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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF:)
BASIN ELECTRIC POWER COOPERATIVE)
DRY FORK STATION,) Docket No. 07-2801
AIR PERMIT CT - 4631)

**RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

ATTACHMENT 4

RECEIVED
1/29/08

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

**IN THE MATTER OF:
THE APPEAL BY SOUTHERN
MONTANA ELECTRIC REGARDING
ITS AIR QUALITY PERMIT NO. 3423-00
FOR THE HIGHWOOD GENERATION
STATION**

CASE NO. BER 2007-06 AQ

**THIRD ORDER SETTING HEARING AND DENYING MOTION TO
STRIKE PORTIONS OF AFFIDAVIT OF APPELLANTS**

On December 21, 2007, the Board of Environmental Review (Board) heard oral argument on the following motions:

1. Motion of Southern Montana Electrical Generation & Transmission Cooperative, Inc. (SME) for Summary Judgment dated November 19, 2007.
2. Motion of Montana Environmental Information Center (MEIC) and Citizens for a Clean Earth (CCE) for Summary Judgment dated November 16, 2007.
3. Motion of the Department of Environmental Quality (Department) for Summary Judgment dated December 12, 2007.

On January 11, 2008, the Board heard supplemental argument on the portions of the summary judgment motions pertaining to whether the Department complied with federal and state requirements in not deeming CO₂ as a regulated pollutant subject to regulation includable in a Best Available Control Technology (BACT) analysis in issuing Permit No. 3423-00 to SME. The Board decided on January 11, 2008 that CO₂ is not a regulated pollutant, "subject to regulation" and BACT requirements. The Board will review and adopt a written order concerning this decision subsequent to, or as an adjunct to the hearing on January 22 and 23, 2008.

1 On December 21, 2007, the Board decided to deny the portions of the
2 Motions for Summary Judgment referenced above that address whether the
3 Department correctly applied the law concerning PM 2.5 emissions when it issued
4 Permit No. 3423-00 to SME on May 11, 2007. A hearing concerning issues
5 subsumed within this question is set for January 22, 2008, at 10 a.m. through
6 January 23, 2008.

7 On November 19, 2007, SME filed a "Motion to Strike Portions of the
8 Affidavit of Appellants Montana Environmental Information Center & Citizens for
9 Clean Energy" ("Motion") together with a "Memorandum in Support of Motion to
10 Strike Portions of the Affidavit of Appellants [MEIC] and [CCE]." Response and
11 reply briefs were filed respectively by the Appellants on December 4, 2007, and by
12 SME on December 11, 2007. Upon a review of the Motion and briefs of the parties,
13 the Motion is denied.

14 The contested statements in the Affidavit filed June 8, 2007, by Ms. Anne
15 Hedges pertaining to (1) the use of "severe environmental impacts,"; (2) the
16 requirement that the Department conduct a top-down analysis for BACT for CO2;
17 and (3) the statement that there was not one reference to PM 2.5 in the permit that
18 was issued are primarily background, somewhat argumentative statements which
19 were clarified in the discovery stages or in the Affidavit itself. The Affidavit is not
20 a "pleading" per se conducive to a motion to strike but is intended to serve as a
21 background and basis for contesting the Department permitting decision on both
22 factual and legal bases. In affidavit form, especially where, as here, the Affidavit
23 was signed by a non-attorney, it is difficult to reconcile the fundamental requirement
24 of an affidavit which is to set forth facts under oath, Mont. Code Ann. § 26-1-1001
25 and the impetus for the party appealing the permit to list legal arguments contesting
26 the permitting action. See Mont. Code Ann. § 75-2-211(10). The contested
27

1 statements, referenced in the Motion, are statements of both fact and law. The
2 accuracy and correctness of the contested statements in the Affidavit are best
3 developed through a disposition on the merits which the parties were commencing
4 even before the Motion was filed through discovery. The second contested
5 statement concerning CO2 is now moot given the decision of the Board on
6 January 11, 2008. The first and second statements still may be considered as a part
7 of the Affidavit.

8 DATED this 22nd day of January, 2008.

9
10 For *Katherine J. Orr*
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12 Hearing Examiner
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I caused a true and accurate copy of the foregoing Third
3 Order Setting Hearing and Denying Motion to Strike Portions of Affidavit of
4 Appellants to be provided electronically (on January 18, 2008) and through the mail
5 on January 22, 2008 to:

6 Ms. Kris Brewer
7 Secretary, Board of Environmental Review
8 Department of Environmental Quality
9 1520 East Sixth Avenue
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11 Helena, MT 59620-0901
12 **(original)**

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23 DATED: Jan. 22, 2008 James M. Scheiey