



ENVIRONMENTAL QUALITY COUNCIL

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January 11, 2010

Mr. Joseph W. Russell, Chairman
Board of Environmental Review
1520 East Sixth Avenue
PO Box 200901
Helena, Montana 59620-0901

Dear Chairman Russell and the Board of Environmental Review:

Pursuant to the Legislative Environmental Quality Council's (EQC) statutory authority as the appropriate administrative rule review committee under 75-1-324(10), MCA, and the provisions of Title 2, chapter 4, parts 3 and 4, this letter constitutes notice to the Board of Environmental Review (BER) that a majority of the members of the EQC have notified the EQC's presiding officer on January 8, 2010, that they object to the notice of proposed rulemaking in MAR Notice No. 17-299 amending and adopting rules to establish permitting thresholds for greenhouse gas (GHG) emissions.

Specifically, after careful review of the Montana Administrative Procedure Act administrative rulemaking compliance issues raised during the January 8, 2010, EQC meeting, a majority of EQC members object to the proposed rulemaking for the following reasons:

(1) Reasonable necessity for the proposed rulemaking has not been clearly and thoroughly demonstrated as required pursuant to 2-4-302(1), MCA, and 2-4-305(1) and (6), MCA. The BER's adoption of rules establishing permitting thresholds for GHG emission is premature because:

- (a) the U.S. Environmental Protection Agency (EPA) has not adopted regulations under the Federal Clean Air Act that would make GHGs regulated pollutants;
- (b) it is uncertain what those EPA regulations would actually entail; and
- (c) it is unknown as to "when" or "if" those EPA regulations would actually be instituted.

(2) Under 2-4-305(5), MCA, in order to be effective, a rule that is adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law. The proposed rules are not in accordance with the following statutory provisions:

(a) Under 75-2-207, MCA, the BER may not adopt a rule to implement the provisions of the Clean Air Act of Montana that is more stringent than the comparable federal regulations or guidelines that address the same circumstances unless the BER holds a public hearing and allows public comment and the BER makes a written finding as required pursuant to 75-2-207(2)(a)(iii), MCA. The proposed rules would establish GHG threshold limits that would subject certain entities that produce GHG emissions above those threshold limits to be regulated. Because EPA has not adopted regulations that would make emissions of GHGs regulated pollutants, it is uncertain whether the proposed BER rules would be more stringent than the EPA regulation and therefore compliance with this statutory provision is dependent on some future unknown federal action.

(b) The proposed rulemaking is an action that is subject to the Montana Environmental Policy Act (MEPA) review process under Title 75, chapter 1, part 2. The BER has not conducted the necessary MEPA review process for these proposed rules.

(3) The proposed rules are not effective unless federal action occurs resulting in the GHG emissions being regulated. Under *Lee v. State*, 195 MT 1 (1981), this is potentially an unlawful delegation of legislative authority. The Legislature has lawfully delegated its authority to BER under the Clean Air Act of Montana to adopt rules regulating the emissions of pollutants. The Legislature cannot delegate its sovereign power to the federal government and by extension, the BER has no authority to delegate the Legislature's sovereign power.

The effect of the EQC's objection is that following the receipt of this notice by the BER, the proposal notice may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published unless, prior to that time, the EQC meets and does not make the same objection (2-4-305(9), MCA).

If, following this written notification, the EQC meets and under 2-4-406(1), MCA, objects to all or some portion of a proposed rule before the rule is adopted, the rule or portion of the rule objected to is not effective until the day after final adjournment of the regular session of the Legislature that begins after the notice proposing the rule was published by the Secretary of State unless, following the EQC's objection under 2-4-406(1), MCA:

- (1) the EQC withdraws its objection under 2-4-406, MCA, before the rule is adopted; or
- (2) the rule or portion of a rule objected to is adopted with changes that in the opinion of a majority of the EQC members, as communicated in writing to the committee presiding officer and staff, make it comply with the committee's objection and concerns (2-4-306(4), MCA).

Within 14 days after the mailing of this written objection to the proposed rule, the BER is required to respond in writing to the EQC's objection (2-4-406, MCA). The EQC will be meeting on March 4 and 5, 2010, and an agenda item will be scheduled to review the BER's response.

Thank you for your consideration of this matter.

Sincerely,

Representative Chas Vincent
EQC Chair

cc: Director Richard Opper, Department of Environmental Quality

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