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## 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:

 Motion of Southern Montana Electrical Generation & Transmission Cooperative, Inc. (SME) for Summary Judgment dated November 19, 2007.

 Motion of Montana Environmental Information Center (MEIC) and Citizens for a Clean Earth (CCE) for Summary Judgment dated November 16, 2007.

 Motion of the Department of Environmental Quality (Department) for Summary Judgment dated December 12, 2007.

19 On January 11, 2008, the Board heard supplemental argument on the portions of the summary judgment motions pertaining to whether the Department complied 20 21 with federal and state requirements in not deeming CO2 as a regulated pollutant 22 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, 23 2008 that CO2 is not a regulated pollutant, "subject to regulation" and BACT 24 requirements. The Board will review and adopt a written order concerning this 25 26 decision subsequent to, or as an adjunct to the hearing on January 22 and 23, 2008.

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THIRD ORDER SETTING HEARING AND DENYING MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF APPELLANTS PAGE 1 On December 21, 2007, the Board decided to deny the portions of the Motions for Summary Judgment referenced above that address whether the Department correctly applied the law concerning PM 2.5 emissions when it issued Permit No. 3423-00 to SME on May 11, 2007. A hearing concerning issues subsumed within this question is set for January 22, 2008, at 10 a.m. through January 23, 2008.

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

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

> THIRD ORDER SETTING HEARING AND DENYING MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF APPELLANTS PAGE 2

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

for

DATED this <u>224</u> day of January, 2008.

cherry KXTHERINE J.

Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440

THIRD ORDER SETTING HEARING AND DENYING MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF APPELLANTS PAGE 3

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 Department of Environmental Quality		
8	1520 East Sixth Avenue P.O. Box 200901		
9	Helena, MT 59620-0901 (original)		
10	Mr. David Rusoff		
11	Legal Counsel Department of Environmental Quality		
12	P.Ô. Box 200901 Helena, MT 59620-0901		
13	Mr. Michael McCarter		
14	Luxan & Murfitt, PLLP Montana Club Building		
15	24 West Sixth Avenue P.O. Box 1144		
16	Helena, MT 59624-1144		
17	Mr. Kenneth A. Reich Wolf, Block, Schorr & Solis-Cohen LLP		
18	One Boston Place, 40th Floor Boston, MA 02108		
19	Ms. Abigail M. Dillen		
20	Ms. Jenny K. Harbine Earthjustice		
21	209 Šouth Willson Avenue Bozeman, MT 59715		
22			
23	DATED: Am. 22, 2008 James M. Scheier		
24			
25			
26			
27			
	THIRD ORDER SETTING HEARING AND DENYING MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF APPELLANTS		
	DENTING MOTION TO STRIKE FORMONS OF AFFIDAVIT OF ATTELLANTS PAGE 4		