



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. §§ 7475(a), 7604(a)(3)

To Whom This May Concern:

On behalf of Montana Environmental Information Center ("MEIC"), Citizens for Clean Energy ("CCE"), and Sierra Club, I am writing to provide notice that the Southern Montana Electric Generation and Transmission Cooperative ("SME") is violating the Clean Air Act in attempting to commence construction of the Highwood Generating Station in the absence of a valid air permit under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program. See 42 U.S.C. § 7475(a).

Under the Clean Air Act § 304(a)(3), any person may commence a civil action "against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter one of [the Act] (relating to significant deterioration of air quality)." 42 U.S.C. § 7604(a)(3).

SME does not currently hold the necessary PSD permit to begin construction of the Highwood Generating Station. While DEQ issued a PSD permit (No. 3423-00) to SME in May 2007, that permit is no longer valid. On May 30, 2008, the Board of Environmental Review granted an appeal, holding that DEQ failed to impose emission limits reflecting best available control technology ("BACT") for very fine particulate matter ("PM_{2.5}") as the federal Clean Air Act and the Clean Air Act of Montana require. See In re: Southern Montana Electric Generation and Transmission Cooperative – Highwood Generating Station Permit 3423-00, Case No. BER 2007-07 AQ, 41-44 (May

30, 2008) (attached as Exhibit 1). Accordingly, the Board ordered that Permit No. 3423-00 be remanded to the agency. See id. at 44.

Until the remand process is complete and the legal violations identified by the BER are remedied, construction of the Highwood Generating Station cannot go forward. In keeping with the federal Clean Air Act's requirements, the Clean Air Act of Montana and its implementing regulations preclude issuance of an air quality permit in the absence of all required BACT analysis and corresponding emission limits. "No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in ARM 17.8.819 through 17.8.827 have been met." Mont. Admin. R. 17.8.818(1) (emphasis added); see also id 17.8.819(2) (requiring that "[a] new major stationary source shall apply BACT for each pollutant subject to regulation under the FCAA that it would have the potential to emit in significant amounts").

SME has yet to obtain a new PSD permit with BACT-determined emission limits for PM_{2.5}. DEQ has released a draft PSD permit for public comment, and the comment period ends on November 5, 2008. DEQ must review these comments and make any necessary changes to the draft before finalizing a new permit. In the meantime, SME does not have a PSD permit to construct the Highwood Generating Station.

Nevertheless, SME began constructing the Highwood facility on October 15, 2008. According to a recent news report, SME has "begun construction of a cooling tower" at the Highwood site. Associated Press, Workers break ground on coal-fired power plant, Great Falls Tribune, Oct. 16, 2008. Further, as set forth in a September 19, 2008 letter from SME to the Montana Department of Environmental Quality ("DEQ"), SME intends to complete "site civil work, which includes clearing and grubbing, excavation and grading, fencing, work on underground pipework, and work on the foundation for the cooling tower" in advance of November 30, 2008. See Letter from Tim R. Gregori, CEO and General Manager, SME, to Richard Opper, Director, Montana DEQ (Sept. 19, 2008) (attached as Exhibit 2).

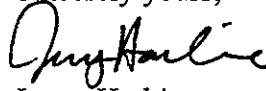
The construction of any part of the Highwood "facility" violates the Clean Air Act's prohibition on construction without a PSD permit. See 42 U.S.C. §§ 7475(a), 7604(a)(3); see also Mont. Admin. R. 17.8.818(1). It is no defense that SME will refrain from building one part of the facility, i.e. the boiler, prior to receiving a Clean Air Act permit. The statute expressly prohibits any construction of a "major stationary source," which the statute defines as a "stationary facility." 42 U.S.C. § 7602(j). The Clean Air Act regulations further define a "facility" as including "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 52 C.F.R. § 52.21(b)(6). Further, it is not clear that current construction activities at the Highwood site are limited to parts of the facility other than the boiler.

This construction in the absence of a PSD permit plainly violates the Clean Air Act and renders SME vulnerable to suit under 42 U.S.C. § 7604(a)(3). SME may incur

civil penalties of \$25,000 per day for each day it continues construction activities, from and including October 15, 2008, without a valid PSD permit. See id. §§ 7413(b), 7604(a).

Please advise Jenny Harbine at (406) 586-9699 or Abigail Dillen at (212) 791-1881 of any action you intend to take to curtail this illegal construction activity.

Sincerely yours,



Jenny Harbine
Abigail Dillen

CC: Carol Rushin, Acting Regional
Administrator
EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

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

David Rusoff, Attorney Specialist
Montana Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

Mike McCarter,
SME Registered Agent
24 W. Sixth Ave.
P.O. Box 1144
Helena, MT 59624

EXHIBIT 1

1 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**
2 **OF THE STATE OF MONTANA**

3 **IN THE MATTER OF:**
4 **SOUTHERN MONTANA ELECTRIC**
5 **GENERATION AND TRANSMISSION**
6 **COOPERATIVE-HIGHWOOD**
7 **GENERATING STATION**
8 **AIR QUALITY PERMIT NO. 3423-00**

CASE NO. BER 2007-07 AQ

7 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON CLAIMS**
8 **OF PETITIONERS THAT THE DEPARTMENT OF ENVIRONMENTAL**
9 **QUALITY FAILED TO COMPLY WITH PERMITTING REQUIREMENTS**
10 **APPLICABLE TO PM2.5 AND**
11 **RULING ON REGULATION OF CO₂ FOR BACT PURPOSES**

11 **INTRODUCTION**

12 The decision by this Board outlined below is directed solely to procedural
13 issues and the process by which the Department of Environmental Quality made its
14 Best Available Control Technology (BACT) determination for the particulate
15 emissions from the Highwood Generating Station. In this decision the Board only
16 holds that the Department failed to follow the procedures necessary to do a proper
17 BACT analysis. Nothing in this opinion is intended to direct or require any
18 particular substantive decision or outcome when the Department re-does that BACT
19 determination, as this decision will require. Indeed, pre-judging the outcome of
20 what control technologies are appropriate and technologically and economically
21 feasible under a BACT determination is exactly what the Board's decision forbids.

22 No one disputes that the pollutants at issue in this decision, fine particulates
23 less than 2.5 microns in size, are very hazardous to health, causing a broad range of
24 serious health consequences. Since 1997, the Environmental Protection Agency has
25 listed them under Clean Air Act regulations as "regulated pollutants" and, as such,

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1 since that time agencies considering air quality permits have been required to make
2 a BACT determination of what control technologies should be required on any
3 facility producing fine particulate emissions.

4 A BACT determination is not a static process. What control technology is
5 determined by a BACT process must be specific to the time and to the type of
6 facility at issue and as technologies are developed or change and improve those new
7 and improved technologies must be taken into consideration.

8 Representatives of respondent Southern Montana Electric (SME) have
9 appeared before this Board numerous times to assure it that SME was pursuing the
10 best and most state of the art boiler and environmental technologies for this project
11 and the Board has no doubt of their sincerity and applauds it for dedication to this
12 goal. What this decision requires of SME and the Department is nothing more than
13 a demonstration that, in fact, all the best, most protective– and possibly innovative–
14 control technologies, or sequence of technologies, have been fully investigated, that
15 their technological, economic, and environmental feasibility has been carefully
16 analyzed and that the analysis and final determination has been fully and explicitly
17 described and explained so that the Board and the citizens of Montana can be
18 assured that they have indeed done their best and that this project can move forward
19 to provide needed electricity for Montana with that assurance.

20 Throughout these proceedings the Montana Environmental Information
21 Center (MEIC) and Citizens for Clean Energy (CCE), collectively the “Petitioners,”
22 appeared through Counsel, Ms. Abigail M. Dillen and Ms. Jenny K. Harbine. The
23 Montana Department of Environmental Quality (“Department”) appeared through
24 Mr. David Rusoff. Mr. Kenneth A. Reich and Mr. Michael McCarter (through April
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1 10, 2008) appeared on behalf of Southern Montana Electric Generation and
2 Transmission Cooperative, Inc. (“SME”).

3 On June 8, 2007, the “Petitioners” filed an Affidavit pursuant to Mont. Code
4 Ann. § 75-2-211(10). In the Affidavit, Petitioners sought review of the decision of
5 the Montana Department of Environmental Quality (Department) to issue an air
6 quality permit authorizing SME to construct the Highwood Generating Station
7 (HGS) near Great Falls, Montana.

8 In the Affidavit, Petitioners contend that the language in the requirement in
9 Mont. Admin. R. 17.8.819(2) and 42 U.S.C. § 7475(4) that each new
10 proposed facility is subject to best available control technology (BACT) for each
11 “pollutant subject to regulation” includes CO₂ and other greenhouse gases as
12 pollutants and that the Department was required to conduct a top-down BACT
13 analysis and set an emission limit that reflects best available control technology for
14 CO₂ and other greenhouse gases.

15 The Affidavit also states that the Department failed to ensure compliance
16 with the PM_{2.5} National Ambient Air Quality Standards (NAAQS) by using PM₁₀
17 as a surrogate as required by Mont. Admin. R 17.8.819(1). An air quality analysis
18 for less dangerous, coarser grain particles (PM₁₀) based on the assumption that all
19 PM₁₀ emitted from the plant would be PM_{2.5} does not comply with the NAAQS
20 for PM_{2.5} according to Petitioners. Using PM₁₀ as a surrogate for PM_{2.5} would
21 result in 24-hour concentrations of 33.5 micrograms per cubic meter just under the
22 PM_{2.5} NAAQS limit of 35 micrograms per cubic meter. This raises concern that
23 pollution from the plant would violate NAAQS for PM_{2.5}. In neglecting to
24 consider secondary PM_{2.5} the Department underestimated PM_{2.5} concentrations by
25 as much as 50%. This violates the requirements to meet applicable emission

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1 limitations, according to the Affidavit. This claim was not addressed at the
2 contested case hearing.

3 The Department also failed to subject PM2.5 to BACT analysis in violation
4 of Mont. Admin. R. 17.8.819(2) according to the Affidavit.

5 Additionally, the Affidavit states, that the Department’s established emission
6 rate for condensable PM10 is not the lowest when compared to other BACT
7 determined rates set across the country and the Department failed to offer any
8 reason why greater emissions reductions are not achievable at the HGS.

9 Specifically, the Affidavit states, “[a]bsent a reasoned justification for the higher
10 emissions limit, DEQ’s permit cannot satisfy BACT requirements for PM10 let
11 alone PM2.5.”

12 Finally, the Affidavit states that the Department failed to provide interested
13 parties with an opportunity to comment on air quality impacts, alternatives and
14 control technology requirements in violation of Montana Administrative Rule
15 17.8.826(2)(e). This claim was not pursued at the contested case hearing. MEIC
16 and CCE asked for relief in form of a stay of the issuance of the air quality permit
17 and the vacating and remanding of the air quality permit pending compliance with
18 all applicable laws and for other appropriate relief. There was no stay of the air
19 quality permit during the proceedings.

20 **PROCEDURAL BACKGROUND AND RULING ON CO₂**

21 On November 16, 2007, Petitioners filed a Motion to Exclude Expert
22 Testimony and on November 19, 2007, SME filed a Motion to Strike Portions of the
23 Affidavit of Petitioners with supporting memoranda. Subsequent answer and reply
24 briefs were filed concerning these motions. The Motion to Exclude Expert
25 Testimony was not ruled on by the Board on the basis that testimony concerning

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1 credentials and experience and legal argument on the issue would be evaluated by
2 the Board during the hearing on the merits. The Board's Hearing Examiner denied
3 the Motion to Strike Portions of the Affidavit in the "Third Order Setting Hearing
4 and Denying Motion to Strike Portions of Affidavit of Petitioners" dated
5 January 22, 2008.

6 On November 16, 2007, Petitioners filed a Motion for Summary Judgment
7 with a supporting memorandum of law and exhibits. On November 19, 2007, SME
8 filed a Motion for Summary Judgment of Permittee with a supporting memorandum
9 of law with exhibits. On November 20, 2007, the Department filed a Motion for
10 Summary Judgment and Supporting Brief with exhibits. Answer and reply briefs
11 were filed by the respective parties.

12 On December 21, 2007, the Board of Environmental Review (Board) heard
13 oral argument on the above referenced motions except for the Motion to Strike
14 Portions of the Affidavit and the Motion to Exclude Expert testimony.

15 On January 11, 2008, the Board heard supplemental argument on the portion
16 of the summary judgment motions pertaining to the question of whether the
17 Department complied with federal and state requirements in not deeming CO₂ as a
18 regulated pollutant subject to regulation in the BACT analyses conducted in issuing
19 Permit No. 3423-00 to SME. The parties, the Department, SME and the Appellant
20 filed supplemental written authorities on the question of whether CO₂ is a pollutant
21 subject to regulation. On January 11, 2008, the Board decided to rule on the
22 Motions for Summary Judgment regarding the requirement to consider CO₂ in a
23 BACT analysis.

24 The Board HEREBY ORDERS that there is no genuine issue of material fact
25 and the Department's and SME's Motions for Summary Judgment as they pertain to

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1 regulation of CO₂ as regulated pollutant are granted as a matter of law. The basis for
2 this decision is that CO₂ does not fall into any of the 40 C.F.R.
3 § 52.21(b)(50 categories. EPA has not promulgated a national ambient air quality
4 standard for CO₂, has not listed CO₂ as a pollutant subject to regulation in the Clean
5 Air Act and has not yet established any other regulations for CO₂. The pollutant
6 CO₂ is not a pollutant that is regulated as of yet under the New Source Review
7 (NSR) Prevention of Significant Deterioration (PSD) regulatory program for
8 authorizing construction permits to major air sources in attainment areas. The Board
9 passed a resolution requesting an Affidavit from SME indicating SME's control
10 technology plans for CO₂. Mr. Tim Gregori submitted an "Affidavit of Tim Gregori
11 Regarding Carbon Capture and Sequestration" dated January 22, 2008. This
12 Affidavit is attached.

13 The Board decided that the portions in the summary judgment motions
14 pertaining to the alleged failure of the Department to conduct a proper BACT
15 analysis of PM₁₀ and PM_{2.5} emissions for the setting of proper emissions limits
16 when permitting the SME plant could not be resolved on summary judgment and
17 determined to hear testimony and take evidence on these questions on the merits in a
18 contested case hearing.

19 On January 22, 2008, and January 23, 2008, the Board heard testimony and
20 received evidence on the PM_{2.5} and PM₁₀ BACT analyses questions. The Board
21 held two follow-up hearings to the fact-finding hearings on February 8, 2008, and
22 April 21, 2008, giving the parties more time to supply legal briefing and provide
23 legal argument concerning their contentions. The parties' submitted written closing
24 arguments prior to the February 11, 2008, hearing. On February 25, 2008, the
25 Board issued a Request for Briefing to the parties asking for briefing on various
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1 legal questions and references to support in the factual record for respective
2 assertions of the parties with respect to issues concerning the Board. Prior to the
3 April 21, 2008, hearing the parties each filed written responses to the Request for
4 Briefing as well as replies to the written closing arguments filed prior to February
5 11, 2008. On April 21, 2008, the Board heard oral argument from the parties and
6 conducted deliberations on the issues of correct PM2.5 and PM10 analyses in
7 issuing Permit No. 3182-00 to SME. The second portion of this Order addresses the
8 PM2.5 and PM10 analysis of the Department.

9 **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED**
10 **ORDER ON CLAIMS OF APPELLANTS THAT THE DEPARTMENT OF**
11 **ENVIRONMENTAL QUALITY FAILED TO COMPLY WITH**
12 **PERMITTING REQUIREMENTS APPLICABLE TO PM2.5 AND PM10**

13 In the contested case hearing on January 22 and 23, 2008, the Petitioners
14 called Mr. Hal Taylor and Mr. Joseph Lierow. The Department called
15 Mr. Eric Merchant. SME called Mr. Gary McCutchen. All of these witnesses
16 provided testimony under oath.

17 The Department and SME submitted joint exhibits DEQ/SME Exhibits 1-4,
18 6, 7, 8, 10-18 which were admitted into evidence. Petitioners submitted Exhibits A
19 through J, L, N through S and U, which were admitted into evidence.

20 Oral argument requested by the parties to supplement their written briefing
21 on questions of law or citations to the record was held on February 11, 2008, and
22 April 21, 2008.

23 **AGREED FACTS**

24 1. On November 30, 2005, the Department received an application
25 from SME for an air quality permit for the construction and operation of a 250-net
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1 megawatt, coal-fired, circulating fluidized bed (CFB) boiler, electric power
2 generating plant, known as the Highwood Generating Station (HGS), to be located
3 southeast of Great Falls, Montana.

4 2. On March 30, 2006, the Department issued, for public comment, a
5 Preliminary Determination on the air quality permit application.

6 3. On June 22, 2006, the Department issued, for public comment, a
7 Supplemental Preliminary Determination on SME's permit application.

8 4. On May 11, 2007, the Department issued the Department's Decision
9 on the application, which decision was to issue the permit.

10 5. On May 29, 2007, the Petitioners filed a request for a contested case
11 hearing before the Board of Environmental Review ("Board"), concerning the
12 Department's Decision.

13 6. On May 30, 2007, the Department's Decision became final and an air
14 permit was issued.

15 7. On June 8, 2007, the Petitioners filed an affidavit stating their claims
16 regarding the Department's Decision.

17 8. Petitioners' affidavit alleged that the Department violated the Clean
18 Air Act and the Clean Air Act of Montana in failing to require compliance with Best
19 Available Control Technology "BACT" requirements for very fine particulate matter
20 ("PM2.5").

21 9. EPA promulgated primary health-based NAAQS for PM2.5, effective
22 September 16, 1997. Effective December 18, 2006, EPA revised the 24-hour PM2.5
23 standard from 65 micrograms per cubic meter ("ug/m³") to 35 ug/m³.

24 10. The HGS permit contains no PM2.5-specific limits.

25 11. The area where the HGS would be located is designated as
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1 "unclassifiable/attainment" in regard to the National Ambient Air Quality Standards
2 (NAAQS) for particulate matter. The formal designation is Prevention of
3 Significant Deterioration of Air Quality (PSD) Class II.

4 12. PM2.5 is particulate matter with a diameter of 2.5 micrometers
5 (microns) or smaller.

6 13. PM10 is particulate matter with a diameter of 10 microns or smaller.

7 14. PM10 includes PM2.5.

8 15. Particulate matter consists of filterable particulate and condensable
9 particulate.

10 16. Filterable particulate from a boiler is material that is in a particulate
11 form within the boiler stack and that can be collected on the filter of a filtering train.

12 17. Condensable particulate from a boiler includes condensable organic
13 compounds and minerals that pass through filters in gaseous or vapor form. These
14 gases or vapors condense into liquid and/or solid particles when they exit the stack
15 and enter the atmosphere.

16 18. PM2.5 consists of both filterable and condensable particulate.

17 19. Condensable particulate is comprised mainly of PM2.5.

18 20. EPA promulgated NAAQS for PM2.5, effective September 16, 1997,
19 and later revised the PM2.5 NAAQS, effective December 18, 2006.

20 21. EPA has never promulgated regulations governing implementation of
21 the New Source Review program, including the PSD requirements, with respect to
22 PM2.5.

23 22. On November 1, 2005, EPA proposed regulations to govern
24 development of SIPs in non-attainment areas for PM2.5 and to implement the New
25 Source Review program with respect to PM2.5.

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1 BACT and instead determined that maintaining compliance with a limit of 0.012
2 lb/MmBtu constitutes BACT in this case.

3 4. Sulfuric acid mist, acid gases (hydrogen fluoride (HF) and hydrogen
4 chloride (HCL) and trace metals, including lead, were grouped together with
5 condensable PM10 in the BACT analysis because these pollutants are a major
6 component of condensable PM10. The PM10 emission rate is “calculated based
7 upon its components (listed above in this paragraph) plus BACT determined
8 filterable PM emission limit.”

9 5. The total condensables emission rates (for the components listed in
10 paragraph 4) were added to the emission rate for filterable PM to yield the PM10
11 limit of 0.026 lb/MmBtu. SME proposed that its CFB boiler have a dry Fluid Gas
12 Desulphurization (FGD) followed by a FFB to maintain compliance with a PM10
13 emission limit of 0.026 lb/MMBtu. The Department determined that the emission
14 control strategy of the applicant and the proposed emission limit of the applicant
15 constitute BACT. DEQ/SME Exhibit 7, p. 43.

16 6. The Department intended to follow a NSR top-down BACT analysis
17 approach to its PM10 analysis. Merchant, Vol. II (uncondensed version) p. 202,
18 lines 9-12. Merchant, Vol. III, p. 320, lines 15-25, p. 321, lines 1-3. The applicant,
19 SME, intended to follow a 5-step approach, Lierow, Vol. I, P. 161, lines 11, 12.

20 7. At the hearing on January 22 and 23, 2008, the Appellant called
21 Mr. Hal Taylor and Mr. Joseph Lierow. The Department called Mr. Eric Merchant.
22 SME called Mr. McCutchen. The following describes the experience and expertise
23 of the witnesses as follows:

24 a) Mr. Hal Taylor: Mr. Taylor is an environmental consultant
25 designing emission control technologies for various sources such as boilers,

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1 metallurgical and mining sources. His clients are the industrial sector including the
2 utility sector. Taylor, Vol. I, p. 38, lines 12-23. Mr. Taylor has a degree in
3 engineering science with a nuclear option. Taylor, Vol. I, p. 39, lines 2-3.
4 Mr. Taylor aided in the installations of power plant emission control systems
5 primarily tied to the Riley Stoker Boiler at coal fired power plants. Taylor, Vol. I,
6 pp. 42-45. Mr. Taylor has performed approximately 100 BACT analyses with a
7 portion focusing on control of particulate matter. Taylor, Vol. I., p. 45, line 23.
8 Mr. Taylor was accepted as an expert witness on control technologies that could be
9 considered in a BACT analysis for fine particulate matter including wet ESP's.
10 Taylor, Vol. I, pages 59 and 60.

11 b) Mr. Gary McCutchen: Mr. McCutchen is a licensed engineer in
12 North Carolina, South Carolina, Florida and Iowa. McCutchen, Vol. III, p. 375,
13 lines 19-25. Mr. McCutchen has a Bachelor of Science degree in chemical
14 engineering from Virginia Tech, and a Master of Science degree in chemical
15 engineering from the University of Kentucky. McCutchen, Vol. III, p. 376, lines 5-
16 8. Mr. McCutchen worked on the five New Source Performance Standards and
17 priority lists for setting air pollution standards. McCutchen, Vol. III, p. 377, lines 1-
18 5.

19 Mr. McCutchen was the Chief of Engineering for the State of Colorado
20 responsible for issuing all air pollution permits. McCutchen, Vol. III, p. 377, lines
21 7-10. Mr. McCutchen wrote and edited the New Source Review Workshop Manual
22 which includes the description of BACT processes and also chaired the BACT Task
23 Force which developed the top-down BACT approach. McCutchen, Vol. III, p. 378,
24 lines 10-19. Mr. McCutchen retired from the EPA in 1992 and is currently an Air
25 Pollution Consultant. McCutchen, Vol. III, p. 379, lines 1-10. SME requested that
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1 Mr. McCutchen be qualified as a witness in the areas of BACT analysis, EPA
2 policies with respect to BACT analysis; EPA policies with respect to New Source
3 Review Program, including the PM2.5 program test methods and generally areas of
4 NSR permitting and implementation. McCutchen, Vol. III, p. 385, lines 3-9. The
5 Board qualified Mr. McCutchen as an expert in these areas. McCutchen, Vol. III, p.
6 387, lines 9-10.

7 c) Mr. Joseph Lierow: Mr. Lierow was called by Petitioners to
8 testify as a fact witness regarding the BACT analysis he performed for SME.
9 Lierow, Vol. I, p. 154, lines 24-25. Mr. Lierow is employed by Bison Engineering
10 who was hired to develop SME's permit application for the Highwood Generating
11 Station. Lierow, Vol. I, p. 155, lines 2-8. Mr. Lierow was responsible for
12 performing the PM10 analysis and proposed emission limits for PM10. Lierow,
13 Vol. I, p. 155, lines 9-15.

14 d) Mr. Eric Merchant: Mr. Merchant has a Bachelor of Science
15 degree in biology with a minor in environmental studies. He also has a master's
16 degree in environmental and occupational health. Merchant Vol. II, p. 197, lines 10-
17 13. Mr. Merchant has had many training courses in PSD permitting, NSR and major
18 NSR permitting. Mr. Merchant has also had training in BACT determination and
19 analysis and effective permit writing. Merchant Vol. II, p. 197, lines 17-23.
20 Mr. Merchant is an air quality specialist with the Montana Department of
21 Environmental Quality having been with the Department for over nine years.
22 Merchant Vol. II, p. 196, lines 2-7. Mr. Merchant spent over nine years in the Air
23 Quality Permitting Section working with portable-type sources and other smaller
24 minor sources and has spent several years working in permitting major sources.
25 Merchant Vol. II, p. 196, lines 10-24.

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1 8. For the following reasons in the paragraphs below, the Board finds
2 that the BACT analysis of PM/PM10 contained in the Permit Analysis and based
3 upon the testimony of Mr. Merchant, Mr. Lierow, Mr. McCutchen and Mr. Taylor
4 was deficient. The Board makes findings of fact about these deficiencies for the
5 purpose of providing guidance as to what deficiencies the Department should avoid
6 in conducting its PM2.5 analysis.

7 9. In the Permit Analysis, DEQ/SME Exhibit 7, the following constitute
8 deficiencies in the BACT process:

9 (a) There was no listing of all available control technologies for
10 filterable PM10 or PM.

11 (b) There is no identification of proposed filterable PM10 control
12 technologies and their respective control efficiencies as opposed to control
13 technologies for PM. SME and the Department identified some control technologies
14 and ranked only some of their respective control efficiencies for total filterable PM
15 as opposed to filterable PM10.

16 (c) As far as filterable PM emissions, linked control options such
17 as a wet scrubber with wet Electrostatic Precipitator (ESP) are listed in the Permit
18 Analysis, but there is no detailed analysis in the text as to technical feasibility or
19 infeasibility of any of these linked technologies nor is there any further ranking by
20 control efficiency or any further economic analysis of any linked technologies
21 including the ones listed. There is no analysis of different types and relative
22 efficiencies of the variety of ESP systems or filtration systems except for Teflon and
23 fiberglass bags. The permit application states that only the control device is
24 described, not each control option. DEQ/SME Exhibit 4, p. 5-21. There is no
25 discussion of LAER emission limits for filterable PM or filterable PM10 even

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1 though LAER emission limits in the NSR Manual are presumptively top control
2 technologies that should be considered in setting BACT limits.

3 (d) There is no description of the cost effectiveness of the
4 technology options listed in the table on p. 25 of the Permit Analysis. For example,
5 it is unknown how wet ESP as a control technology for filterable PM either alone or
6 in combination with a wet scrubber would price out. Taylor, Vol I, p. 124, l. 17,
7 p. 126, l. 6. Generally the text describing the technologies does not track the
8 technologies listed. The technical feasibility analysis, the ranking, the
9 environmental impacts and the economic impacts are skeletal and do not
10 demonstrate systematically why technologies should or should not be excluded.
11 What is “commonly used” on boilers is not a sufficient explanation of why a
12 technology is feasible or not feasible. DEQ/SME Exhibit 4, p. 5-20. There were no
13 control efficiencies in tons per year produced ranked or discussed. This renders the
14 economic analysis in cost per tons per year impossible.

15 (e) For condensable particulate the same findings apply, namely, of
16 a lack of thorough listing of control technologies and a justification of why the
17 technologies should or should not be excluded. SME provided no analysis in its
18 Permit Application of energy, environmental and economic impacts. DEQ/SME
19 Exhibit 4, p. 5-46 through 5-51. In the Permit Analysis, the Department, simply
20 states that “[t]he environmental, economic, and energy impacts associated with the
21 available H₂S₀₄, acid gas, trace metals, and condensable PM₁₀ options are the same
22 as the impacts for those control options addressed in the BACT analyses for SO₂ and
23 filterable PM emissions.” There is no explanation of why the impacts of control
24 options for SO₂ and filterable PM emissions are applicable to an analysis of impacts
25 for condensable PM₁₀ and what these impacts are. DEQ/SME Exhibit 7, p. 38-42.

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1 (f) The record does not show that the top control technology that
2 could achieve LAER was identified for PM10 condensables or that there was an
3 attempt to find out what technologies were being used to achieve the lower permit
4 limits in other facilities. Vol. I, p. 161, lines 13-19. Mr. Lierow testified that “he
5 did not look into all the [permit limits] listed and try to dig in and find out why there
6 were lower than the proposed facility.” Vol. I., p. 164, line 19 through p. 165, l. 2.

7 (g) In general the specific steps of the NSR manual for a top-down
8 BACT analysis, DEQ/SME Exhibit 1, were not followed nor an equivalent
9 evaluation system such that the choice of control technology and emission
10 limitations can be shown definitively to constitute the maximum degree of reduction
11 achievable for PM10.

12 10. From MEIC Exhibit E, the Department’s view of top-down BACT is
13 the Department evaluates the energy, environmental, economic, and other costs
14 associated with each alternative technology and then specifies an emissions
15 limitation for the source that is considered the maximum degree of reduction
16 achievable for each regulated pollutant. Mr. Merchant stated, “[t]he top-down
17 procedure is a method that we generally think is a good method to use.” Merchant,
18 Vol. I, p. 277, lines 7-8. The Department’s stated approach does not match what it
19 actually implemented by way of a BACT analysis.

20 In contrast, the Department stated it “has the discretion to set BACT limits at
21 levels that do not necessarily reflect the highest possible control efficiencies but,
22 rather will allow permittees to achieve compliance on a consistent basis.” More
23 specifically, Mr. Merchant described the BACT process that the Department uses in
24 various parts of his testimony. He states, “BACT isn’t –you don’t start with a
25 lowest limit that is out there and being achieved, which we discussed as

1 LAER...BACT is the process.” Vol. III, p. 267, lines 1-8.

2 Mr. Merchant went on to admit that when he reviewed the draft application
3 he was concerned, as to acid gases, and limits that the limit proposed by the
4 applicant was not comparable to lower emissions set around the country. Vol. III, p.
5 268, lines 5, 17. Mr. Merchant later confirmed in response to a question whether
6 LAER is the first step in the BACT process that the first step in the process is not
7 LAER but it is to evaluate available controls. Vol III. p. 303, lines 9-10.

8 Mr. Merchant goes on to state that in Step I, the analysis of what is the best that
9 being achieved out there, “that’s not typically how it’s practiced. We look at
10 available control technologies for that project.” Vol III. p. 305, lines 15-20. As far
11 as development of the control efficiencies for condensable emission rates,
12 Mr. Merchant testified that for the components of a BACT analysis such as ranking
13 as opposed to other technologies, justifying control efficiencies or considering other
14 technologies, he relies on what is in the application. Merchant, Vol. III, p. 270,
15 lines 1-5.

16 11. In contrast, Mr. McCutcheon testified that “the way the top-down
17 works is by obtaining all of the information the reviewer needs to know “by making
18 the source begin with the top ranked level of control—which was EPA’s idea
19 behind the top-down approach, in the first place—what we’re doing is forcing the
20 source to provide all of the information that the agency reviewer—in this case
21 Mr. Merchant—needs to know whether he or she agrees or disagrees with rejecting
22 that level of control.” McCutchen, Vol. III. p. 414, lines 1-5.

23 12. Mr. McCutchen testified that his consulting group would have
24 considered a fabric filter with a wet ESP had they been asked to do so by the State.
25 Vol. III, p. 415, lines 2-4. Mr. McCutcheon also testified that when you do a BACT

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1 analysis in Step 1 of the BACT process, "...you're pulling in all of the different
2 possible control technologies, you look at everything out there that's available,
3 including technologies that have been uses to meet LAER limits. You're not limited
4 to the United States you start with...the EPA RACT/BACT/LAER Clearinghouse
5 (RBLC) and you proceed from there with all of the other technologies that you're
6 aware of and you just start listing them. Vol. III. p. 407, lines 10-20.

7 13. Mr. McCutcheon also testified that "available" means it's both
8 "commercially available" and it has been proven out in a full scale operation.
9 McCutchen, Vol. III. p. 407, lines 24-25; p. 408, lines 1-4. When asked about
10 whether he advocates the use of the top-down BACT process, Mr. McCutchen
11 stated, "yes". McCutchen Vol. III. p. 483, l.11. He testified that the reason the EPA
12 adopted the top-down approach was that "it provided much more information to the
13 regulator about the best control technologies. When we were doing what was called
14 the bottom up approach, many times the applicant never got up to the best
15 technologies so the regulator was stuck with either accepting where the applicant
16 had stopped or having to gather all the information themselves which was a terrible
17 resource burden." McCutchen, Vol. III, pages 483-484.

18 14. In this case, as demonstrated in the findings herein, the Board finds
19 that the Department stopped short of where it was supposed to be in analysis of all
20 of the control technologies in step 1 of the top-down BACT analysis. The
21 eventuality that Mr. McCutchen described came to pass, namely, that the
22 Department conducted a sort of bottom-up approach, starting from what was
23 economically feasible, looking what was in common use and deriving limits as an
24 average of a some of the other permitted sources and limiting its analysis to the
25 technologies and emission limits the applicant submitted. These were in turn based
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1 upon what vendors of the boiler could guarantee. With this approach the
2 Department faced a resource burden in gathering the information itself and didn't
3 gather the BACT information and conduct an analysis based upon its independent
4 analysis.

5 15. For instance, the Department did not consider a wet ESP following a
6 fabric filter. Merchant, Vol. III, p. 272, l. 12. The Department determined that a
7 "redundant control" such as this arrangement would not be cost effective, but did
8 not evaluate or consider the cost or cost effectiveness of this (for example, in terms
9 of numbers of particulates reduced or health impacts) prior to rejecting it.
10 Merchant, Vol. III, p. 273, l. 12. The Department never considered membrane bags
11 and the additional efficiency that they might add if they were used. Merchant, Vol.
12 III. p. 275, l. 3. Mr. Merchant did not address membrane bags because they were
13 not addressed in the application and he wasn't aware of this technology being used.
14 Vol. III, p. 293, lines 21-25; p. 294, p. 1. Mr. McCutchen testified that they did not
15 analyze pairing fabric filters with wet ESP's as BACT control devices because they
16 knew it would not be cost effective and it would be "wasted work." McCutchen,
17 Vol. III, p. 415, l. 1. This contradicts his other testimony that the NSR top-down
18 analysis is "highly encouraged" and best to achieve maximum pollutant reduction.
19 McCutchen, Vol. III, p. 489, l. 22 and further, that sources should be forced to
20 provide information to agencies so that the agency knows all it needs to know to
21 reject levels of control. McCutchen, Vol. III, p. 414, lines 1-5.

22 16. The EPA in a similar permit for a CFB Boiler, the Deseret Permit,
23 DEQ/SME Exhibit 11, identified various linked technologies including alkali
24 injection plus dry SO₂ scrubbing plus fabric filter baghouse plus wet electrostatic
25 precipitation as potential control technologies for condensable emissions.

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1 DEQ/SME Exhibit 12, p. 69. Wet ESP was identified as effective to capture 86% of
2 the condensable particulate that has escaped control by the upstream scrubbing and
3 baghouse devices.

4 17. Thus, it was demonstrated that the addition of a wet ESP could
5 increase by 86% the existing control efficiencies that SME and DEQ estimated for
6 acid gases. Mr. Taylor's un rebutted testimony was that it is known wet ESP's were
7 developed primarily to handle acid mists. Vol. I, p. 68, lines 6-8.

8 18. The explanation of the Department that it didn't have to analyze
9 LAER, see Merchant, Vol. III, p. 267, lines 1-8, because this is not a non-attainment
10 area, see Petitioners' Exhibit E, is misplaced.

11 19. In the permit application submitted, there is no justification showing
12 how technologies were ranked as oppose to other technologies or the justification
13 for control efficiencies. The application included certain control technologies.
14 Mr. Merchant stated that the Department relied on what was in the application and
15 didn't go beyond it in addressing doing its BACT analysis and evaluating
16 technologies. Merchant, Vol. III, p. 270, lines 1-5, lines 18-22. In the Permit
17 Analysis, the control technologies and efficiencies are what SME provided in its
18 application. Merchant, Vol. III, p. 273, l. 17.

19 20. As to the controls used, Mr. Merchant stated that wet ESP's are one of
20 the top two controls for controlling particulate in general. As to fabric filters, he
21 stated there can be a problem where the gases that are condensables pass through the
22 fabric filters and are not controlled. Merchant, Vol. III, p. 271, lines 1-13. Despite
23 this, the Department did not analyze wet ESP's as a potential top control technology
24 either alone or in combination with fabric filtration. DEQ/SME Exhibit 7. There is
25 no economic or feasibility discussion in the Permit Analysis of wet ESP's in the

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1 analysis aside from listing a wet ESP as potential control technology. DEQ/SME
2 Exhibit 7.

3 21. Mr. Taylor’s unrebutted testimony is that “in the hierarchy of emission
4 control devices, the wet ESP is the most efficient “emission control device that you
5 can put on a process.” Taylor, Vol. I, p. 67, lines 23-25. Mr. Taylor also testified
6 without rebuttal from SME or DEQ that the membrane bag is the most efficient bag
7 at controlling small fine particles. Taylor, Vol. I, p. 75, l. 8. Mr. Taylor’s testimony
8 is that there is no evidence that membrane bags are unreliable. Taylor, Vol. I,
9 p. 108, lines, 17, 18. Mr. McCutcheon testified that he was aware of membrane bag
10 technology and was deferring to Mr. Taylor’s expertise on it. McCutcheon, Vol. III,
11 p. 337, lines 1-2.

12 22. As far as the ability of wet electrostatic precipitators (“ESP’s”) to
13 achieve up to 99% control of particulate in the PM2.5 size, Mr. Merchant testified
14 that he has not seen this information. Merchant, Vol. III, p. 338, l. 15, 16.

15 23. The Department and SME did not consider using membrane bags to
16 control filterable particulate from the HGS boiler. Merchant, Vol. III, p. 338, l. 21.

17 24. SME did not provide as part of the permit application the name of the
18 vendor for the specific technology that SME proposed as a part of its BACT
19 analysis. Merchant, Vol. III, p. 339, lines 20-22.

20 25. The emissions limits proposed by SME as BACT and accepted by
21 DEQ as BACT were set by working backwards from limits that SME’s vendor was
22 willing to guarantee. Lierow, Vol. 1, p. 158, l. 22. See also Lierow, Vol I.,
23 pp. 160, 161, 163, 167. This method improperly prejudices the outcome of what is
24 the BACT. What is achievable is not only what a vendor can guarantee.

25 26. The emission limits were also set by using an average of permit limits

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1 from other permit analyses from the RBLC instead of a BACT analysis of the
2 technologies that could produce the limits. This method is of concern. Taylor, Vol.
3 I, p. 116, lines 1-4. Lierow, Vol. I. p. 160, l. 17. Mr. McCutchen stated you don't
4 just have to rely on vendor guarantees. If a vendor can't guarantee a rate, a
5 [reviewing authority] could evaluate test data showing some other facility with that
6 equipment and similar gas stream characteristics that have met the emission limit.
7 McCutchen, Vol. III, p. 510, lines 12-16.

8 27. As to linked technology, states have the ability to put extra emphasis
9 on concerns of public health or on the beauty of the area and use higher cost
10 effectiveness numbers in an area of the state. McCutchen Vol. III, p. 525, lines 16-
11 25.

12 28. For the following reasons, the Board finds that a PM2.5 BACT
13 analysis is required and achievable at least to the point in the BACT process of (1)
14 determining that either a technology is technically infeasible or economically
15 unfeasible and (2) determining whether emission control efficiencies can be
16 obtained from equipment manufacturers and if not (3) whether there are design,
17 alternative equipment, work practices or operational standards which can reduce
18 emissions of the PM2.5 to the maximum extent possible. DEQ/SME Exhibit 1,
19 p. B states that (from the NSR manual) "even if a review authority determines that
20 there is no economically reasonable or feasible way to accurately measure the
21 emissions, and hence to impose an enforceable emissions standard, it may require
22 the source to use design, alternative equipment, work practice, or operational
23 standards to reduce emissions of the pollutant to the maximum extent."

24 29. As background concerning PM2.5, the Board the makes the following
25 findings. Eric Merchant agrees with the statement in Petitioners' statement of
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1 contentions in the prehearing filed by the parties on January 22, 2008 (“statement”)
2 and it is therefore a finding of the Board that, “[r]educing emissions of PM2.5 is a
3 major public health concern. According to EPA, decreasing PM2.5 in the ambient
4 air by only 0.5 ug/m³ can prevent as many as 25-50 premature deaths each year.”
5 70 Fed. Reg. at 66,006. Merchant, Vol. III, p. 328, l. 5; l. 13.

6 30. Eric Merchant agrees with the statement and it is a finding that,
7 “[m]icroscopic particles in the PM2.5 size range are small enough to lodge deep into
8 the lungs. Even short-term exposure to PM2.5 is known to cause serious respiratory
9 illnesses, including asthma, cardiovascular illness, including heart attacks, as well as
10 premature death. Those particularly sensitive to PM2.5 exposure include children,
11 older adults, and people with heart and lung disease.” Merchant, Vol. III, p. 328, l.
12 22; p. 329, l. 2.

13 31. Eric Merchant agrees with the statement and it is a finding that,
14 “PM2.5 is produced chiefly by combustion processes and by atmospheric reactions
15 of various gaseous pollutants, and they can remain suspended in the atmosphere for
16 days to weeks and be transported many thousands of kilometers.” Merchant, Vol.
17 III, p. 329 l. 11.

18 32. As to whether HGS will be a major source of PM2.5 emissions,
19 Mr. McCutchen testified that there is an uncontrolled emission of 140 tons per year
20 of PM2.5 particulate. McCutchen, Vol. III, p. 417, lines 7-11, 13-15. This
21 qualifies the CFB Boiler at HGS as a major stationery source of PM2.5 emissions.
22 Mont. Admin. R 17.8.801(22).

23 33. Mr. Merchant agrees with the statement, “[t]he CFB boiler, alone, is
24 anticipated to emit 299 tons of PM10 each year. Given that SME is anticipated to
25 achieve over 99% control efficiency for filterable particulate in the larger PM10

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1 size range, and 80 to 90% control efficiency for condensable particulate in the
2 larger PM10 size range, the vast majority of the HGS' uncontrolled PM emissions
3 will be in the smaller PM2.5 size range.” Merchant, Vol. III, p. 334, l. 4.

4 34. Mr. Merchant agrees with the statement and it is a finding that, “EPA
5 acknowledges that “[t]he obligation to implement PSD was triggered upon the
6 effective date of the NAAQS” for PM2.5. Rule to Implement the Fine Particle
7 National Ambient Air Quality Standards, Notice of Proposed Rulemaking, 70 Fed.
8 Reg. 65,984, 66,043 (Nov. 1, 2005).” Merchant, Vol. III, p. 334, l. 24.

9 35. Mr. Merchant agrees with the statement and it is a finding that,
10 “[t]he primary health-based PM2.5 NAAQS became effective over ten years
11 ago, and the 24-hour NAAQS have since been revised to be nearly twice as
12 stringent in response to extensive data regarding the health impacts of PM2.5.”
13 Merchant, Vol. III, p. 335, l. 7. Effective, December 18, 2006, EPA revised
14 the 24-hour PM2.5 standard from 65 micrograms per cubic meter to 35
15 micrograms/cubic meter. (Agreed Facts)

16 36. While NAAQS have been in effect for PM2.5 for over a decade,
17 Mr. Merchant stated that he did not directly require a PM2.5 BACT analysis of the
18 applicant, Merchant, Vol. III, p. 335, lines 12-23, and instead required a BACT
19 analysis of PM2.5 through a surrogate analysis consisting of a BACT analysis of
20 PM10. Merchant, Vol. III., p. 330, lines 4 and 5.

21 37. Technologies for control of PM2.5 emissions, both filterable and
22 condensable are available and in use. Mr. Merchant testified that he was not aware
23 of membrane bag technology *through any BACT analysis* but that the fabric filter
24 as analyzed through the Department process is also capable of controlling filterable
25 particulate *down to the submicron size including PM2.5*. Mr. Merchant did not

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1 know of the relative efficiency of membrane bags versus Teflon bags at the
2 submicron size but stated that he had no reason to disagree with Mr. Taylor on this.
3 Merchant, Vol. III, pp. 336, 337, lines 12-25, 1-7.

4 38. In 1997, when the EPA first promulgated the NAAQS for PM2.5, the
5 agency expressed concern that insufficient information was available on how
6 PM2.5 is distributed geographically, how PM2.5 should be modeled, and how
7 PM2.5 emissions should be measured. Citing these concerns, John Seitz, then
8 Director of EPA's Office of Air Quality Planning and Standards (OAQPS), issued a
9 memo stating that, until these issues were satisfactorily resolved, states could rely
10 on PM10 as a surrogate for PM2.5 in PSD reviews including BACT analyses.
11 DEQ and SME Exhibit 2.

12 39. This so-called "Seitz memo" was never adopted through notice-and-
13 comment federal rule-making. DEQ and SME Exhibit 2.

14 40. The Seitz memo is not legally binding on the Montana DEQ or any
15 other state agency. As the memo itself expressly provides, its "statements do not
16 bind State and local governments and the public as a matter of law." Memorandum
17 from John S. Seitz, Director, Office of Air Quality Planning and Standards, to
18 Regional Air Directors, Interim Implementation of New Source Review for PM2.5
19 (Oct. 23, 1997). DEQ and SME Exhibit 2.

20 41. Mr. Merchant agrees with the statement and it is a finding that, "[t]he
21 Seitz memo's guidance to rely on BACT analysis for PM10 does not ensure
22 maximum achievable reductions in emissions of PM2.5." Merchant, Vol. III, p.
23 344, l. 1.

24 42. Mr. Merchant agrees with the statement and it is a finding that, "[a]
25 control technology that is deemed to be BACT for PM10 may not be BACT for

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1 PM2.5. Merchant, Vol. III, p. 343, l. 20. See also, Taylor, Vol. I, p. 95, lines 6-10;
2 p. 123, lines 9-24.

3 43. Mr. Merchant testified that he doesn't have the information to answer
4 whether some particulate matter control such as membrane bags and wet ESP are
5 better than others at capturing smaller particles. He also stated that without a spec
6 sheet from the manufacturer of the control technology, (Alstom) it would be hard to
7 know if the manufacturer could provide information about what the uncontrolled
8 emissions were. Merchant, Vol. III, pp. 345, l. 7, 346, lines 14-17.

9 44. Mr. Merchant generally agrees with the statement and it is finding that
10 "PM2.5 is more hazardous than PM10. He stated that there are toxic characteristics
11 of particles in the PM10 range. Merchant, Vol. III, 348, l. 4.

12 45. Mr. Merchant agrees that with the statement and it is a finding that,
13 "[i]n November, 2005, EPA announced that the concerns raised in the Seitz memo
14 had largely been resolved and on this basis, the agency proposed new
15 implementation rules with respect to PM2.5." Mr. Merchant agreed that the 70 Fed.
16 Reg. 66043 dated November 1, 2005 contains the language written by the EPA,
17 "[t]he 1997 guidance stated that sources would be allowed to use implementation of
18 a PM10 program as a surrogate for meeting PM2.5 NSR requirements until certain
19 difficulties were resolved, primarily the lack of tools to calculate the emissions of
20 PM2.5 and related precursors, the lack of adequate modeling techniques to project
21 ambient impacts, and the lack of PM2.5 monitoring sites. As discussed in this
22 preamble, *those difficulties have been resolved in most respects*, and where they
23 have not been, the proposal contains appropriate provisions to account for it."
24 Merchant, Vol. III, p. 349 lines 9, 10; p. 351, l. 3.

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1 46. Mr. Merchant agrees with the statement that the EPA acknowledged
2 in November 2005, no new regulations are required to conduct BACT analyses for
3 PM2.5 (despite the fact that no final PM2.5 NSR implementation rule for attainment
4 areas has been promulgated yet). This is reflected in the language in 70 Fed. Reg.
5 66,042 dated November 1, 2005, “[t]he requirements applicable to NSR [New
6 source Review] SIPs for and the obligation to subject sources to NSR permitting for
7 PM2.5 direct emissions are codified in the existing federal regulations and can be
8 implemented without specific regulatory changes.” Merchant, Vol. III, p. 351, l.
9 18.

10 47. With respect to measuring PM2.5, the difficulties cited by SME and
11 the Department relate to a lack of emission factors and testing methods for
12 predicting amount of emissions impacted by control technologies, specifically the
13 emission rate without controls, with control and the difference, the control
14 efficiency, which is needed to rank the control devices from the most stringent
15 controls to the least stringent. McCutcheon, Vol. III, p. 391, lines 21-23.

16 48. The Department and SME have argued that it is impossible to
17 complete a PM2.5 BACT analysis for the HGS because the emission factors or tools
18 to calculate emissions of PM2.5 don’t exist and the surrogate PM10 analysis may be
19 used in place of PM2.5 analysis because there is an EPA policy that allows use of
20 the surrogate analysis, referring to the Seitz memorandum of 1997.

21 49. In this case, the record consisting of the findings of the Board, shows
22 that setting BACT emission limits for PM2.5 emissions for the HGS CFB boiler is
23 feasible using existing test methods, by using emissions estimates from boiler
24 manufacturers and by requiring SME pursuant to DEQ/SME Exhibit 1, NSR

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1 Manual, p. B.2., to use design alternative equipment, work practices or operational
2 standards to reduce emissions of PM2.5 to the maximum extent.

3 50. An “emission factor” consists of a large amount of data to predict
4 emissions from a particular control technology of a boiler and is obtained from the
5 manufacturer. The ideal emission factor is one that is based on the manufacturing
6 unit being analyzed whereas a generally published emission factor might be just a
7 best guess. Merchant, Vol. III, p. 352, l. 12-16 and 21-22.

8 51. Mr. Merchant testified that there is no published emission factor for
9 PM2.5 but if he had a reliable way of estimating PM2.5 emissions, he could have
10 conducted a BACT analysis specific to PM2.5. Merchant Vol. III, p. 353, lines 16-
11 18. Mr. Merchant testified that the best emission factor comes from the source
12 itself. Merchant, Vol. III, p.352, lines 13-14. Yet, the record shows that the
13 Department didn’t follow up on its request for PM2.5 emission factors from the
14 manufacturer. This indicates the Department prematurely concluded that the tools
15 were not available to obtain emission factors for PM2.5. (It is noteworthy that
16 although the Department didn’t know what test method it would use for PM10
17 condensables, it did a BACT analysis before designating this test method. Lierow,
18 Vol. I, p. 179, lines 1-15, p. 180, lines 1-20.)

19 52. Mr. Merchant relies on the application of the permittee plus his own
20 research to verify the information that is provided to him. He stated that
21 information such as on PM2.5 emissions control technology from the manufacturer,
22 as in this case, Alstom Boilers, would not be given to him either because it is not
23 available or because it’s not something the that manufacturers want to share.
24 Merchant, Vol. III, p. 357, lines 6-16.

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1 53. Mr. Merchant stated he did have enough information necessary to
2 estimate and limit condensable PM emissions based on precursor pollutants (even
3 though SME asked the Department not to have a condensable limit and even though
4 the EPA suggested that regulators did not need to impose condensable limits.)
5 Merchant, Vol. III, p. 359, lines 6-10. Based on specifications provided by Alstom,
6 SME was able to propose, and DEQ was able to set BACT-determined emission
7 limits for condensable particulate matter. Lierow, Vol. I, p. 155, lines 24-11, p. 156,
8 13.

9 54. With respect to condensable emissions, SME and DEQ clearly could
10 have performed a BACT analysis and set emission limits for PM2.5 especially since
11 it already did so for PM10 condensables. Mr. McCutcheon stated that whether you
12 use PM10 as a surrogate or not, you're still doing a BACT analysis for condensables
13 and that PM10 condensables are the same as PM2.5 condensables. McCutchen,
14 Vol. III, p. 453, lines 8, 9. See also Mr. Taylor's testimony that condensable
15 emissions are made up of particulate matter in the 2.5 size range and smaller.
16 Taylor, Vol. I, p. 95, lines 15-19. Mr. Lierow testified, as to MEIC Exhibit A, that
17 he didn't need to inquire about PM2.5 emission data from the manufacturer because
18 "they had a pretty good indication of what the PM2.5 emission rate would be based
19 on the condensable emission rate [for PM10]. He also stated that they ultimately
20 used PM10 as a surrogate but they had a good indication that condensables were
21 mainly PM2.5. Lierow, Vol. II (uncondensed version) p. 192, lines 8-15.

22 55. With respect to filterable PM2.5 emissions, SME and DEQ possibly
23 could have relied on data from Alstom to conduct a BACT analysis based on
24 emission factors provided by the manufacturer. Taylor Vol. I., p. 84, line 21
25 through p. 86, lines 2-21. He stated, "I've been given very explicit discharge
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1 information (categories of particulate, size, range of particulate matter) for all of the
2 boiler equipment I have worked on (from the boiler vendors).” Id. at p. 85, lines 1-
3 3. According to Mr. Taylor, there are many technologies for control of PM2.5
4 emissions, such as wet ESP, dry ESP’s, fabric filter and a combination of dry
5 filtration and wet ESP, dry ESP, wet FGD. Vol I. p. 87, lines 1-13.

6 56. There is some question as to whether data on the CFB Boiler as to
7 PM2.5 emissions was unobtainable or whether such information was even
8 requested. Mr. Merchant testified that he asked for it but never followed up on its
9 request for PM2.5 emissions data. Merchant, Vol. III, p. 330, l. 20-333, p. 331, l.
10 13. Mr. Lierow testified that he didn’t need to ask for data from the manufacturer as
11 to PM2.5 condensibles because they had a good idea of what they were based on the
12 condensable emission rate for PM10. Lierow, Vol. II, (uncondensed version),
13 p. 192, lines 8-15. Thus, essentially SME did provide reliable estimates of
14 condensable PM2.5 emissions and the Department never required SME to provide
15 data on filterable PM2.5 emissions.

16 57. An e-mail interchange between an employee for the consultant for
17 SME that helped prepare the permit application and another consultant for SME
18 indicates that the consultants were already contemplating factoring in PM2.5
19 emission reduction technology. Mr. Lierow was able to ask an SME contractor in
20 an e-mail to talk to the baghouse manufacturer about providing PM2.5 emissions
21 rates. The consultant responded by saying if PM2.5 regulations come into effect,
22 “our solution to comply is to install higher efficiency bags. These will cost more
23 and require more frequent replacement. We probably don’t want to get into this
24 discussion with MDEQ to avoid any tighter restrictions being placed upon us.”
25 MEIC Exhibit A. This indicates that the SME’s consultant was contemplating

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1 PM2.5 control technology and presumably had at least a good idea of PM2.5
2 emissions rates available from the manufacturer or knew he could obtain this
3 information from the manufacturer. Mr. Lierow himself testified that he could have
4 asked the vendor for the main baghouse boiler for PM2.5 emission rates. Lierow,
5 Vol III. p. 536, l. 25.

6 58. Mr. McCutchen testified that if there is a problem with measuring
7 particulate matter, and emission limits can't be specified, the reviewing authority
8 can mandate inspection and maintenance procedures to make sure equipment is
9 operated properly [to reduce emissions to the maximum extent.] McCutchen Vol.
10 III, p. 511, l. 20-21.

11 59. The record shows there are technologies available to control
12 particulate PM2.5 emissions. Mr. Merchant testified that Teflon-coated bags "are
13 capable of controlling filterable particulate down to submicron size. Merchant, Vol.
14 III, p. 336, lines 15-17. There are many other control devices such as scrubbers,
15 ESP's and of fabric filter devices that can reduce PM2.5 emissions. Taylor, Vol. I
16 p. 86, lines 22-25, p. 87, lines 1-13, p. 96, lines 2-25, p. 97, l. 2. It is possible to
17 rank effectiveness of the control devices based on vendor specifications and existing
18 literature. Taylor, Vol. I, p. 89, lines 2-20.

19 60. Mr. Taylor specified that there are ways to determine control
20 efficiencies for the different control technologies for PM2.5, Taylor, Vol. I, p. 88,
21 lines 20-25, p. 89, l. 1. There is published literature, information from vendors that
22 can help develop how effective each of the controls is of getting at PM2.5. Taylor,
23 Vol. I, p. 89, lines 4-20. Mr. Taylor testified that a BACT analysis of PM2.5 can be
24 done because there is equipment available to control it and the control efficiencies
25 for these technologies is very high. Taylor Vol. I, p. 96, lines 9-25. He stated there

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1 are other facilities that have had to control condensable and filterable PM2.5 as
2 where facilities have visible emissions (caused in part by PM2.5 emissions) to
3 control. These facilities have installed wet ESP's to control the filterable PM2.5.
4 Taylor, Vol. I, p. 93, lines 3-17. Conceivably, even if the applicant or the reviewing
5 authority could not accurately measure PM2.5 emissions, the source could evaluate
6 wet ESP as an alternative equipment to reduce emissions of the pollutant to some
7 extent.

8 61. The tools needed to derive BACT determined limits for PM2.5 were
9 available to SME and DEQ. This, coupled with the fact that manufacturers can
10 provide PM2.5 emissions data, if asked, and with Mr. Merchant's statement that had
11 he had the correct emissions data, he would have imposed a PM2.5 BACT analysis,
12 indicate that there was no impediment to the Department conducting a PM2.5
13 analysis to determine how or if PM2.5 emissions could be reduced.

14 62. The EPA has developed at least three test methods for measuring
15 condensable particulate emissions for filterable PM2.5. There is Conditional Test
16 Method 40 available since December 3, 2002, and Conditional Test Method 39
17 available since July 2004 for filterable and condensable together. There are a
18 number of levels of validation already achieved for these test methods. McCutchen,
19 Vol. III, p. 475, lines 15-19. Mr. McCutchen's testimony is that test method 202 is
20 usable for determining control efficiencies for condensable emissions. Vol. III, p.
21 453, lines 1-3, p. 479, lines 9-16. Mr. McCutchen testified that for the individual
22 condensables, there are reference test methods that are acceptable. McCutchen,
23 Vol. III, p. 504, lines 2-3. He also did not object to the testimony being read into
24 the record from his deposition that there is a dilution method out there that is a
25 reliable way of testing for PM2.5 emissions. McCutchen, Vol. III, p. 457, lines 17,

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1 18. A state can use a conditional test method so long as EPA has the power to veto
2 that decision. McCutchen, Vol. III, p. 455, l. 13. Rulemaking is not necessary to
3 approve the use of a Conditional Test Method in a BACT permitting process.
4 McCutchen, Vol. III, p. 455, l. 18. Mr. McCutchen did confirm that there is no
5 referenced test method as among many boilers of a similar type that is usable today.
6 McCutchen, Vol. III, p. 458, lines 6-24. The Stephen D. Page Memorandum dated
7 April 5, 2005, acknowledges that a source may quantify its PM2.5 fraction by
8 applying two test methods in series, the Conditional Test Method 40 and the Method
9 202 sampler to collect condensable materials. DEQ/SME Exhibit 3, p. 3.

10 63. The cost per ton of removal of PM2.5 emissions is higher than for
11 PM10 because PM2.5 particles weigh less. McCutchen, Vol. III, p. 524, lines 13-
12 17. He testified states can use a higher cost effectiveness number if they want to.
13 Vol. III, p. 525, lines 21-24.

14 64. Even without switching to PM2.5 to get more controls of fine
15 particles, such as the 140 tons approximately coming out after all of the controls that
16 are mandated to be put on the particular facility, Mr. McCutchen stated that “[a]ll
17 you have to do is improve the efficiency or find higher efficiency control
18 technologies that pass the top-down BACT test including the cost effectiveness. So
19 there could be a focus through the Board on looking to make sure that the highest
20 level, most recent technologies have been evaluated....you could say from X date
21 forward we want every BACT analysis to include for filterable PM2.5 and look at
22 membrane filters.” Vol. III, McCutchen, p 497, lines 15-25, p. 498, lines 1-9. This
23 characterizes the Board’s position.

24 65. NAAQS pollutants such as PM2.5 are subject to BACT requirements,
25 McCutchen, Vol. III, p. 461, l. 19.

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1 3. Montana law requires all air pollution sources to obtain permits from
2 the Department before commencing construction and operation. See Mont. Code
3 Ann. § 75-2-211(2)(a).

4 4. The Department administers its permitting program regarding the
5 issuance of air quality construction permits through rules and regulations adopted by
6 the Board pursuant to Mont. Code. Ann § 75-2-211(1) and (11). The rules list
7 specific requirements for various types of air permits depending on the air quality in
8 the area of the source, e.g. whether the source is located in an area that is in
9 “attainment” or “nonattainment” of applicable National Ambient Air Quality
10 Standards (“NAAQS”). The site of the HGS lies in an “attainment area” for all
11 regulated pollutants. This means the air quality in the area is in compliance with
12 state and federal air quality standards.

13 5. The Federal Clean Air Act (“CAA”), 42 U.S.C. § 7401, et. seq.,
14 requires states to adopt regulatory programs for issuing a certain type of
15 construction permit to major air pollution sources located in attainment areas. This
16 permit is known as a “Prevention of Significant Deterioration” or “PSD” permit,
17 because it is designed to prevent significant deterioration of air quality in areas that
18 are currently meeting NAAQS. See 42 U.S.C. § 7470(1). In 1997, The U.S.
19 Environmental Protection Agency (“EPA”) set primary health-based National
20 Ambient Air Quality Standards (“NAAQS”) for PM2.5 pursuant to the federal
21 Clean Air Act. See 42 U.S.C. §§ 7408 and 7409. In 2006, the EPA revised the 24-
22 hour NAAQS for PM2.5 making them nearly twice as stringent from 65
23 micrograms/cubic meter to 35 micrograms/cubic meter.

24 Montana has adopted a regulatory program for PSD permits which the
25 United States Environmental Protection Agency or EPA has approved as part of

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1 Montana’s Implementation Plan (“SIP”). The Department issues PSD permits to
2 qualifying sources pursuant to rules promulgated for prevention of significant
3 deterioration. PSD permits require a number of demonstrations and conditions to
4 ensure protection of ambient air quality standards, “NAAQS” and to restrict future
5 air quality degradation. See 42 U.S.C. § 7475(a)(3). All new major air pollution
6 sources must use best available control technology (“BACT”) for each pollutant
7 regulated under the EPA’s New Source Review (“NSR”) program. See 42 U.S.C.
8 § 7475(a)(4). Mont. Admin. R 17.8.752, 17.8.819.

9 6. The HGS plant is a new major stationary source. A new major
10 stationary source shall apply best available control technology for each regulated
11 NSR pollutant that it would have the potential to emit in significant amounts. Mont.
12 Admin. R 17.8.819.

13 7. BACT under Mont. Admin. R. 17.8.740 is defined as follows:
14 “means an *emission limitation* (including a visible emission standard)
15 based on the *maximum degree of reduction* for each pollutant subject
16 to regulation under 42 U.C.C. 7410, et. seq. or 75-2-101, et seq.,
17 MCA, that would be emitted from any proposed emitting unit...which
18 the department, on a case-by case basis taking into account energy,
19 environmental and economic impacts and other costs, determines is
20 achievable for such emitting unit...through application of production
21 processes or available methods, systems and techniques...for control
22 of such contaminant....If the department determines that technological
23 or economic limitations on the application of measurement
24 methodology to a particular class of emitting units would make the
25 imposition of an emission standard infeasible, it may instead prescribe
26 a design, equipment, work practice or operational standard or
27 combination thereof to *require the application of BACT*. Such
 standard must to the degree possible, set forth the emission reduction
 achievable by implementation of such design, equipment work
 practice, or operation and must provide for compliance by means that
 achieve equivalent results. (Emphasis supplied) Mont. Admin. R
 17.8.740. See also Mont. Admin. R 17.8.801(6) (BACT definition
 under Montana’s Prevention of Significant Deterioration, “PSD”
 program.

1 8. The HGS plant is a major stationary source of PM2.5 emissions
2 because the HGS plant has the potential to emit 100 tpy of PM2.5. Mont. Admin. R
3 17.8.801(22).

4 9. The pollutant, PM2.5, a fine particle 2.5 microns and smaller, is a
5 “pollutant subject to regulation.” See 40 C.F.R. 52.21(b)(50)(i) which states that a
6 regulated NSR pollutant includes “[a]ny pollutant for which a national ambient air
7 quality standard has been promulgated and any constituents or precursors for such
8 pollutant identified by the Administrator.” The EPA has promulgated National
9 Ambient Air Quality Standards (NAAQS) for PM2.5 in 40 C.F.R. 50.7. Therefore,
10 best available control technology (“BACT”) requirements apply to PM2.5 under the
11 definition of BACT.

12 10. In 1997, the EPA issued a Memorandum entitled “Interim
13 Implementation of New Source Review Requirements for PM2.5.” This
14 memorandum observes that “[i]n view of the significant technical difficulties that
15 now exist with respect to PM2.5 monitoring, emissions estimation, and modeling,
16 that PM10 may be properly used as a surrogate for PM2.5 in meeting NSR
17 requirements until these difficulties are resolved.” SME/DEQ Exhibit 2, page 1.
18 This is a so-called “surrogate” approach for reducing PM2.5 emissions and
19 protecting air quality using PM10. According to the memorandum, it does not bind
20 State and local governments and the public as a matter of law. The memorandum is
21 not applicable as a law or regulation. The memorandum states, “[w]hen the
22 technical difficulties are resolved, the EPA will amend the PSD regulations...to
23 establish a PM2.5 significant emissions rate and EPA will also promulgate other
24 appropriate regulatory measure pertinent to PM2.5 and its precursors.

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1 In another memorandum dated April 5, 2005, see SME/DEQ Exhibit 3, page
2 4, the EPA through Mr. Paige, stated that the EPA interprets Part C of the Clean Air
3 Act to require PSD permits for PM2.5 upon the effective date of the PM2.5 NAAQS
4 but that significant technical difficulties with implementing PSD for PM2.5 because
5 of limitations in ambient monitoring and modeling were identified. Mr. Paige stated
6 that “[b]ecause we have not promulgated the PM2.5 implementation rule,
7 administration of a PM2.5 PSD program remains impractical” and that states should
8 continue to follow the October 23, 1997, guidance for PSD requirements. Again the
9 memorandum states that the statements in this policy guidance do not bind State and
10 local governments.

11 11. There is no promulgated rule prohibiting States from requiring PSD
12 permit analysis of PM2.5 and no promulgated rule of the EPA excepting from the
13 BACT definition, PM2.5 as a pollutant. The Department is required to conduct a
14 BACT analysis for each pollutant, including PM2.5. Under Mont. Admin. R.
15 17.8.749 (1), when the Department issues a Montana air quality permit, the permit
16 must authorize the construction and operation of the facility or emitting unit subject
17 to the conditions in the permit and to the requirements of subchapter 7 [of Title 17,
18 chapter 8] and the permit must contain any conditions necessary to assure
19 compliance with the Federal Clean Air Act, with the Clean Air Act of Montana and
20 rules adopted under those acts. A Montana air quality permit may not be issued for
21 a new facility unless the applicant demonstrates that the facility can show that it will
22 not cause or contribute to a violation of any Montana or national ambient air quality
23 standard.

24 12. There is no binding requirement for a the Department as the
25 permitting authority to conduct a top-down BACT analysis, however, because it

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1 elected to use the top-down method in the HGS permitting process it is obligated to
2 conduct a correct top-down BACT analysis correctly following the NSR Manual in
3 a reasoned and justified manner. See Alaska Dept. of Env'tl. Conservation v. EPA,
4 298 F3d 814, 822 (9th Cir. 2002), aff'd 540 U.S. 461 (2004).

5 13. The NSR ("New Source Review") Manual, DEQ/SME Exhibit 1, as
6 described EPA Environmental Appeals Board in In re: Prairie State Generating
7 Company, 2006 EPA App. LEXIS 38 p. 11, summarizes the top-down method
8 described in the NSR Manual, for determining BACT as follows:

9 The top-down process provides that all available control
10 technologies be ranked in descending order of control
11 effectiveness. The PSD applicant first examines the most
12 stringent-or "top"-alternative. That alternative is established
13 as BACT unless the applicant demonstrates, and the
14 permitting authority in its informed judgment agrees, that
15 technical considerations or energy, environmental, or
16 economic impact justify a conclusion that the most stringent
17 technology is not "achievable" in that case.

18 14. The Department is not obligated to strictly follow the NSR manual
19 providing policy guidance as to how to conduct a top-down BACT analysis,
20 however, a careful and detailed analysis of the criteria identified in the regulatory
21 definition of BACT is required and the methodology described in the NSR Manual
22 provides a framework that assures adequate consideration of the regulatory criteria
23 and consistency within the PSD permitting program. In re: Prairie State Generating
24 Company, Id., citing In re: Cardinal FG Co., PSD Appeal No. 04-04 Slip op. at 12
25 (EAB Mar. 22, 2005).

26 15. Therefore, the Department is obligated to comply with the
27 requirement to identify, as an initial matter, all of the possible control technologies
that could reduce emissions and to generally comply with all regulatory criteria that
the NSR manual is designed to address. The first step requires the Department to

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1 identify all “potentially” available control options. NSR Manual at B.5. The
2 Appeals Board stated in In re: Prairie State Generating Company that “[a]vailable
3 control options are those technologies including the application of production
4 processes or innovative technologies, ‘that have a practical potential for application
5 to the emission unit and the regulated pollutant under evaluation.’”

6 16. The most stringent or top control alternative is the starting point for
7 the BACT examination of control alternatives. In Alaska Dept. of Envntl.
8 Conservation v. EPA, 298 F.3d 822, the Court stated, “[t]he most stringent
9 technology is BACT unless the applicant can show that it is not technically feasible,
10 or if energy, environmental or economic impacts justify a conclusion that it is not
11 achievable, citing Citizens for Clean Air v. United State EPA, 959 F.2d 839, 845-46
12 (9th Cir. 1992). If the top choice is eliminated, then the next most stringent
13 alternative is considered and so on. The most effective control option not
14 eliminated is BACT. Alaska Dept. of Envntl. Conservation v. EPA, 298 F. 3d at 822.

15 17. Also applicable is the opinion of the Environmental Appeals Board,
16 In re: Knauf Fiber Glass, GmbH, 8 E.A.D. 121, 129-30 n.14 (EAB 1999) that
17 remanded an Air Quality Management District’s permit decision on the basis that
18 there was an inadequate BACT analysis, specifically a failure to identify multiple
19 pollution control options and to provide infeasibility analyses as necessary. The
20 Environmental Appeals Board states that the “goal of step one in the top-down
21 BACT analysis is to develop a comprehensive list of control options. In compiling
22 the list of available control options, a variety of information sources may be
23 reviewed including information on pollution control and emission limitations for
24 other industrial facilities.” Id. at 9. The Appeals Board also observed that “[t]he
25 BACT analysis is one of the most critical elements of the PSD permitting process.

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1 As such it should be well documented in the administrative record. A permitting
2 authority's decision to eliminate potential control options as a matter of technical
3 infeasibility or due to collateral impacts must be adequately explained and justified.
4 *Id.* at 10. The point of the BACT analysis is to know if the most stringent options
5 were really adopted. *Id.* at 13. In the Knauf case, Knauf did not document the
6 preliminary steps of a BACT determination by including a listing of all possible
7 control options and including a discussion of the emission control technologies and
8 limits for other manufacturing facilities. See also In re: Inter-Power of N.Y., Inc.,
9 5 E.A.D. 130, 144 (EAB 1994); In re: Indeck-Elwood, LLC. PSD Appeal 03-04,
10 2006 WL 307109 (E.A.B. Sept. 27, 2006) (remanding a permit for failure to justify
11 rejection of more stringent limits for particulate matter).

12 18. The lowest achievable emission rate ("LAER"). LAER technologies
13 "usually represent the top alternative" in step one of the top-down BACT analysis.
14 DEQ/SME Exhibit 1 at B.5. See also, McCutchen, Vol. III, p. 305, l. 26, p. 306, l.
15 1.

16 19. As established in MEIC v. Montana Department of Environmental
17 Quality, 2005 MT 96 ¶ 16, 326 Mont. 502 ¶ 16, 112 P.3d 964 ¶ 16, the burden is on
18 the Appellants to prove by a preponderance of evidence that any permit procedures
19 that they have challenged violate laws and rules governing the issuance of a
20 preconstruction air quality permit. See also, Mont. Code Ann. § 26-1-401.

21 20. Here the Petitioners have shown, and the record supports the
22 conclusion, that the Department failed to conduct a proper BACT analysis of PM10
23 by unduly limiting its scope of analysis primarily to information supplied by the
24 applicant which was in turn limited almost exclusively by what could be guaranteed
25 by the vendor. This approach precludes consideration of neutral analyses of

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1 technologies and emissions limitations that manufacturers and sources may have
2 successfully achieved. Moreover, the Department failed to evaluate top or most
3 stringent control technologies at least initially by determining, in some instances
4 first, what is economically unfeasible and excluding possible control technologies
5 on this basis. This approach prejudices the outcome of which technology can be
6 used to achieve which maximum reduction. Moreover, as to identification of the top
7 control measures, the Department has instituted a process that precludes its own
8 depth of exposure or understanding of the top control technologies, by for instance,
9 failing to identify and examine all available technologies beyond what is submitted
10 in the permit application, including technologies required under the lowest
11 achievable emissions rate determinations, by failing to evaluate different control
12 efficiencies for top control technologies and design alternatives through consultation
13 with industry experts and manufacturers of control equipment or boilers, by failing
14 to evaluate linked technologies as top control technologies especially in reference to
15 reducing pollution with different particulate sizes and different compositions,
16 (filterable and condensable) and by failing to take into account special removal
17 capabilities of certain technologies relative to certain pollutants, such as for wet ESP
18 and acid mists. Taylor, Vol. I, p. 68, lines 6-8. In short, the Department's top-down
19 BACT analysis of PM10 and resultant emissions limitation were not well reasoned
20 and justified based on the NSR or similar evaluation methods which do yield a
21 defensible emission limit that represents the maximum reduction of PM10 emissions
22 achievable.

23 21. The permit application and Permit Analysis briefly address energy,
24 environmental and economic impacts for identified filterable particulate controls but
25 they do not contain any economic analysis for identified condensable particulate

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1 controls. The BACT analysis in the Permit Analysis identifies certain control
2 technologies in lists but does not provide a rationale as to technical feasibility or
3 infeasibility of these technologies. In the case of condensable PM10, there is no
4 economic justification as to why certain control technologies were excluded or
5 included.

6 22. The Court in Citizens for Clean Air v. United States Environmental
7 Protection Agency, 959 F.2d 839 (9th Cir. 1992), the PSD permit procedure
8 imposes different burdens on different parties at various stages of the process. The
9 top-down approach places the burden of proof on the applicant at the permitting
10 stage to justify why the proposed source is unable to apply the best technology
11 available. 959 F. 2d 839 at 845. Under Mont. Admin. R 17. 8.749 and 17.8.819,
12 the burden rests with the PSD applicant and ultimately the Department to identify
13 and adopt the best available control technology that can reach the maximum degree
14 of reduction for each pollutant subject to regulation. Here, the Department has the
15 burden to show that a BACT analysis for PM2.5 was attempted since PM2.5 is a
16 regulated pollutant. Mr. Merchant stated he was never provided information about
17 anticipated PM2.5 emissions and it was his understanding that PM2.5 information
18 was not available and he therefore used a surrogate analysis. Vol. III, p. 331, lines
19 11-12; p. 332, lines 1-8; p. 361, lines 23-25, p. 362, lines 1-7. At page 362, Vol. III,
20 l. 7, Mr. Merchant stated that the surrogate analysis was an acceptable methodology
21 and was “appropriate by all standards.” Because of the existence of the surrogate
22 analysis, the Department did not call the application that didn’t have PM2.5
23 emission data incomplete. Id., lines 12-18. Mr. Merchant also stated that he could
24 have asked the applicant for a quantification of uncontrolled PM2.5 emissions from
25 the boiler because there is a NAAQS specifically for PM2.5. Vol. III, p.333, l. 13.

27
**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON CLAIMS OF PETITIONERS THAT THE
DEPARTMENT OF ENVIRONMENT QUALITY FAILED TO COMPLY WITH PERMITTING
REQUIREMENTS APPLICABLE TO PM2.5 AND RULING ON REGULATION OF CO₂ FOR BACT
PURPOSES**

1 He admits that promulgation of the NAAQS standard triggers PSD permitting for
2 PM2.5, Vol. III, P. 334, line 24. The Department should have at the least analyzed
3 what PM2.5 emission data could be produced and what if any barriers existed to
4 evaluate emission factors particular to the HGS plant. Because the Department had
5 the burden of identifying emission limitations and adopting the best control
6 technology for PM2.5, it should have evaluated what control technologies exist for
7 PM2.5 and should have determined conclusively (by applying existing conditional
8 test methods and gathering data from the manufacturers, the applicant and from
9 other credible sources, (of which there is now a considerable amount developed)
10 that a PM2.5 BACT analysis was not technically possible before failing to conduct
11 one.

12 23. The Findings of Fact and Conclusions of Law concerning PM10 are
13 addressed in this order to show the deficiencies in the PM10 BACT analysis.
14 Although the Board is not requiring a PM10 BACT analysis on remand, but solely a
15 PM2.5 BACT analysis, the Department must take steps to avoid the deficiencies
16 indentified in the PM10 analysis when doing a PM2.5 analysis.

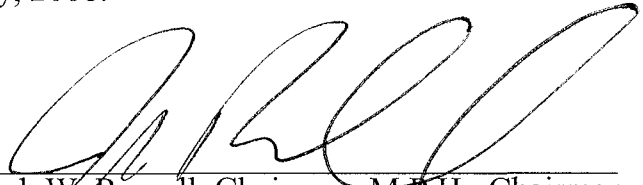
17 24. The Board, in adopting this ruling, finds that the BACT approach is a
18 fluid, forward looking process intended to take into account the newest technologies
19 and most complete compilations of information. Because the duration of a permit
20 can be for decades, the most modern technologies must be considered and analyzed
21 in the BACT process.

22 WHEREFORE, IT IS HEREBY ORDERED, that Permit No. 3423-00 is
23 remanded for a thorough top-down BACT analysis of PM2.5 of the CFB boiler. A
24 surrogate analysis for PM2.5 is not acceptable. A top-down BACT analysis
25 conforming to the NSR Manual will be deemed to be sufficiently thorough.

27 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON CLAIMS OF PETITIONERS THAT THE
DEPARTMENT OF ENVIRONMENT QUALITY FAILED TO COMPLY WITH PERMITTING
REQUIREMENTS APPLICABLE TO PM2.5 AND RULING ON REGULATION OF CO₂ FOR BACT
PURPOSES**

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DATED this 30th day of May, 2008.



Joseph W. Russell, Chairman, M.P.H., Chairman
Montana Board of Environmental Review

c: Mr. David M. Rusoff
Mr. Kenneth A. Reich
Ms. Abigail M. Dillen
Ms. Jenny K. Harbine
Ms. Katherine J. Orr

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON CLAIMS OF PETITIONERS THAT THE
DEPARTMENT OF ENVIRONMENT QUALITY FAILED TO COMPLY WITH PERMITTING
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PURPOSES**

EXHIBIT 2



September 19, 2008

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

Re: Montana Air Quality Permit #3423-00

Dear Director Opper:

On behalf of Southern Montana Electric Generation and Transmission Cooperative, Inc. ("SME"), I am writing with respect to Montana Air Quality Permit #3423-00 (the "Permit") for the Highwood Generating Station ("HGS"). More specifically, this letter requests a determination from the State of Montana Department of Environmental Quality ("DEQ") that Southern Montana Electric Generation and Transmission Cooperative - Highwood Generating Station ("SME-HGS") will have satisfied the "commencement of construction" requirement for the Permit by November 30, 2008, based on actual construction as described below, recognizing DEQ will need to verify that such actual construction has been performed by such date.

The Permit became final on May 30, 2007, and under its terms SME-HGS has 18 months from permit issuance to commence construction. The 18 month period expires November 30, 2008.

"Commence" is defined under Administrative Rules of Montana ("ARM") 17.8.801(8) as follows:

"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.

(emphasis added)

The "or" connector means that one can satisfy "commencement of construction" by meeting either subsection (a) or subsection (b); i.e., one does not have to meet the conditions in both subsections.

"Begin actual construction" is defined under ARM 17.8.801(5) as follows:

"Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

We will begin "physical on-site construction" before November 30, 2008. These activities will not include any work on the boiler island, as we recognize any such work is not permitted until the PM_{2.5} issue is resolved. The on-site construction activities that we will commence before November 30, 2008 include site civil work, which includes clearing and grubbing, excavation and grading, fencing, work on underground pipework, and work on the foundation for the cooling tower.

Two of these activities merit further discussion with respect to "commencing construction" - the work on 1) the cooling tower foundation, and 2) the underground pipework. We believe work on either of these activities by November 30, 2008, will satisfy the "commencement of construction" requirement. Each activity is discussed as follows.

1) Cooling Tower Foundation

As noted above, the definition of "begin actual construction" means "*initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, **installation of building supports and foundations...***" (emphasis added).

The cooling tower is obviously a site-specific permanent structure that is an integral component of HGS, which is an "emissions unit." Moreover, the cooling tower itself is an "emissions unit" which is defined in ARM 17.8.801(11) as "any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the FCAA [Federal Clean Air Act]." The Permit, in Section H.K, limits cooling

tower PM₁₀ emissions and the Permit Analysis inventories the cooling tower's PM₁₀ emissions.

Accordingly, pursuant to the ARMs quoted above, work on the HGS cooling tower foundation by itself will satisfy the "commencement of construction" criteria. In terms of specific work, our current plans anticipate commencement of the following activities on the cooling tower foundation by November 30, 2008: excavation, installing reinforcing steel, and beginning placement of concrete. This work will commence by November 30, and ultimately the work on the cooling tower will include the following. Excavation work will include an approximately 540 feet long by 60 feet wide by 20 to 30 feet deep bath-tub type excavation. Structural backfill would be added to the proper elevation and then formwork and reinforcing steel installed prior to placing the concrete for the foundation slab on grade. Later, concrete basin retaining walls will be formed, rebar installed and concrete placed for the walls, varying from 5 feet tall to 18 feet tall. Additionally, steel anchor bolts, concrete pedestals and pump openings will be installed specifically for the cooling tower structure and operation.

Additional support that commencement of work on the cooling tower foundation is adequate is found in guidance from the United States Environmental Protection Agency on what constitutes actual construction, in a memorandum dated July 1, 1978 from Edward E. Reich, Director, Division of Stationary Source Enforcement, to David Kee, Chief Air Enforcement Branch, Region 5, which memo specifically addressed the "commence construction" issue, and it provides in part:

What constitutes physical on-site construction?

*We have interpreted physical on-site construction to refer to placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source. In order to qualify, these activities must take place on-site or must be site-specific. **Placement of footings, pilings and other materials needed to support the ultimate structures clearly constitutes on-site construction....***

(emphasis added)

This reinforces that work on the HGS cooling tower foundation by November 30, 2008 will satisfy "commencement of construction."

2) Underground Pipework

The underground pipework is an integral component of HGS, and its sole purpose is for HGS operations. The systems to be served by the underground pipework include the following: raw water, service water, demineralized water (for boiler makeup), sanitary sewer, oily water, potable water, storm water and fire protection. Attached is a document which details the underground pipework, including the size of the pipes for the various systems.

As shown by the attachment, all these systems and associated underground pipework are site-specific and HGS-specific. The pipework is industrial pipework that was sized for HGS operations, and the layout and design of the systems/pipework is specific to HGS, as opposed to some generic layout and design that could be used for other purposes, such as a subdivision or property subject to annexation. In this regard, please note the HGS property was conditionally zoned industrial by Cascade County for the express purpose of constructing HGS or a similar base load electric generation facility. The property cannot be used for any other purpose without seeking zoning approval from Cascade County. Therefore, use of the underground pipework is limited to HGS by such conditional zoning, and the zoning would prohibit its use for a subdivision or any other use not allowed by the zoning.

As noted above, the definition of "begin actual construction" means *"initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework ..."* (emphasis added).

Therefore, work toward installation of underground pipework is specifically recognized as an activity that meets the "begin actual construction" definition, and together with the definition of "commence" satisfies the "commencement of construction" standard.

Continuous Program of Construction

The work to be done by November 30, 2008, on the cooling tower foundation or the underground pipework, is part of a "a continuous program of actual on-site construction of the source, to be completed within a reasonable time" under ARM 17.8.801(8)(a). In that regard, the following activities associated with the construction of HGS have already been done, or are in the process of being accomplished:

1) Air Quality Permit – as noted above, the Permit became final on May 30, 2007. The Permit is site-specific and HGS-specific, as set forth in the Permit. In this regard, twelve months of on-site air quality monitoring for PM₁₀ was done at the HGS project location, for purposes of the Permit application.

2) Purchase of Land for HGS – the land for the HGS project site has been purchased – a fee title ownership conveyance, with the deeds recorded with the Cascade County Clerk and Recorder in late August, 2008. Therefore all property ownership necessary to construct HGS on the project site has been accomplished. In addition, we have obtained and recorded an easement for the raw water intake structure and pipeline.

3) Large Generator Interconnection Agreement – this agreement with NorthWestern Energy ("NorthWestern") has been executed, securing our place in NorthWestern's interconnection queue. This agreement allows HGS to connect to NorthWestern's Great Falls 230 kv substation, and HGS is identified as a

"Network Resource" and HGS will be able to deliver power to NorthWestern's transmission system.

4) Project Labor Agreement – this agreement – signed by nine unions so far - has been executed, addressing the terms and conditions for union labor on the construction of HGS.

5) Alstom Power Boiler Contract – we are in the process of final negotiations, and plan to execute a contract in October, 2008, with Alstom Power, Inc., for the circulating fluidized bed boiler, flue gas cleaning equipment, and associated auxiliary equipment.

6) Stanley Consultants, Inc. – we have been working with Stanley Consultants for the past several years on the HGS project. Stanley Consultants is the lead engineering firm on the project, and has provided many services, including preliminary engineering, plant engineering, procurement support, technical permitting support, and construction management support.

7) EIS/ROD – an environmental impact statement has been prepared for the project, and the Record of Decision was issued on May 10, 2007.

8) Solid Waste Disposal Permit – Although not required by Montana law, we voluntarily subjected the plans for coal ash disposal at HGS to review by the DEQ Solid Waste Program. As a result, a Solid Waste License for coal ash disposal on the HGS site was issued by DEQ in conjunction with the Record of Decision discussed above.

9) Steam Turbine and Chimney – we have entered into contracts for these items.

10) Water Agreements - we have executed raw water, waste water and potable water agreements with the City of Great Falls.

In addition to the above-listed activities, which are the more significant functions, there have been numerous other activities associated with HGS' development, as one would expect with a project of this magnitude.

Our current construction schedule calls for HGS to be on-line in approximately late 2013, which is a reasonable time under industry standards for a power plant of this size and design.

That the above activities reflect a continuous program of construction is illustrated by the investment to date in HGS - roughly \$28 million. That investment has been made by the member cooperatives involved in HGS – whose member systems serve approximately forty percent of the land area of Montana.

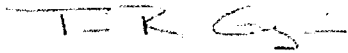
Summary

Circleling back to the "commence" definition in ARM 17.8.801(8), we believe that even if SME-HGS did not begin actual construction by November 30, 2008, the above-listed contract related activities would satisfy the subsection (b) criteria; i.e., the binding agreements or contractual obligations standard. However, because we believe we will clearly meet the subsection (a) actual construction standard, we are not requesting a determination at this time under subsection (b), although we reserve the right to request such a determination if necessary.

In summary, we respectfully request a determination from DEQ that SME-HGS will satisfy the "commencement of construction" requirement for the Permit under the subsection (a) actual construction standard in ARM 17.8.801(8), by virtue of the work on the HGS cooling tower foundation, or the HGS underground pipework, to be performed by November 30, 2008, recognizing DEQ will need to verify such work has actually been performed by such date.

Thank you for your attention to this matter. If you have any questions please contact me.

Sincerely,



Tim R. Gregori
CEO and General Manager

cc: Board of Trustees

Attachment

Description of Underground Pipework Systems

The following underground piping systems will be installed as part of the initial HGS site preparation construction contract.

Raw Water – This is the onsite portion of a 20” pipeline that will convey water from the Missouri River to the HGS site to provide water for services such as cooling tower makeup, fire protection, demineralized water, and service water.

Demineralized Water – This is an 8” line that transports very high purity water produced in the water treatment building to the boiler building for makeup water to the boiler.

Oily Water Collection – This is a line varying from 8” to 10” that collects water that is potentially contaminated with oil from HGS’ industrial machinery so that it can be treated prior to disposal.

Service Water – This is an 8” line transporting water to various locations in the plant where non-potable industrial water is required such as area washdown and closed loop cooling system makeup water.

Fire Protection Water – These lines vary from 6” to 12” and deliver significant quantities of water throughout the HGS site that may be needed to extinguish a large industrial fire.

Storm Sewer – These lines collect rain water runoff across the HGS site area and range in size from 18” to 36”.

Sanitary Sewer – These lines vary from 8” to 12” and carry all HGS waste water offsite and eventually into the City of Great Falls treatment system.

Potable Water – Potable water is distributed throughout the HGS site in 6” pipelines for HGS operator consumption.