



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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Ref: 8P-SA

MAR 25 2009

Honorable Brian D. Schweitzer
Governor, State of Montana
Office of the Governor
Montana State Capitol Bldg.
P.O. Box 200801
Helena MT 59620-0801

Dear Governor Schweitzer:

I am writing to indicate that legislation pending in the 2009 Montana Legislature, House Bill 483, is of potential concern to the U.S. Environmental Protection Agency (EPA). EPA is very reluctant to become involved with the actions of a State's legislature. However, this bill raises concerns about whether important parts of the State's federally approved air and water-quality permit programs would meet federal requirements for EPA approval if it becomes law. In the spirit of partnership, we offer the following for your consideration.

I have been advised by EPA's attorneys that House Bill 483 may create impediments to the public's ability to challenge air and water-quality permits that would be contrary to applicable requirements for State-administered air and water permit programs. In this regard, three separate aspects of House Bill 483 concern us.

First, if our reading is correct, House Bill 483 would require citizens seeking review of a State air or water-quality permit to post a bond ("written undertaking") for potential damages to the permit applicant and its employees. This bond requirement could deter citizens from seeking review of air and water-quality permit decisions, no matter how compelling their case.

Second, it appears that House Bill 483 would establish a new limit on citizens' ability to appeal an air-quality permit decision – a person seeking appeal would have to be "directly and adversely affected" by the Department of Environmental Quality's decision. We understand that this standard has never been construed by Montana's courts.

Third, it appears that House Bill 483 would prevent citizens from raising issues on appeal regarding changes in a final air or water-quality permit from the Department's proposed permit, or other matters that citizens couldn't have reasonably identified during the Department's formal comment period. In contrast, House Bill 483 would apparently allow the permit applicant to raise new issues on appeal without any limitation.

We are concerned that these three aspects of the bill could result in restrictions on citizens' permit appeal rights that would be inconsistent with EPA's requirements for State-administered programs. (See, e.g., 40 CFR 123.30; 61 FR 1882, January 24, 1996; Virginia v. Browner, 80 F.3d 869, 880 (4th Cir. 1996)).

We are also concerned with other aspects of the bill that relate to the Department of Environmental Quality's best available control technology (BACT) determinations. Under the Clean Air Act, BACT represents the maximum degree of reduction of a pollutant at a source considering available control technologies and other factors. For major sources in attainment areas, the Department must determine and impose a BACT limit before source construction begins.

Our first concern related to BACT is that House Bill 483 would prohibit the board or a court from rejecting the Department's BACT determination unless the determination was not in compliance with state or federal law when the permit application was filed. We are concerned that limiting review to the law that applied when the application was filed, without exception, may be overly broad and in certain circumstances impermissibly allow a source to have its permit issued without accounting for applicable changes in federal law. (See, e.g., 42 U.S.C.A. 7410(j).)

Our second concern related to BACT is that House Bill 483 would allow the Department to waive any requirement that project construction proceed with due diligence. Such a waiver could "freeze" a BACT determination in situations where federal regulations (e.g., 40 CFR 51.166(j)(4)) would require that the BACT determination for phased construction projects be reviewed and modified as appropriate.

In sum, it appears that House Bill 483 could burden rights to review of air and water-quality permitting decisions in Montana and otherwise affect the adequacy of Montana's air quality construction permitting program. Thus, if it becomes law, the bill could impact the federal-approvability of the State's programs. I welcome your insights as to whether our understanding of the bill is accurate, and the opportunity to work together to carefully consider the ramifications of this pending legislation.¹ If you need more information, please call me at (303) 312-6308.

Sincerely,

Juiced Wong
for Carol Rushin
Acting Regional Administrator

¹ We understand there are other pending bills – for example, Senate Bill 288 and House Bill 418 – that would impose a bond requirement for appealing various types of environmental permits or otherwise restrict permit appeal rights. Please note that some of our same concerns about House Bill 483 also extend to these other bills.

cc: Richard Opper, Director,
Montana Department of Environmental Quality

