



EARTHJUSTICE

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October 22, 2008

Mr. Stephen L. Johnson, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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

Mr. Kenneth A. Reich, Counsel for SME
Wolf, Block, Schorr & Solis-Cohen, LLP
One Boston Place, 40th Floor
Boston, MA 02108

RE: Notice of Violation of the Clean Air Act, 42 U.S.C. § 7412

To Whom It May Concern:

Montana Environmental Information Center ("MEIC"), Citizens for Clean Energy ("CCE"), and Sierra Club hereby provide notice, pursuant to the Clean Air Act citizen suit provision, 42 U.S.C. § 7604(b), that ongoing construction of the Highwood Generating Station without a valid air quality permit containing "maximum achievable control technology" ("MACT") emissions limits violates the Clean Air Act section 112(g)(2)(B), 42 U.S.C. § 7412(g)(2)(B).

The Clean Air Act contains a list of "hazardous air pollutants" ("HAPs") including, but not limited to, hydrochloric acid, hydrogen fluoride, antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, selenium, sulfuric acid, benzene, polycyclic organic matter, and radionuclides. See id. § 7412(b). If a listed source of air pollution, such as a power plant, emits 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPS, that source is required to obtain HAP emission limits representative of MACT as a prerequisite to commencing construction. See id. § 7412(a)(1) (defining "major source"); 40 C.F.R. §§ 63.42, 63.43(d), (e). The Clean Air Act prohibits any person from "construct[ing] ... any major source of hazardous air pollutants unless the Administrator (or the State) determines that the [MACT] emission limitation ... will be met." Id. § 7412(g)(2)(B).

In a February 27, 2008 letter, Earthjustice informed the Montana Department of Environmental Quality ("DEQ") of the requirement to establish MACT emissions limits for the Highwood Generating Station before Southern Montana Electric Generation and Transmission Cooperative, Inc. ("SME") may commence construction. In its March 18, 2008 response,

attached as Exhibit 1, DEQ acknowledged that Highwood's anticipated "emissions of hydrochloric and hydrofluoric acid would meet the major source thresholds that trigger review for the HAPs subject to regulation under Section 112 of the [federal Clean Air Act], including mercury." Accordingly, DEQ correctly concluded that "SME [will] need to obtain a MACT approval, in addition to MAQP #3423-00, prior to beginning construction" of the Highwood Generating Station. See Exhibit 1

We understand that DEQ has advised SME that it may proceed with construction at the Highwood site that is unrelated to construction of the boiler. This position contradicts clear legal requirements. A "major source" for the purpose of a MACT determination is "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit" HAPs in quantities that exceed threshold levels. See 42 U.S.C. § 7412(a)(1) (emphasis added). There is no justification for segregating the boiler from other emitting units at the Highwood facility for the purpose of MACT review.

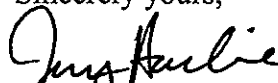
Although DEQ previously determined that the Highwood facility is a major source of HAPs, see Exhibit 1, SME has not yet obtained a final MACT determination for the Highwood facility or any of its emitting units. Indeed, the public comment period on the proposed MACT determination for the Highwood Generating Station is open until November 5, 2008. A MACT determination may not become final until after a 30-day public comment period or the "the date of issuance of a title V permit incorporating a MACT determination." See 40 C.F.R. § 63.44(j).

Nonetheless, SME began construction on the power plant on October 15, 2008. According to an October 16 article that appeared in the Great Falls Tribune, attached as Exhibit 2, SME has begun digging the foundation for the plant's cooling tower and building a road at the project site. Under the terms of SME's existing air quality permit, SME must commence construction on the Highwood Generating Station on or before November 30, 2008. To the extent that the activities at the Highwood site constitute "construction" that avoids the expiration of SME's air quality permit, the activities also constitute "construction" that violates section 112. See Admin. Rules Mont. 17.8.740(4) (defining "construction" for the purposes of air quality permitting).

Because SME has not obtained "a final and effective case-by-case determination" of MACT for its HAP emissions, including mercury, the ongoing construction activities violate the Clean Air Act and its implementing regulations. See 40 C.F.R. § 63.42(c); 42 U.S.C. § 7412(g)(2)(B). SME may incur civil penalties of \$25,000 per day for each day it continues construction activities without a valid MACT determination. See 42 U.S.C. §§ 7413(b), 7604(a).

Please do not hesitate to contact Jenny Harbine at (406) 586-9699 or Abigail Dillen at (212) 791-1881 if you have any questions or concerns.

Sincerely yours,


Jenny Harbine
Abigail Dillen

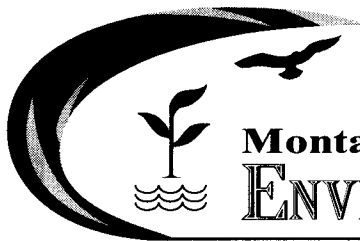
CC: Carol Rushin, Acting Regional
Administrator
EPA, Region 8
1595 Wynkoop Street
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Governor Brian Schweitzer
Office of the Governor
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EXHIBIT 1



Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

March 18, 2008

Jenny Harbine
Abigail Dillen
Earthjustice
209 South Wilson Avenue
Bozeman, MT 59715

Re: Highwood Generating Station – Requirement to Perform MACT Analysis

Dear Ms. Harbine and Ms. Dillen:

Thank you for the opportunity to address your concerns regarding the Highwood Generating Station (HGS) and its status with respect to Maximum Achievable Control Technology (MACT) requirements in light of the recent ruling in *State of New Jersey v. U.S. Environmental Protection Agency*, Case No. 05-1097 (D.C. Cir. February 8, 2008). The Department of Environmental Quality (Department) air quality permitting staff have been following the decision and evaluating its potential effects on MACT requirements. The U.S. Environmental Protection Agency (EPA) has filed a document with the court stating that EPA is evaluating whether to petition for rehearing, and the Department's understanding is that the timelines for petitioning for rehearing and/or appealing the decision have not expired.

Section 112 of the Federal Clean Air Act (FCAA) prohibits construction of a new major source of hazardous air pollutants (HAPs) unless EPA or the State permitting authority has determined that the MACT emission limitation for new sources will be met. On December 20, 2000, EPA added electric utility steam generating units (EGUs) to the list of emission sources subject to the Section 112 MACT requirements. On March 29, 2005, EPA revised its December 2000 determination and issued a regulation delisting EGUs from Section 112 requirements ("Delisting Rule"). Southern Montana Electric Cooperative Generation and Transmission Cooperative, Inc. (SME) submitted its application for an air quality permit for the HGS on November 30, 2005, after EPA delisted EGUs from Section 112 requirements and the Department made its decision on May 11, 2007, prior to the recent court decision. At the time the Department made its decision on the application, we had no authority to review an application for, or make, a MACT determination, for the HGS.

If the vacature of the "Delisting Rule" (as described in the above-mentioned court ruling) is finalized, EGUs that are major sources of HAPs, and that meet the definition of a "new source," under Section 112 of the FCAA, will be subject to the case-by-case MACT determination requirement, pending promulgation by EPA of a MACT standard for EGUs. Mercury emissions from the HGS, at 0.017 tons per year, would not trigger major source status. However, emissions of hydrochloric and hydrofluoric acid would meet the major source thresholds that trigger review for the HAPs subject to regulation under Section 112 of the FCAA, including mercury.

The Montana Air Quality Permit (MAQP #3423-00) issued to SME for the HGS contains mercury limitations based on the Best Available Control Technology (BACT) requirements. BACT requirements, as you mentioned, are not based on the same determination process as MACT requirements. As described in 40 CFR 63.43(d)(1) and (2), "The MACT emission limitation [for proposed new or reconstructed sources] shall not be less stringent than the emission control which is achieved in practice by the best controlled similar source and the MACT emission limitation and control technology shall achieve the maximum degree of reduction in emissions of HAP [Hazardous Air Pollutants] which can be achieved by utilizing those control technologies that can be identified from the available information, taking into consideration the costs of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements associated with the emission reduction."

MAQP #3423-00, as issued to SME for the HGS, was issued in compliance with the rules in force at that time and remains valid. However, if the vacature of the "Delisting Rule" is finalized, SME would need to obtain a MACT approval, in addition to MAQP #3423-00, prior to beginning construction of the HGS, or in order to continue construction or operation, if construction or operation has begun by that time, unless the courts rule that some other procedure applies.

It would be the obligation of the owner or operator in question (SME, in this case) to apply for and obtain any necessary MACT approval prior to beginning construction; therefore the owner or operator of the HGS, not the Department, would be responsible for providing the MACT analysis. There are three review options authorized in 40 CFR 63.43(c)(2) for a case-by-case MACT determination for a listed major source when EPA has not promulgated a MACT standard. The owner or operator could: 1) follow the process to obtain a Title V Operating Permit and include a case-by-case MACT application; 2) incorporate the case-by-case MACT application in an application for a Montana Air Quality Permit; or 3) use the Montana Air Quality Permit administrative process to obtain a stand-alone MACT Approval. All of those processes would include making the applicant's MACT analysis and the Department's subsequent determination available for public review and comment prior to the Department's final decision.

The Department will also be sending a similar letter to SME this week. Should you have any additional concerns, please feel free to contact Charles Homer in the Air Resources Management Bureau at (406) 444-5279 for further assistance.

Sincerely,



Richard H. Opper
Director

c: Judy Hanson, Acting Administrator, Permitting and Compliance Division
Dave Klemp, Chief, Air Resources Management Bureau

EXHIBIT 2



October 16, 2008

SME breaks ground on Highwood plant

By *KARL PUCKETT*
Tribune Staff Writer

Workers broke ground Wednesday east of Great Falls on a coal-fired power plant that is still being challenged in Cascade County District Court on grounds the site was illegally rezoned from farmland to industrial.

"The time has come for us to break ground and move forward with construction," said Tim Gregori, the CEO of Billings-based Southern Montana Electric Generation and Transmission.

A formal groundbreaking is planned for next week, but workers with Wickens Construction out of Lewistown, the general contractor for the earth-moving portion of the job, and Stanley Consultants, SME's engineering consultants, arrived Wednesday morning and went to work.

"It's just like building a basement," said Denver-based Brad Schimke of Stanley, looking on as big "scrapers" dug an area where the foundation of the plant's cooling tower will be located on the 850-acre site.

The scrapers also began work on what will be known as the "B road" to the cooling tower.

"That's going to be the first major piece of equipment constructed," Schimke said. The cooling tower will cool and recycle hot water used at the main plant, he said.

SME is under a time crunch because construction must begin by Nov. 30 for its air quality permit from the state to remain valid. The first phase of work involves foundations, site preparation, water and sewer lines and portable water pipes, Gregori said.

County Commissioner Joe Briggs said the county must still approve a location conformance permit before structures are erected, but earth-moving activities are allowed until then.

"I'm done being surprised," said Daryl Lassila, an organic grain producer and one of several area landowners suing Cascade County over the rezoning. "I was surprised when the county voted in their favor, period."

It's unclear how the project could begin, given a judge has yet to rule on the rezoning case, said Lassila, who could see the heavy equipment from his kitchen window. "They might have to undo all the work," Lassila said.

Neighbors contend the rezoning is illegal spot zoning, but SME, which has intervened in the case on behalf of Cascade County, argued in court Oct. 2 the lawsuit is moot because the land already was rezoned industrial by the time SME bought it in August, and opponents never asked for an injunction to stop the project.

Cascade County's position is that the acreage was properly rezoned.

"We have adequate financing to carry this project through this phase of work and transition us to subsequent phases," Gregori said.

SME has arranged a "significant piece of financing" from commercial banks for the initial work, but the financial package for the entire project is being put together in phases, he said. Gregori declined to identify who is financing the project.

John Prinkki of the Beartooth Electric Cooperative in Red Lodge, one of four rural cooperatives building Highwood, said previously SME was seeking \$10 million to \$15 million to begin work. The cost of the plant has been previously estimated at \$800 million to \$850 million.

"We're putting Montana labor to work in a Montana project where we use Montana coal to generate electricity for Montanans," Gregori said.

Ryan Durbin, a superintendent for Wickens Construction, said five of the company's employees were on the site Wednesday. "We're going to keep ramping up," he said.

SME has signed agreements with union officials to hire a certain percentage of Montana union labor for the project, which is expected to take about 4 1/2 years to construct.

SME officials say Highwood would be a steady source of low-cost electricity for its members. It began considering the facility after the Bonneville Power Administration, SME's main provider, discontinued a power supply contract beginning this year.

Four rural cooperatives are putting the financial package together to build the facility, Gregori said. The utility arm of the city of Great Falls, which sells power to government and commercial users in the city, purchases its power from SME, and as a member it would receive electricity from Highwood. At this stage, however, the city is not a direct party in constructing the power plant, Gregori said. "They may move in as they so desire," he said.
