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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

MONTANA ENVIRONMENTAL)
INFORMATION CENTER and)
CITIZENS FOR CLEAN ENERGY,)
)
Petitioners,)
)
v.)
)
MONTANA DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
)
Respondent.)

Case No. **DDV, 08- 820**

Judge: **DIRK M. SANDEFUR**

PETITION FOR REVIEW

COME NOW Petitioners Montana Environmental Information Center ("MEIC") and Citizens for Clean Energy ("CCE"), and respectfully request that this Court: (1) declare that the Department of Environmental Quality ("DEQ") violated federal and state law air pollution laws in issuing Air Quality Permit No. 3423-00 for the Highwood Generating Station; (2) invalidate Air Quality Permit No. 3423-00 for the Highwood Generating Station; and (3) enjoin DEQ from approving construction of the Highwood Generating Station until DEQ has issued a valid air quality permit.

The Petitioners state the following information, with supporting information attached to this petition:

1. This case challenges DEQ's decision to issue an air quality permit to Southern Montana Electric Generation and Transmission Cooperative ("SME") for the construction and operation of the Highwood Generating Station near Great Falls, Montana. See Exh. 1, attached hereto. The proposed Highwood Generating Station is a 250-MW coal-fired power plant that would employ a conventional circulating fluidized bed ("CFB") boiler.

2. The Highwood coal plant is anticipated to emit 2.8-million tons of greenhouse gases, including 2.1-million tons of carbon dioxide (CO₂) each year. In the United States, coal-fired power plants are the single largest source of greenhouse gas emissions that are responsible for global warming. Absent pollution controls to reduce CO₂ and other greenhouse gas emissions, the proposed Highwood coal plant and other proposed plants will spur climate change and its potentially devastating impacts in Montana .

3. In the face of a global warming crisis, the DEQ and the Montana Board of Environmental Review ("BER") have taken the untenable position that they have no legal authority to impose limits on greenhouse gas emissions from new and retrofitted coal-fired power plants. On the contrary, both the federal Clean Air Act and the Clean Air Act of Montana require major emitting facilities, including coal plants, to reduce their pollution to the greatest extent possible using the best available control technology ("BACT"). 42 U.S.C. § 7472(4); Mont. Admin. R. 17.7.752, 17.8.801(6), 17.8.819.

4. With this lawsuit, Petitioners MEIC and CCE seek to compel DEQ to comply with federal and state law and require the best available pollution control technologies to limit the Highwood Generating Station's contribution to global warming.

JURISDICTION AND VENUE

5. Petitioners bring this action pursuant to the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-702, the federal Clean Air Act, 42 U.S.C. § 7401 et seq., and the Clean Air Act of Montana, § 75-2-101 et seq. This Court has jurisdiction over Petitioners' claims pursuant to Mont. Code Ann. § 3-5-302(1)(b), (c).

6. Venue is proper in this District under Mont. Code Ann. § 2-4-702(2)(d) because this action challenges a permitting decision made pursuant to Title 75 for a facility proposed to be located in Cascade County, Montana.

7. Plaintiffs have attempted to resolve their claims administratively by providing comments on the draft air quality permit and appealing the final air quality permit to the BER, as required by Mont. Code Ann. §§ 2-4-702(1), 75-2-211(10). The BER issued a final written order regarding Petitioners' appeal on May 30, 2008. See Exh. 2, attached hereto.

PARTIES

8. Petitioner Montana Environmental Information Center ("MEIC") is a member-supported advocacy and public education organization based in Helena, Montana, that works to protect and restore Montana's natural environment. Since its founding in 1973, MEIC has lobbied and litigated both at the state and federal level to prevent degradation of air quality and natural resources. Recent MEIC advocacy efforts have focused on reducing pollutant emissions from coal-fired power plants nationwide. With respect to the Highwood coal plant specifically, MEIC has led efforts to inform the public, elected officials, and responsible agencies about less polluting energy alternatives. At every opportunity in the environmental review and permitting process, MEIC has submitted comments aimed at promoting renewable energy sources, efficiency, and conservation, and thereby reducing emissions that threaten public health and contribute to global warming.

9. Citizens for Clean Energy (“CCE”) is a public interest, non-profit organization based in Great Falls, Montana, that is dedicated to promoting clean, efficient, cost-effective energy alternatives to coal-fired power. Over the past two years, CCE has led a public education campaign to inform Montana citizens and their elected officials about environmentally preferred alternatives to building the Highwood coal plant in Great Falls. To this end, CCE has organized lectures and screenings to raise public awareness about global warming; CCE has sponsored several expert presentations on clean energy alternatives to electricity generated by coal-fired power plants; CCE has held a series of informational meetings specifically about the Highwood coal plant across northern Montana in Great Falls, Havre, Fort Benton, and on the Rocky Boy Reservation; and CCE has presented testimony and submitted extensive comments regarding the plant’s adverse impacts on public health, local agriculture, and the Great Falls National Historic Landmark, where it is sited.

10. MEIC and CCE members live and work in Montana communities—including Great Falls, Fort Benton and the Rocky Boy Reservation—that will be adversely impacted by pollution from the coal plant. MEIC and CCE members include landowners that live and farm in the immediate vicinity of the proposed Highwood coal plant, and many more farmers, ranchers, and landowners that rely on scarce water supplies that are severely impacted by drought associated with global warming and climate change. MEIC and CCE members also include many Montana residents who use and enjoy natural resources that are now threatened by rising temperatures — sport-fishermen, wildlife enthusiasts, and recreational users of public lands, including Glacier National Park. DEQ’s decision to issue an air quality permit for construction and operation of the Highwood coal plant without any limitation on CO₂ emissions injures the interests of MEIC, CCE, and their members in curbing greenhouse gas emissions that cause global warming.

11. Defendant Montana Department of Environmental Quality (“DEQ”) is a state agency in the executive branch of Montana state government, created pursuant to Mont. Code Ann. §§ 2-15-3501 et seq. Its offices are located in Lewis and Clark County.

GLOBAL WARMING

12. As the United States Supreme Court has recently made clear, state governments can no longer afford to ignore the monumental threats posed by climate change. A National Research Council Report, cited by the Court, has “identifie[d] a number of environmental changes that have already inflicted significant harms, including the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, and the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years.” Massachusetts v. EPA, ___ U.S. ___, 127 S.Ct. 1438, 1455 (2007) (internal quotations, citations, and alterations omitted) (emphasis added). In the future, the consequences of global warming promise to be even more severe. According to climate scientist Michael MacCracken, also favorably cited by the Court, “qualified scientific experts involved in climate change research have reached a strong consensus that global warming threatens (among other things) a precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences, and an increase in the spread of disease.” Id. at 1456 (internal quotations and citations omitted).

13. Many of these identified harms are already being felt in Montana. As of 1997, precipitation had decreased by up to 20 percent in many parts of the state, and over the last decade of drought, precipitation has declined much further. As DEQ, itself, has reported, the climate is anticipated to change even more dramatically in coming years. The consequences, as itemized by

DEQ, include: “glaciers melting and disappearing in Glacier National Park and elsewhere in the Rocky Mountains; a potential decline in the northern Rockies snowpack and stressed water supplies both for human use and coldwater fish; ... an increase in the frequency and intensity of wildfires as forest habitats dry out ...; loss of wildlife habitat; possible effects on human health from extreme heat waves and expanding diseases like Western equine encephalitis, West Nile virus, and malaria; [and] possible impacts on the availability of water for irrigated and dryland crop production alike.” Final Environmental Impact Statement (“FEIS”), Highwood Generating Station, Vol. I at 346 (Jan. 2007).

14. Climate change is the result of a buildup of greenhouse gases—primarily CO₂—in the atmosphere, which reduces the reflection of solar radiation back out into space. The greenhouse effect is a natural phenomenon, but with a record amount of carbon dioxide in the atmosphere (6 billion tons of carbon enter the atmosphere each year), the greenhouse effect is now causing major changes to the earth’s climate, weather, and sea level.

15. About 40 percent of U.S. CO₂ emissions stem from the burning of fossil fuels—primarily coal—for the purpose of electricity generation. In Montana, coal-fired power plants are the largest source of greenhouse gas emissions by a very large margin, well over four times the collective greenhouse gas emissions from motor vehicles.

16. To avoid climate catastrophe, the United Nations Intergovernmental Panel on Climate Change estimates that the Earth’s human population must reduce global carbon emissions by at least 80 percent by 2050. This reduction target may only be met with efforts that include substantial reductions in CO₂ emissions from coal-fired power plants.

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THE HIGHWOOD GENERATING STATION

17. The proposed Highwood Generating Station is a 250-MW coal-fired power plant that would employ a conventional CFB boiler. In addition to the boiler, the coal plant would include a turbine building, smoke stack, coal yard, switch yard, cooling tower, and extensive associated infrastructure including new roads, a new rail spur, and a 53-acre landfill for disposal of 220 tons of coal ash per day. This sprawling industrial facility would be sited in the so-called “Golden Triangle,” 8 miles east of the city of Great Falls, on top of prime agricultural lands – and on top of the Great Falls Portage National Historic Landmark site, where Lewis and Clark and the Corps of Discovery camped during their arduous overland trek around the Great Falls of the Missouri River.

18. As DEQ acknowledged in the Final Environmental Impact Statement (“FEIS”) for the Highwood project, construction and operation of the coal plant would result in significant adverse environmental impacts. Among other impacts, the coal plant will be a significant contributor to global warming. The plant is anticipated to emit 2.8-million tons of greenhouse gases, including 2.1-million tons of CO₂ each year. Notwithstanding federal and state legal requirements, DEQ did not consider ways to limit the Highwood plant’s CO₂ emissions.

THE FEDERAL CLEAN AIR ACT AND CLEAN AIR ACT OF MONTANA

19. In 1977, Congress added the Prevention of Significant Deterioration (“PSD”) program to the Clean Air Act in order to maintain air quality in areas that were still relatively unspoiled by air pollution. As articulated by Congress, the program was intended to “protect public health and welfare from any actual or potential adverse effect which ... may reasonably be anticipated to occur from air pollution or from exposures to pollutants ..., notwithstanding attainment and maintenance of all national ambient air quality standards.” 42 U.S.C. § 7470(1).

20. In keeping with this Congressional mandate, PSD provisions not only require compliance with National Ambient Air Quality Standards (“NAAQS”), they also require major emitting facilities to reduce their emissions to the greatest extent possible by installing BACT “for each pollutant subject to regulation under” the federal Clean Air Act. 40 U.S.C. § 7475(4). As defined by the federal Clean Air Act, BACT means:

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

Id. § 7479(3).

21. As contemplated by Congress, this federal BACT requirement has been incorporated into state law via Montana’s PSD State Implementation Plan (“SIP”). See Mont. Admin. R. 17.8.801(6), 17.8.819. Under the federal Clean Air Act’s implementing regulations, states may take responsibility for administering the federal PSD program if they have an EPA-approved SIP that expressly includes the Act’s requirements regarding BACT. See 40 C.F.R. § 51.166. Consistent with the federal Clean Air Act, governing PSD regulations in Montana require that any “new major stationary source shall apply BACT for each pollutant subject to regulation under the federal Clean Air Act that it would have the potential to emit in significant amounts.” Mont. Admin. R. 17.8.819(2); see also id. 17.8.801(6) (adopting Clean Air Act’s definition of BACT). In addition, Montana’s air permitting regulations require more generally that “[t]he owner or operator of a new or modified facility or emitting unit for which a Montana air quality permit is required by this subchapter shall install on the new or modified facility or emitting unit the maximum air pollution

control capability that is technically practicable and economically feasible” and that “BACT must be utilized.” Mont. Admin. R. 17.7.752.

22. In Montana, BACT requirements apply to all pollutants “subject to regulation” under the federal Clean Air Act and the Clean Air Act of Montana. 40 U.S.C. § 7475(4); Mont. Admin. R. 17.8.819(2). The U.S. Supreme Court recently clarified that CO₂ is an “air pollutant” under the federal Clean Air Act. Massachusetts, 127 S.Ct. at 1462. CO₂ is further “subject to regulation” that requires monitoring, record-keeping and reporting of CO₂ emissions, for purposes of tracking source contribution to global warming. See P.L. 101-549, 104 Stat. 2399, § 821 (Nov. 15, 1990); see also 40 C.F.R. §§ 75.1(b), 75.10(a)(3). Polluting facilities may not operate unless they comply with these CO₂ monitoring and reporting requirements established in the 1990 Clean Air Act Amendments. As CO₂ is expressly regulated under the Clean Air Act, BACT requirements apply to ensure maximum feasible reductions in CO₂ emissions.

THE RIGHT TO A “CLEAN AND HEALTHFUL ENVIRONMENT”

23. The Montana Constitution further requires DEQ to curb greenhouse gas emissions that would otherwise contribute to climate change and its adverse environmental effects across the state. The Constitution provides that all persons have a “right to a clean and healthful environment.” Mont. Const art. II, § 3. To that end, the Constitution charges the state legislature with “provid[ing] adequate remedies for the protection of the environmental life support system from degradation and provid[ing] adequate remedies to prevent unreasonable depletion and degradation of natural resources.” Id. art. IX, § 1. In establishing a fundamental right to a clean and healthful environment, delegates to the 1972 constitutional convention intended “to permit no degradation from the present environment and affirmatively require enhancement of what we have now.” MEIC v. Dept. of Env’l Quality, 1999 MT 248, ¶¶69, 296 Mont. 207, 227, 988 P.2d 1236, 1247 (quoting Montana

Constitutional Convention, Vol. IV at 1205, March 1, 1972); see id. at 230 (“The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment.”).

24. State pollution control laws implement the Constitutional guarantee of a clean and healthful environment. In light of this guiding Constitutional policy, the Clean Air Act of Montana and its implementing regulations—including the requirement to apply BACT to “each pollutant subject to regulation under the [federal Clean Air Act],” Mont. Admin. R. 17.8.819(2)—should be construed in a manner that is most protective of the environment.

THE AIR QUALITY PERMIT AND BER APPEAL

25. DEQ issued a final air quality permit for the construction and operation of Highwood Generating Station on May 30, 2007. Although the FEIS prepared by DEQ disclosed that the power plant would emit substantial amounts of CO₂ each year, DEQ’s permit analysis contained no BACT analysis and no emissions limit for CO₂. Thus, under its air quality permit, the Highwood Generating Station will emit CO₂ without any controls throughout its more than 30-year life span.

26. MEIC and CCE filed a request for a contested case hearing before the BER on May 29, 2007. Petitioners moved for summary judgment on their claims that DEQ unlawfully failed to perform a BACT analysis for two pollutants: CO₂ and fine particulate matter (PM_{2.5}). With respect to PM_{2.5}, the BER held evidentiary hearings and, on May 30, 2008, issued a final written order remanding the permit to DEQ for a PM_{2.5} BACT analysis. BER Order, Case No. BER 2007-07 AQ, at 44 (May 30, 2008). With respect to CO₂, the BER denied Petitioners’ motion for summary judgment and granted summary judgment in favor of DEQ and SME, finding that “CO₂ does not fall into any of the 40 C.F.R. § 52.21(b)(50) categories” and “CO₂ is not a pollutant that is regulated as of yet under” the PSD program. Id. at 6.

FIRST CAUSE OF ACTION

(Violations of the federal Clean Air Act and Clean Air Act of Montana)

27. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 26.

28. Federal and state BACT requirements apply to CO₂ because CO₂ is a “pollutant subject to regulation” under the Clean Air Act. Mont. Admin. R. 17.8.801(6); *id.* at 17.8.818(2); 42 U.S.C. § 7475(a)(4).

29. DEQ violated the federal Clean Air Act and Clean Air Act of Montana by failing to undertake a BACT analysis and establish a BACT-determined emissions limit for CO₂ in the air quality permit for the Highwood Generating Station. 42 U.S.C. § 7475(a)(4); Mont. Admin. R. 17.8.801(6); *id.* at 17.8.818(2). Thus, Air Quality Permit No. 3423-00 is invalid and should be set aside. Mont. Code Ann. § 2-4-704(2)(a)(i).

SECOND CAUSE OF ACTION

(Violation of Montana Constitution, Art. II § 3 and Art. IX § 1)

30. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 29.

31. Montanans have a Constitutional “right to a clean and healthful environment.” Mont. Const. art. II, § 3; *see also id.*, art. IV, § 1. Interference with the fundamental right to a clean and healthful environment receives the highest level of judicial scrutiny: state action may impede the right only if the state demonstrates a compelling interest in doing so.

32. Construction and operation of the Highwood Generating Station without any limitation or control of the power plant’s substantial CO₂ emissions directly interfere with the right to a clean and healthful environment.

33. State and federal air pollution laws—which are designed to protect public health and the environment—are consistent with Montanans’ right to a clean and healthful environment to the

extent that they mandate BACT application “for each pollutant subject to regulation under the FCAA,” including CO₂. Mont. Admin. R. 17.8.819(2). However, to the extent that DEQ interprets the Clean Air Act of Montana and its implementing regulations as not requiring a BACT-determined emissions limit for CO₂, notwithstanding the fact that CO₂ is an air pollutant with harmful environmental effects, the Clean Air Act as applied to the Highwood Generating Station is unconstitutional. See Mont. Code Ann. § 2-4-704(2)(a)(i), (3).

REQUEST FOR RELIEF

THEREFORE, Petitioners respectfully request that this Court:

1. Declare that DEQ violated the federal Clean Air Act and Clean Air Act of Montana and their implementing regulations in failing to perform a BACT analysis and establish a BACT-determined emissions limit for CO₂ when it issued Air Quality Permit No. 3423-00 for the Highwood Generating Station;
2. In the alternative, declare that the Clean Air Act of Montana is unconstitutional as applied to the Highwood Generating Station because it fails to regulate harmful CO₂ emissions;
3. Invalidate Air Quality Permit No. 3423-00 for the Highwood Generating Station;
4. Issue an injunction prohibiting DEQ from approving any construction activities for the Highwood Generating Station until DEQ has issued a valid air quality permit with a BACT-determined emissions limit for CO₂;
5. Award Petitioners their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and

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6. Grant Petitioners such additional relief as the Court may deem just and proper.

Respectfully submitted on this 27th day of June, 2008,

Jay Harbine

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Attorneys for Petitioners

STATE OF MONTANA)
County of Gallatin : SS)

Jenny K. Harbine being first duly sworn, upon oath, deposes and says as follows:
I am counsel for the Petitioners in the foregoing action. Because my place of business is in Gallatin County, and Petitioners reside in Lewis and Clark and Cascade counties, this verification is made by me. I certify on that I have read the foregoing Petition and the facts and matters contained therein are true, correct and complete to the best of my knowledge and belief.

Jay K Harbine
Counsel for Petitioner

Subscribed and sworn to before me this 27th day of June, 2008.

(SEAL)

Donna Hendrickson

Notary Public for the State of Montana
Residing at: Bozeman

My Commission Expires: 03/13/2012

