



December 4, 2008

Mr. Richard Opper, Director  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

*Via electronic mail with hard copies to follow*

Dear Mr. Opper,

We are writing on behalf of Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club, and the National Parks Conservation Association to advise you that illegal construction activities do not constitute “commencement of construction” of the proposed Highwood Generating Station. As the Department of Environmental Quality (“DEQ”) informed the Southern Montana Electric Generation and Transmission Cooperative (“SME”) on November 20, 2008, it violated the Clean Air Act and implementing Montana regulations in undertaking construction activities prior to the issuance of a final Maximum Available Control Technology (“MACT”) approval and final air quality permit modification. Because SME did not legally commence construction on the Highwood plant in advance of its November 30, 2008 deadline, its air quality permit has expired on its own terms. DEQ must take all necessary steps to halt any further construction by SME until it obtains a new air quality permit.

We understand that DEQ is inspecting the Highwood site to determine whether construction has “commenced” as required under the terms of the Air Quality Permit #3423-00 and permit modification #3423-01. Yet DEQ already has determined that “construction activities that have taken place at the SME site location without a case-by-case MACT approval and prior to MAQP #3423-01 becoming final are a violation of 40 CFR 63 and ARM 17.8.342.” Violation Letter # VLRAG08-1.8. Since the requisite MACT approval and permit modification only became final on November 26, 2008 and there was no ongoing construction over the Thanksgiving holiday, DEQ cannot conclude that SME has met its construction deadline.

Obtaining all required preconstruction approvals is an express prerequisite to commencing construction. Under the Clean Air Act, “the term ‘commenced’ as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction to be completed within a reasonable



time.” 42 U.S.C. § 7479(2)(A) (emphasis added). “The term ‘necessary preconstruction approvals or permits’ means those permits or approvals required by the permitting authority.” Id. § 7479(2)(B).

Tracking these statutory definitions, Montana’s administrative rules provide that:

“Commence”, as applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

- (a) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
- (b) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

Mont. Admin. R. 17.8.801(8) (emphasis added); see also id. 17.8.801(23) (“‘Necessary preconstruction approvals or permits’ means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the Montana State Implementation Plan.”).

As these provisions make clear, construction activities that are undertaken in the absence of “necessary preconstruction approvals or permits” do not satisfy the legal definition of commencement of construction. See, e.g. Montana Power Co. v. EPA, 608 F.2d 334, 357-58 (9th Cir. 1979) (holding that Montana Power had failed to commence construction on two units at the Colstrip power plant because it “did not have both a state Clean Air Act permit and a Siting Act permit”); see also Mont. Admin. R. 17.8.819(4) (all sources must “comply fully with applicable provisions and requirements under local, state, or federal, law”).

It was SME’s responsibility either to obtain all applicable preconstruction approvals within the 18-month period prescribed by its permit or to take the necessary steps to update its best available control technology (“BACT”) analysis and extend its construction deadline. Yet despite repeated warnings from DEQ staff, SME declined to pursue a permit extension and elected instead to begin construction activities without a final MACT approval and permit modification.

SME has long been aware of its MACT obligations. DEQ’s meeting logs show that agency staff discussed case-by-case MACT requirements with SME as early as February, 2008. See SME Meeting Timeline: Post BER Hearing (“Timeline”) (attached as Ex. 1); see also Letter from Jenny Harbine to Richard Oppen (Feb. 27, 2008) (copying SME’s counsel on letter to DEQ regarding applicability of MACT requirements). On March 12, 2008, DEQ staff again discussed



MACT issues with SME, see Timeline, and on March 18, 2008, DEQ confirmed in a letter to undersigned counsel that “SME would need to obtain a MACT approval, in addition to MAQP #3423-00, prior to beginning construction” of the Highwood Generating Station. Letter from Richard Opper to Jenny Harbine and Abigail Dillen (March 18, 2008) (stating that “the Department will also be sending a similar letter to SME this week). On April 9, 2008, DEQ provided SME with the D.C. Circuit Court of Appeals vacatur decision confirming the applicability of case-by-case MACT requirements to the Highwood plant, and on April 28 and 30, 2008, DEQ met twice with SME to discuss construction in light of applicable MACT requirements. See Timeline. On May 12, 2008, six months ago, DEQ unequivocally “notif[ie]d SME that it is the agency’s opinion that physical construction cannot occur unless they comply with the MACT requirements or obtain a permit limiting their emissions to below the major source threshold.” Id. Thus, SME has had ample warning that MACT requirements (as well as best available control technology (“BACT”) requirements for PM2.5) could delay its ability to commence construction.

For this reason, DEQ informed SME on multiple occasions that it should pursue an extension of its construction deadline. Over ten months ago, on January 23, 2008, “DEQ strongly urged the consultant to consider re-submitting a BACT analysis for the other pollutants so that the time allowed for construction of SME’s facility could be properly extended, thus avoiding conflicts as the construction deadline approaches.” Id. Again on February 28, 2008, DEQ “reminded SME representatives that it would be wise to consider properly extending the construction timeframes for the air quality permit.” Id. And yet again on April 9, 2008, DEQ “reminded SME representatives that it would be wise to consider properly extending the construction timeframes for the air quality permit.” Id. Notwithstanding these warnings, SME never sought an extension of its permit, either from DEQ or from the Board of Environmental Review in the context of appeal proceedings. Instead, SME began construction at the Highwood site on October 15, 2008 without a final permit modification and MACT approval, and it continued construction even after receiving a 60-day notice of Clean Air Act violations from undersigned counsel on October 22, 2008.

Construction in the absence of final permit approvals does not satisfy the requirement to commence construction. As a federal district court in North Carolina held just this week, final MACT approvals are a necessary prerequisite to construct all new power plants, including facilities that received air permits in advance of the D.C. Circuit’s ruling in New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008). See Southern Alliance For Clean Energy, et. al. v. Duke Energy Carolinas, LLC, No. 1:08CV318, slip op. at 8-15, 22(D.N.C. Dec. 2, 2008) (attached as Ex. 2). In Southern Alliance, Duke Energy allegedly began construction of its Cliffside coal-fired power units in January, 2008. Nevertheless, Duke had been aware of the New Jersey litigation as of June 2005, and construction went forward unabated after the D.C. Circuit ruled in February, 2008. On these facts, the court found that “§ 112(g)(2)(B) [of the Clean Air Act] and 40 C.F.R. § 63.40(b) were in effect at the time Duke began its construction of Cliffside Unit 6 and the



completion of a MACT process was required before construction began.” Id. at 9. Thus the court ultimately held that “Defendant is continuing with the construction of Unit 6 without the required § 112 MACT determination. The material facts herein are not in dispute. Duke is simply refusing to comply with controlling law.” Id. at 22.

The same is true of SME. As DEQ correctly informed SME many months ago, case-by-case MACT requirements are in effect and applicable to the Highwood coal plant. This means that a final MACT determination is a “necessary preconstruction approval” to commence construction. Mont. Admin. R. 17.8.801(8); see also id. 17.8.801(23); 42 U.S.C. §§ 7479(2)(A),(B). Yet SME has attempted to commence construction without this MACT approval. The facts are not in dispute. SME has refused to comply with the law. As a result, DEQ must conclude that SME has not commenced construction and that its air quality permit has expired. See Air Quality Permit #3423-01, General Condition H.<sup>1</sup>

As DEQ is aware, its forthcoming determination on commencement of construction must vindicate two key safeguards under the Clean Air Act: (1) preconstruction approvals; and (2) firm construction deadlines. First, DEQ cannot ensure that the Highwood coal plant will effectively control its emissions, including its emissions of the most hazardous air toxics, if construction is allowed to commence without a final permit reflecting thorough analysis and public comment. Second, DEQ must strictly enforce construction deadlines to ensure that emission limits are based on up-to-date rather than stale BACT analyses.

Thank you for your attention to our concerns,

/s/ Abigail Dillen  
Jenny Harbine

CC: David Rusoff, DEQ  
Dave Klemp, DEQ  
Ken Reich, counsel for SME

---

<sup>1</sup> General Permit Condition H provides:

Construction Commencement – Construction must begin within 18 months after permit issuance of Permit #3423-00 and proceed with due diligence until the project is complete or Permit #3423-01 shall expire. If the permit expires, SME-HGS shall not commence construction until SME-HGS has applied for and received a new air quality permit pursuant to Sections 75-2-204 and 75-2-211, Montana Code Annotated, and ARM 17.8.740 *et seq.*, as amended (ARM 17.8.762).