

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
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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 Thomas M. Scheing
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12 Hearing Examiner
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16 Helena, MT 59620-1440
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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
10 P.O. Box 200901
11 Helena, MT 59620-0901
12 **(original)**

13 Mr. David Rusoff
14 Legal Counsel
15 Department of Environmental Quality
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17 Helena, MT 59620-0901

18 Mr. Michael McCarter
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26 One Boston Place, 40th Floor
27 Boston, MA 02108

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Ms. Jenny K. Harbine
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209 South Willson Avenue
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28 DATED: Jan. 22, 2008 James M. Scheiey