plan represents BACT for purposes of controlling the emissions from the flares. Decision Document at III and IV.6. A copy of the Decision Document is attached hereto as **Exhibit D**.

The primary purpose of the flares is to serve as emission control devices that safely combust syngas that would otherwise vent to the atmosphere when the processing facilities cannot accommodate the syngas, primarily during periods of startup or malfunction. The flare is a control device for both Volatile Organic Compounds (VOCs) and Hydrogen Sulfide (H_2S). See deposition of Andrew Keyfauver at 16. A copy of the relevant pages of Mr. Keyfauver's deposition is attached hereto as **Exhibit E.** The WDEQ's permit analysis describes the use of the flares for plant safety. The permit contains conditions mandating the proper operations of the flare, in order to insure the flare functions properly as a control device. See Permit Conditions 22 through 25. A copy of the Permit is attached hereto as **Exhibit F.** See also the September 15, 2009 Report of Katrina Winborn attached hereto as Exhibit 1 to her Affidavit. Ms. Winborn's Affidavit is attached hereto as **Exhibit G.**

The Facility's estimated SO_2 emissions are described in the application for periods of routine or normal operations, with the combustion turbines being the primary source of SO_2. The application also estimates emissions from malfunctions that may occur at the facility and from cold start ups of the facility. A cold start for the MBFP facility will occur with the initial commissioning of the facility and may occur every three to four years when major maintenance requires a full plant shutdown. See the November 11, 2008 letter attached hereto as **Exhibit H.**

A cold start occurs when equipment is at ambient temperature and each piece of equipment is brought up to operating temperatures. The application estimates a total of cold start up emissions and normal emissions of approximately 256.69 tpy of SO_2 in the initial cold start year due to the flow of syngas to the flares. See Application at 3-6; DEQ 000078-000051. A copy of the Application is identified as DEQ Exhibit 15. However, it is anticipated that any cold starts following the initial year will result in reduced emissions.

The WDEQ evaluated the application prior to issuing the draft permit for public comment and determined that the Potential to Emit (PTE) for SO_2 was 32.9 tpy for normal operations of the facility. The DEQ permit analysis discusses cold start emissions, although they are excluded from the PTE as not representative of the normal operating conditions of the facility.

Following the public comment period, the WDEQ, on September 5, 2008, requested additional information from MBFP regarding its emission estimates for SO_2 and asked MBFP to consider whether the PTE presented in the draft permit included emissions that could result from normal start up events. In response, MBFP provided information on October 14, 2008 and a clarification on November 11, 2008. See letter from DKRW dated October 14, 2008, a copy of which is attached hereto as **Exhibit I.** MBFP determined that planned maintenance activities on the gasifiers would result in additional normal start up emissions not included in the applications' estimation of routine emissions, but included in the application's estimate of malfunction. See Affidavit of James Knox, a copy of which is attached hereto as **Exhibit J.** The result of this analysis was the addition of 3.64 tpy of SO_2 to the PTE, bringing the total to 36.6 tpy, still below the PSD threshold of 40 tpy.

In its Decision Document providing the response to comments in support of the issuance of the Permit, WDEQ explained that "[i]t has been the Division's consistent practice to make applicability determinations based on consideration of a facility's routine operations." Decision Document at III.1, DEQ 001434. Relying on its longstanding practice and its analysis of the supplemental information provided by MBFP, the WDEQ determined that neither the cold start emissions, nor the malfunction emissions were part of the facility's "routine" emissions.

The underlying premise of Sierra Club's Claim I is that all of the cold start and malfunction emissions should have been included in the PTE for SO_2. Yet, they have no expert

testimony that counters the decision of WDEQ with concrete examples or EPA guidance that supports their position.

Potential to Emit is defined in the WAQSR as:

> ***"Potential to emit"*** means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the affect it would have on emissions is enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

WAQSR Ch. 6, § 4(a).

As a matter of law, the WDEQ's interpretation of this provision is entitled to deference. *Printher v. Department of Administration and Information*, 866 P.2d at 1302 (court gives deference to an administrative agency's construction of its rules unless clearly erroneous).

Taking into account all of the documents in the administrative record, the expert reports and the affidavits accompanying this motion, the Sierra Club cannot meet its burden of showing a defect in the permit. The WDEQ has stated that it does not view the cold startup emissions or the malfunction emissions to be the routine emissions that occur on a regular basis that must be included in PTE. The record is clear that the WDEQ scrutinized the PTE calculations of MBFP in order to insure that normal startup emissions from routine, planned maintenance were included. There are no facts in dispute that prevent a finding in favor of the respondents on this issue.

3. The SSEM Plan Represents BACT for Startup/Shutdown Emissions Associated with Flares

The Sierra Club's obsession with whether the WDEQ correctly determined the PTE for SO_2 is merely an academic concern, given the controls for SO_2 emissions required in the Permit. Whether the Facility is deemed "major" for SO_2 for purposes of PSD is irrelevant given that the

WDEQ has imposed BACT for the Facility's sources of SO_2. Under the WAQSR, Chapter 6, Section 2, minor sources of emissions must undergo a BACT review. Accordingly, the Application and WDEQ analysis identify control technologies for the primary source of normal SO_2 emissions—the combustion turbines. Permit Application Analysis at 23-27; DEQ 000528. See also Application at § 4.3.2, DEQ Exhibit 15. In addition, consistent with the definition of BACT found in Chapter 6, Section 4 of the WAQSR, the permit imposes a work practice standard on the emissions from the flares through the Startup, Shutdown Minimization Plan, included as an enforceable requirement of the permit.

The Sierra Club does not take issue with the BACT determination for the combustion turbines. Rather, without any evidence to support the position and despite the obvious impractibility, the Sierra Club asserts that the WDEQ was required to establish a numerical emission limit for the flares at the Facility. This demand is contrary to the regulatory requirements found in the BACT determination.

Under Chapter 6, Section 4, a work practice standard is appropriate in lieu of an emissions standard under the following circumstances:

> If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, he may instead prescribe a design, equipment, work practice or operational standard or combination thereof to satisfy the requirement of Best Available Control Technology.

WAQSR Ch.6, § 4(a).

In short the regulation recognizes that a numerical limit without a reliable process for measuring compliance is a meaningless exercise. See Winborn Report at 10-11.

The WDEQ applied this principle and the record in this case demonstrates a work practice standard is the only rational choice for the emergency flares for the MBFP Facility. The

decision document summarizes the rationale for the WDEQ's determination that the Startup, Shutdown, Minimization plan represents BACT. In response to a public comment requesting an emission limit for the flares, the WDEQ stated:

> The Division did not establish emission limits for the flares as emission limits would not be practically enforceable as these units cannot be tested using traditional EPA reference methods to determine compliance with emission limits. However, the Division considered the SSM plan to represent BACT for the flares during startup/shutdown operations. DKRW has also indicated that the SSM plan for the facility will continuously be evaluated for improvements to minimize emissions. It should be noted that any revisions to the SSM plan by DKRW are subject to approval by the Division.

Decision Document at IV.35, DEQ 001448.

The Permit also contains additional operational requirements as permit conditions, designed to insure that the flares are operated efficiently to convert H_2S and COS to SO_2, as well as destruct other pollutants. Also in Section IV.35, the WDEQ explained some of the additional control requirements for the flares:

> The Division agrees that the flares need to be monitored to ensure compliance, and has included conditions in the permit requiring monitoring and recordkeeping for the presence of a pilot flame, along with provisions requiring the flares to smokeless as defined in Chapter 5, Section 2(m) of the WAQSR.

The WDEQ further explained that "The Division will require monitoring of the SO_2 emissions as part of the permit. DKRW has indicated that this can be accomplished by installing flow monitoring equipment and by direct sampling of the flows to the flares and of sampling of the coal which can then be used to calculate SO_2 emissions during flaring." DEQ Decision Document at IV.6, DEQ 001440. The various requirements for insuring the proper operation of the flares are found in Conditions 22-25 of the Permit. These basic operational requirements are in addition to SSM plan, attached as an appendix to the permit and required by Condition 31 of the Permit. See the Permit, Exhibit F.

4. Summary Regarding Claim I

The EQC has more than one basis for granting the Respondents summary judgment on Claim I. First, the claim fails as a matter of law on the assertion that WDEQ properly calculated the PTE for SO_2. Sierra Club may disagree with the decision, but their disagreements, speculation and questions are not sufficient to survive summary judgment when it is their burden to prove WDEQ error. Even if the EQC has lingering concerns about the PTE calculation, these need not prevent the EQC from finding in favor of the Respondents. Since WDEQ has met its obligations to require BACT for SO_2 emissions from the flares, as well as other sources of emission, regardless of whether the facility is deemed a major or minor source of SO_2, the Permit requires BACT and as a result, Claim I fails.

5. Permit Emissions Calculations in Accordance with Clean Air Act Requirements and Subject to BACT under Permit

In Claims II and III, Sierra Club asserts that the WDEQ and MBFP miscalculated the emissions of volatile organic compounds (VOCs) from emission leaks, erroneously concluded the Facility is a minor source of Hazardous Air Pollutants (HAPs) and failed to require MACT for the emissions.[2] There is ample support in the record MBFP supplied the necessary information in its application and WDEQ implemented the appropriate terms in the Permit to regulate the HAPs from the facility. Because the Sierra Club has no testimony or other support in the record for its position, respondents are entitled to summary judgment on the entirety of Claim II of the Petition.

[2] The challenges to the emissions calculations in Claims II and III are based on the same theory and thus, are considered together here.

6. The Record Supports the Emissions Calculations For HAPs and Volatile Organic Compounds

The primary source of volatile organic compounds (VOCs) and hazardous air pollutants (HAPs), as well as hydrogen sulfide, from the Facility will be leaking process equipment, located downstream from the coal preparation and gasification portions of the facility. (App. Section 4.7). The number of components at issue, comprised of pumps, valves, flanges and similar equipment, is approximately 4000. See Appendix B to Application, B42, DEQ Exhibit 15. At this stage of the design of the Facility, it is impossible to know an exact count, much less to have selected a vendor for these types of equipment for the facility. See Affidavit of James Knox.

The emission estimates for VOCs and HAPS resulting from equipment leaks have been refined from initial submission of the application until final permit issuance. It is necessary to understand the sequence of events to comprehend fully the attention given to the emission estimates by both the applicant and the WDEQ.

The emission estimates in the application are stated for both controlled and uncontrolled emissions from equipment leaks. The controlled emission estimates assume the implementation of a Leak Detection and Repair (LDAR) program. The original application assumed a leak detection level of 10,000 ppm from piping, meaning leaks would not be repaired until detected at this level. Basing estimates on a higher leak detection level, resulted in a higher estimate of emissions. As discussed in more detail below, the WDEQ questioned this leak detection level and required MBFP to base its estimates and control option on a leak detection level of 500 ppm for valves and connectors and 2000 ppm for pumps in VOC service. As a result of this reduction in leak detection levels, the estimate of HAPs emissions was also reduced.

The application contains a detailed discussion of the estimates of the HAP emissions, as revised on May 12, 2008, following the reduction of the leak detection levels. The application

explains that equipment leak estimates were calculated in accordance with EPA's "Protocol for Equipment Leak Emission Estimates" (EPA-453/R-95-017). Reliance on emission factors is appropriate and an accepted EPA permitting protocol for estimating emissions resulting from equipment leaks. See September 15, 2009 Report of Katrina Winborn at p.13, no. 6 attached as Exhibit 1 to her Affidavit, Exhibit G.

As a first step, the applicant needs to provide a component count, based on design information available at the permitting stage of a facility. MBFP provided this information in Appendix B of the application. See Affidavit of James Knox, Exhibit J. See also Deposition of Andrew Keyfauver at 72-74, Exhibit E. When using average emission factors, it is necessary to select the right type of emission factors for the facility in question and the process stream. Section 3.2.6.3 describes the selection of the emission factors. The choice was essentially between refinery emission factors and the factors for the Synthetic Organic Chemical Manufacturing Industry (SOCMI), with SOCMI the final selection. MBFP is not a refinery. MBFP, therefore, reasoned in the Application that since the facility uses a chemical synthesis process rather than a refinery process and since SOCMI is recommended for all industries, except refineries, the choice was justified. This decision at the application stage was confirmed by WDEQ's decision, as reflected in Permit Condition No. 38, requiring the Facility to comply with NSPS for SOCMI, 40 C.F.R. Part 60, VVa.

Appendix B of the Application contains detailed calculations based on the process streams of the plant and the number of each of the components, conservatively assuming that all process streams contain material full time for the year or 8,760 hr/yr. As explained in more detail by Katrina Winborn, all of the available information to understand the basis for the calculations and to verify them is set forth in Appendix B of the Application. Each calculation

page identifies the process stream type, the composition of the process stream, the number of components for each stream type and the emission factor used with footnotes to the EPA reference. The WDEQ found this level of detail sufficient for its review purposes and consistent with their experience. See Deposition of Andrew Keyfauver at 62.

When the draft permit was issued, the total HAPs emissions estimate was 24.8 tons per year, below the major source threshold for total HAPs under 40 U.S.C. 112 and the WAQSR, but the individual emissions of methanol were 10.2 tpy, making the facility a major source under the same provision. Following the public comment period, WDEQ requested additional information from MBFP regarding the applicability of Section 112 of the CAA to which MBFP responded on September 30, 2008 with new calculations for methanol emissions, based on updated engineering design information from Davy Process Technology, the vendor for the methanol synthesis process. See September 30, 2008, letter from DKRW, a copy of which is attached hereto as **Exhibit K.** The August package from Davy showed six traditional sampling lines, replacing them with 6 closed-loop sampling lines. With this design change, less methanol would be vented to the atmosphere since in a traditional sampling process, the sampling line is purged to atmosphere prior to taking the sample, while in a closed-loop system, the sample is taken without venting to the atmosphere. As a result of this change and the elimination of two other traditional sampling lines, the component count for sampling connections for methanol found on page B-42 of the application, was reduced from 28 to 20. See September 30 letter from Jude Rolfes to Chad Schlichtemeier, Exhibit K. See also Affidavit of James Knox, Exhibit J. As a result of this change, the methanol emissions were reduced from 10.3 tpy to 9.2 tpy. WDEQ reviewed the information and incorporated the change into the decision document. See Decision Document at II.14.

MBFP is bound under the permit to construct the facility to maintain its status as a minor source of HAPs and to demonstrate this status ***prior*** to start up, facing a likely permit revision if the facility is found to be major. (Permit Condition No. 19). In addition, MBFP is bound under Condition 2 of the permit to all the substantive commitments made in the application, including its commitments regarding fugitive emission leaks. As noted by Ms. Winborn, and WDEQ's engineer, Mr. Keyfauver, the compliance burden for maintaining the minor source status is enforceable and rest with MBFP. See Winborn Report at 14 and Depo. of Andrew Keyfauver at 69. The company has every incentive to insure that its facility once in final design and constructed will not have HAP emissions that exceed major source thresholds.

In the face of the evidence in the application, the decision document, the expert report of Ms. Winborn and the deposition of Andrew Keyfauver all providing detailed support to bolster the WDEQ's minor source determination, the Sierra Club has a substantial burden to meet to establish that the WDEQ permit decision was in error. Based on the evidence in the record, they cannot meet this burden. There is also redundancy in the permit to insure the facility, once constructed, remains a minor source of HAPs. There is no validity to the Sierra Club's assertion the facility is a major source of emissions of hazardous air pollutants.

7. LDAR is BACT for Equipment Leaks

The definition of BACT is found in WAQSR, Ch. 6, Sec. 4(a) and states, in part:

> [A]n emission limitation (including a visible emission standard) based on the maximum degree of reduction of each pollutant subject to regulation under these Standards and Regulations or regulation under the Federal Clean Air Act, which would be emitted from or which results for any proposed major stationary source or major modification 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, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

WAQSR, Ch. 6, Sec. 4(a)

The application summarizes the "top-down" BACT review process, required by EPA, as follows:

> The "top-down" process involves the identification of all potentially applicable emission control technologies according to control effectiveness. Evaluation begins with the top or most stringent emission control alternative. If the most stringent control technology is shown to be technically or economically infeasible, or if environmental when conducting a top-down BACT analysis, required by EPA guidance, the first step is to "Identify all available control technologies with practical potential for application to the specific emission unit for the regulated pollutant under evaluation."

Application, Sec. 4.1 (citing EPA guidance).

The EPA developed a five-step process for identifying BACT in its "New Source Review Workshop Manual," Draft October 1990, EPA Office of Air Quality Planning and Standards. The first step in the process is:

> Identify all available control technologies with ***practical potential*** for application to the specific emissions unit for the regulated pollutant under evaluation.

Application, Sec. 4.1

As explained in the application, the BACT analysis for equipment leaks did not need to proceed past this first step since "the only available control technology for comprehensively addressing equipment leak fugitive emissions is a structured Leak Detection and Repair (LDAR) program in which certain piping components and equipment are routinely inspected for leaks, and components found to be leaking in excess of stated thresholds are repaired in a timely manner." Application at Sec. 4.7; Winborn Report at 19-20. For the equipment leaks BACT analysis, the top-down process was truncated by the availability of only one viable control for equipment leaks. Winborn Report at 19-20. The selection of LDAR as the only viable control option is further supported by review of the EPA Reasonably Available Control Technology

(RACT)/BACT/Lowest Achievable Emission Rate Clearinghouse database which demonstrated that "LDAR programs are established as BACT in many recent RBLC determinations." Application at Sec. 4.7; Winborn Report at 19-20; Keyfauver Deposition at 72-74.

WDEQ, although it concurred in the selection of LDAR as BACT, it nonetheless scrutinized the details of the implementation of the LDAR program at the facility. First, as discussed above, WDEQ required MBFP to reduce the leak detection levels from 10,000 ppm to 500 ppm for valves and 2000 ppm for pumps to improve the effectiveness of the control technology. Then, in response to public comment, the WDEQ asked MBFP to consider even lower leak detection limits for its LDAR program. MBFP considered lower levels and concluded that they would not lead to lower emissions, based on EPA's consideration of lower leak standards and its conclusion that "'data gathered from facilities making a first attempt at repair on valves with leaks above 100 or 200 ppm suggests that these attempts do not always reduce emissions.'" September 30, 2008 MBFP letter to WDEQ (quoting EPA Docket ID No. EPA-HQ-OAR-2006-0699-0094); Winborn Report at 22.

Ultimately, WDEQ agreed and did not further reduce the leak detection levels. Decision Document at IV.4. In its attempts to find fault with WDEQ's analysis, Sierra Club contends the agency and the applicant erred by failing to consider leakless valves as a control option. However, leakless valves were never identified as a technically feasible option for the facility's 4000 components and the Sierra Club has no evidence to the contrary. As explained in detail in Ms. Winborn's report, EPA considered leakless technology in developing the requirements for equipment leaks, "'[w] e could not identify any new ''leakless'' technologies that could be applied in all applications. Therefore, requiring ''leakless'' equipment is not technically feasible. ...'" Winborn Report at 20-21 (quoting 72 Fed. Reg. 64864). WDEQ also agreed that there is

not another technically-feasible option for controlling emission leaks. Keyfauver Deposition at 72; lines 18-20.

The application, the WDEQ Decision document, the expert report of Ms. Winborn and the deposition of Mr. Keyfauver all support the WDEQ's decision finding that LDAR is BACT to control fugitive emission leaks. This record is sufficient to support summary judgment for the respondents.

8. The Modeling of Fugitive Emissions of Particulate Matter was Proper

Claim V erroneously alleges WDEQ failed to require modeling of fugitive emissions of particulate matter. On its face, this assertion is false. The WDEQ permit analysis contains a detailed discussion of the modeling for particulate matter, including fugitives. (DEQ Permit Analysis at 37, Winborn Designation). Consistent with other permitting decisions, the WDEQ did not require inclusion of fugitive emissions in the modeling to demonstrate compliance with the short-term or 24-hr standard for particulate matter. Fugitive emissions were included in the modeling to demonstrate compliance with the long-term standard for particulate matter.

WDEQ explained its position in its Decision Document:

> 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 PM_{10} fugitive emissions in other parts of the state.

Decision Document at III.14

The Agency's position is based, in addition, on what is commonly referred to as the Simpson Amendment, § 234 of the Clean Air Act Amendments of 1990. (PL 101-549). The Amendment allows states to use other tools for assessing the impacts of fugitive emissions of

particulate from coal mines, pending the development of a more accurate model for short-term emissions modeling.

The Sierra Club has no expert testimony to support this claim. Their expert admitted during his deposition that he is not a modeler and has not done any modeling for several years. In fact, the last time he conducted any modeling, he used the ISCST model, which is not the model used currently by the agency or at issue in this permitting action. See Deposition of Ranajit Sahu at 100-101. A copy of the relevant ages of Mr. Sahu's deposition is attached hereto as **Exhibit L.** The Sierra Club's discovery responses to both WDEQ and MBFP, indicate that their only support for this claim would be Mr. Sahu's testimony. Mr. Sahu's opinions do not and cannot support this claim. Without any evidence to support their claim, the Sierra Club cannot prevail and respondents are entitled to summary judgment on this issue. Modeling was conducted by the permit consultant and WDEQ during its evaluation of the application, both well qualified modelers.

9. WDEQ's Reliance on the PM_{10} Surrogacy Policy was Required and Appropriate

The WDEQ did not require MBFP to evaluate separately $PM_{2.5}$ emissions and instead used PM_{10} as a surrogate for determining compliance and establishing emission controls. WDEQ's reliance on the surrogacy policy has been the agency practice since 1997 and its use is required as part of its State Implementation Plan. 73 Fed. Reg. 26019 (May 8, 2008). The state of $PM_{2.5}$ rulemaking and the ongoing use of the surrogacy policy are in flux at the federal level, as outlined in the briefs filed in support and in opposition to the Motion for Dismissal of Claim VII. Whatever the state of EPA rulemaking or guidance development, it is clear under EPA directives in place at the time this permit application was under review, there was no question the surrogacy policy was still appropriate in SIP states, such as Wyoming. 73 Fed. Reg. 26019 (May

8, 2008). The Council, in its Dismissal Order, relying on Trimble, issued by EPA on August 12, 2009, nonetheless concluded the use of PM_{10} as a surrogate must still be reasonable. Trimble suggested, but did not mandate, two factors to consider: 1) whether there is a statistical relationship between PM_{10} and $PM_{2.5}$ from the unit in questions and 2) whether the emission controls selected for PM_{10} will be as effective as those that would be selected for $PM_{2.5}$. The Trimble case stressed the determination is case specific and depends on the facts of the permit facts at issue.

Using PM_{10} as a surrogate for this Facility was reasonable in light of the fact that most of the particulate generated will be from gas-fired turbines and fugitive emissions from haul roads. The particulate from the gas-fired turbines is more likely than not comprised of smaller particulate matter and thus, as concluded by Ms. Winborn, "calculated PM emissions from turbines can be used to estimate PM_{10} and $PM_{2.5}$." Winborn Report at 31. The fugitive emissions from coal handling, including haul road emissions and the like, present a different situation, but also justify the use of the surrogacy policy. In the situation of the fugitive particulate emissions, it is more likely that the majority of particulate is larger in size and that $PM_{2.5}$ comprises a much smaller component of these emissions. Thus, in this situation, PM_{10} emissions as a surrogate are likely to over-estimate the $PM_{2.5}$ emissions or more than account for them. (Winborn Report at 31-32)

The primary factor in assessing the reasonableness of using a surrogate should be the degree to which the emission controls for PM_{10} would also control $PM_{2.5}$. In the case of the gas-fired turbines, due to the size of the particulate matter, the emission controls selected are the only available option, whether the emissions are characterized as PM_{10} or $PM_{2.5}$. In Ms. Winborn's opinion, in some cases, "the emission controls to be employed for PM_{10} and $PM_{2.5}$ can be, or

must be, the same technology. That is the case for the proposed MBFP facility, and this fact supports the use of the Surrogate Policy for $PM_{2.5}$." Winborn Report at 32. The selected control for the turbines is good combustion practices in combination with use of fuels that have a low particulate potential. This selected control technology would be no different if the emissions had been analyzed as $PM_{2.5}$ rather than the larger-sized particle. Both baghouses and electrostatic precipitation were considered for control and found to be infeasible, "as it was found that neither technology could provide a lower particulate emission rate than the baseline emission rate." Due to the small size of the particle, these controls could provide no additional reductions and as a result, the control technologies selected was the only possible alternative. Winborn Report at 33. See also WDEQ Decision Document at DEQ 001436.

Similarly, the control options remain the same for reducing fugitive emissions from coal-handling activities whether the analysis is for PM_{10} or $PM_{2.5}$:

> However, the same set of emission control techniques are applied for fugitive particulate emissions regardless of the size of the particulate matter, and irrespective of varying proportions due to meteorological conditions. EPA's AP-42 document describes techniques such as watering and the use of chemical wetting agents as primary means of controlling dust emissions. No differentiation between PM_{10} and $PM_{2.5}$ exists for these types of controls. Therefore, regardless of the amount of PM_{10} and $PM_{2.5}$ in the MBFP fugitive emission inventory, the selected control technologies for the MBFP facility will remain the same. Thus, use of the Surrogate Policy for $PM_{2.5}$ is justified.

Winborn Report at 33-34.

Permit Condition No. 47 requires application of water and chemical suppressants to all haul roads to control emissions of particulate or dust from the roads. This condition would be not different if there were a separate speciation or calculation of the amount of $PM_{2.5}$ generated by the haul roads. Thus, the use of the surrogacy policy was appropriate.

The Council Order also suggests the surrogacy policy only remains appropriate if the agency can demonstrate it cannot implement $PM_{2.5}$ standards in its PSD program. Given that EPA has yet to promulgate key standards necessary to fully incorporate $PM_{2.5}$ into the PSD process, the WDEQ's continued reliance on the surrogacy policy is their only realistic option.

For these reasons, WDEQ met its obligations to regulate $PM_{2.5}$ with its reliance on the surrogacy policy and respondents are entitled to summary judgment on this claim.

VII. CONCLUSION

There is no need in this case to use the limited resources of the Council to proceed with a hearing on any of the claims presented by the Sierra Club in light of the overwhelming support in the record for the WDEQ's decision to issuer Air Permit CT-5873. The administrative record, the depositions and MBFP's expert report demonstrate the Sierra Club's are without merit. WDEQ has issued a permit in full compliance with the relevant requirements of the Act and the WAQSR. The Sierra Club's Petition presents questions that are more than answered by the record. Under these circumstances summary judgment under Rule 56 is warranted for all claims.

Dated this 16th day of November 2009.

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CERTIFICATE OF SERVICE

I, John A. Coppede, hereby certify that on this 16th day of November 2009 a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF MEDICINE BOW FUEL & POWER'S MOTION FOR SUMMARY JUDGMENT** was served by regular mail and electronic mail to:

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