



Montana Legislative Services Division
Legal Services Office

EQC Oversight Subcommittee
Capitol Bldg., Rm 102
June 10, 2008, Tuesday
EXHIBIT 2

May 8, 2008

Senator Keith Bales

HC 39 Box 33

Otter, Montana 59062-9703

Dear Senator Bales:

I am writing in response to your request for an analysis of the decision by the Board of Environmental Review (BER) to remand the air quality permit for the Highwood Generating Station to the Department of Environmental Quality (DEQ). I have had difficulty in analyzing the issue, because the order for remand has yet to be issued. The permit was apparently remanded for additional analysis on fine particulates known as PM 2.5.

Title 75, chapter 2, MCA, relates to air quality in Montana. Section 75-2-203, MCA, authorizes the BER to establish the limitations of the levels, concentrations, or quantities of emissions of various pollutants from any source necessary to prevent, abate, or control air pollution. Pursuant to section 75-2-203(4), MCA, the BER may, if necessary in some localities of this state, set more stringent standards than federal minimum standards of air pollution by rule. Section 75-2-207(1), MCA, provides that after April 14, 1995, except as provided in section 75-2-207(2) and (3), MCA, or unless required by state law, the BER or DEQ may not adopt a rule to implement Title 75, chapter 2, MCA, that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The BER or DEQ may incorporate by reference comparable federal regulations or guidelines.

The procedure for applying for an air quality permit is contained in section 75-2-211, MCA. Section 75-2-211(10), MCA, provides that when the DEQ approves or denies the application for a permit, a person who is jointly or severally adversely affected by the DEQ's decision may request a hearing before the BER. The request for hearing must be filed within 15 days after the DEQ renders its decision. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA, apply to a hearing before the BER. Section 75-2-211(11), MCA, provides that the DEQ's decision on the application for a permit is not final until 15 days have elapsed from the date of the decision. The filing of a request for hearing does not stay the DEQ's decision. However, the BER may order a stay upon receipt of a petition and a finding, after notice and opportunity for hearing, that the person requesting the stay is entitled to the relief demanded in the request for a hearing or a finding that continuation of the permit during the appeal would produce great or irreparable injury to the person requesting the stay. The party asserting the claim in the contested case has the burden of presenting evidence necessary to establish the fact that the DEQ's decision violated the law. The role of the BER is to receive evidence from the parties, enter findings of fact based on a preponderance of the evidence, and then enter conclusions of law based on the findings. The determination of whether DEQ's decision is erroneous, arbitrary, capricious, or an abuse of discretion is the role of the

District Court on appeal. Montana Environmental Information Center v. Department of Environmental Quality, 2005 MT 96, 326 Mont. 502, 112 P.3d 964 (2005).

Ambient air quality standards for PM 2.5 are contained in 40 CFR 50.13, adopted by the federal Environmental Protection Agency (EPA) pursuant to the Clean Air Act (CAA). Those same standards are adopted in Montana by the BER in ARM 17.8.202, which incorporates 40 CFR part 50 by reference. Under Title V of the CAA, state environmental agencies issue air quality permits to large stationary sources of pollution such as power plants and factories. The permitting process requires a monitoring plan to be created and sets limits on the amounts and types of releases allowed. Part of the CAA is the EPA's Prevention of Significant Deterioration (PSD) program. Under that program, a major air pollutant emitting facility may not be constructed unless the facility is equipped with the best available control technology (BACT). BACT, as defined in 42 U.S.C. 7479(3), means, "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990. "

The EPA recommends a top-down methodology for determining BACT for state environmental agencies issuing air quality permits. The top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent or top alternative. That alternative is established as the BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not achievable in that case. If the most stringent technology is eliminated in this fashion, then the next most stringent alternative is considered until a BACT determination is reached. The DEQ uses the top-down BACT process.

The EPA does not currently require a study of PM 2.5. The EPA is working on new guidelines and has advised states in the meantime that PM 10 can serve as a surrogate look at the smaller particulate. The CAA entrusts state authorities with initial responsibility to make BACT determinations because they are best positioned to adjust for local circumstances that might make a technology unavailable in a particular area. However, according state authorities initial responsibility does not signify that there can be no *unreasonable* state agency BACT determinations. Alaska Department of Environmental Conservation v. Environmental Protection Agency, 540 U.S. 461 (2004). In that case, the U.S. Supreme Court construed the

authority of the EPA to enforce the provisions of the CAA PSD program. The CAA authorizes EPA to stop construction of a major pollutant-emitting facility permitted by a state authority when EPA finds that an authority's BACT determination is unreasonable in light of 42 U. S. C. 7479(3)'s prescribed guides. The Supreme Court held that in either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves is whether the state agency's BACT determination was reasonable, in light of the statutory guides and the state administrative record. The reviewing court considers whether EPA's finding was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in the same manner as Montana courts review state agency contested case actions under the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.

It appears that in the case of the air quality permit for the Highwood Generating Station, the BER concluded that additional evidence on PM 2.5 was required and that DEQ will be directed to do additional modeling specifically on PM 2.5 rather than relying solely on the surrogate testing on PM 10. However, this issue will become more clear once the order is drafted and adopted. It also appears that this is the first time that a state environmental permitting office has been directed to do testing on PM 2.5. Because the EPA has not required a study of PM 2.5, there does not appear to be a nationally accepted methodology for conducting the study. However, the BER appears to be acting in a role similar to that of the EPA under Alaska in ensuring that the top-down BACT is reasonable.

I hope that I have adequately addressed your questions, based upon the information available at this time. If you have other questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

cc: Todd Everts

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