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February 3, 2010

Representative Chas Vincent, Chair
Environmental Quality Council
P.O. Box 201704
Helena, MT 59620-1704

Subject: EQC letter dated January 11, 2010, concerning MAR Notice No. 17-299

Dear Chairman Vincent and Members of the Environmental Quality Council:

I'm writing on behalf of the Montana Board of Environmental Review (BER) in response to your letter dated January 11, 2010, concerning Montana Administrative Register Notice No. 17-299, dated December 24, 2009.

In your letter, you stated that a majority of the members of the Environmental Quality Council (EQC) object to the notice of proposed rulemaking, in which the BER proposed to adjust the air quality permitting thresholds for greenhouse gas (GHG) emissions. The grounds specified in your letter for the objection were that, "after careful review of the Montana Administrative Procedure Act administrative compliance issues raised during the January 8, 2010, EQC meeting," a majority of EQC members object to the proposed rulemaking...."

At the January 8, 2010, EQC meeting, after DEQ Director Richard Opper made a presentation explaining the intent and effect of the proposed rule amendments and new rules, and after industry representatives spoke in opposition to the proposed rulemaking, EQC legal counsel Todd Everts informed the EQC of several legal issues he had identified concerning the proposed rulemaking. The issues raised by Mr. Everts included:

Whether reasonable necessity for the proposed rulemaking had been demonstrated, as required by Sections 2-4-302(1) and 305(1) and (6), MCA;

Whether the rulemaking could comply with the stringency analysis requirements of Section 75-2-207, MCA (House Bill 521 from the 1995 Legislative Session);

Whether the rulemaking would comply with the Montana Environmental Policy Act (MEPA); and

Whether the proposed amendments and new rules, which, under their express terms, would not become effective unless and until the U.S. Environmental Protection Agency (EPA) takes final action to promulgate currently proposed GHG regulations, would constitute an unlawful delegation of state legislative authority to the federal government.

The BER appreciates the time and effort of the EQC in reviewing this matter and the opportunity provided to the DEQ to explain the proposed rulemaking to the EQC. The BER also appreciates Mr. Everts' legal analysis and his explanation of possible legal issues that might need to be addressed. However, the BER respectfully disagrees with the EQC's interpretation of the legal issues raised by Mr. Everts.

The BER does not believe that it failed in the notice of proposed rulemaking to demonstrate reasonable necessity for the rulemaking (as described below). As to the unlawful delegation argument, the BER was not delegating its sovereign power to the federal government in the proposed rules. Action at the federal

level was a trigger for enactment of provisions tailored to Montana, at the exercise of discretion of the BER, not the federal government. The BER believes that the remaining issues raised by Mr. Everts could have been adequately addressed during the rulemaking process. For instance, the BER would have had the opportunity, based on the rulemaking record, to determine whether it could make written finding under Section 75-2-207, MCA, if any were required. Also, the BER would have had the opportunity to conduct an environmental analysis required by MEPA and to issue that analysis for public comment, if the determination were made that MEPA applied to the rulemaking.

As stated in the BER's notice of proposed rulemaking, and as Director Opper explained to the EQC, the intent and purpose of the proposed rulemaking was not to regulate GHG emissions. Upon promulgation by the EPA of GHG regulations under the Federal Clean Air Act (FCAA), those federal regulations will apply to the emission sources subject to the regulations, and Montana and other states will be required to ensure compliance or lose primacy. Rather, the intent and purpose of the BER's proposed rulemaking was to avoid the regulatory burden, with little environmental benefit, of requiring air quality permits for minor sources of GHG emissions when EPA makes the determination to regulate GHG emissions under the FCAA. EPA has indicated this determination may occur as soon as March of this year. Absent state rulemaking to establish specific higher permitting thresholds for GHG, given existing state rules regulating pollutants subject to regulation under the FCAA, and EPA GHG regulations under the FCAA automatically will trigger air quality permit requirements for sources at existing state permitting thresholds, which are much lower than the 25,000 tons per year threshold proposed by EPA for permitting of GHG emissions. In other words, a broadening of the scope of regulated pollutants at the federal level automatically affects the Clean Air Act of Montana and state air quality rules because, on the state level, definitions and other rules that apply to regulated pollutants will apply to GHGs.

Contrary to many statements made to the EQC by opponents of the rulemaking, the rulemaking would not have created new regulation. Rather, it would have had the opposite effect, that of providing for exemptions from automatic applicability of GHG permitting requirements to relatively minor emission sources. As stated in the BER's notice of proposed rulemaking to raise the permitting threshold for GHG from 25 tons per year to 25,000 tons per year:

"If permitting requirements become applicable to GHG emissions to the applicability levels provided under the FCAA and adopted by the board under the existing state rules, minor and major source permitting requirements will apply for the first time to thousands of relatively small emission sources for which permits are not currently required. For example, many home furnaces, currently not subject to minor source permitting under the residential heating use exemption, exceed the existing potential emissions threshold of 25 tons per year of GHG for minor source permitting. In addition, the department will be required to process permit applications in numbers that are orders of magnitude greater than current administrative resources can accommodate. The proposed rules would be temporary in an effort to quickly make rule changes to avoid the consequences of permitting GHG sources at the current permit thresholds but allow for a stakeholder process in later rulemaking to establish permanent GHG permit thresholds for both major and minor source air quality permitting."

Under the express terms of the proposed new rules, the rule amendments and new rules would not have taken effect until the date that compliance with EPA's GHG regulations was required under the federal regulations. If EPA had not finalized either of its currently proposed GHG regulations, the state rules also would not have taken effect. So, in addition to the fact that the proposed rule amendments and new rules would not have created new regulation of GHG, the proposed BER rules would have had no effect if EPA does not finalize its GHG regulations. This is contrary to the arguments of opponents that the state should not "get out ahead of the federal government."

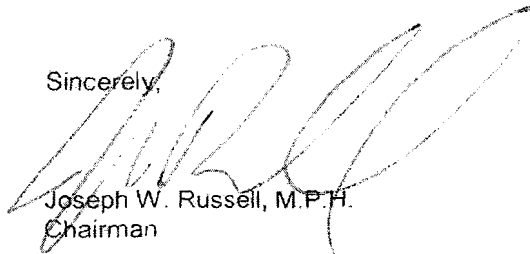
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Further, delaying the effective date of the rulemaking and thereby not establishing higher permitting thresholds for permitting GHG emissions under Montana's air quality permitting rules will not protect Montanans from regulation of GHG emissions, as claimed by some opponents to the rulemaking. Any federal GHG regulations will apply to those emission sources with GHG emissions exceeding the thresholds in EPA's regulations regardless of action taken by the EQC or the BER. More importantly, as discussed above, under the existing state permitting thresholds, EPA's regulations will automatically apply to thousands of relatively minor emission sources. The BER's intent was to avoid this result, and the BER does not believe this is the direction Montanans will support if GHG emission permitting is triggered for minor sources by federal action prior to BER adoption of higher state permitting thresholds.

In response to the objection of a majority of the EQC members to the BER's notice of proposed rulemaking, the BER conducted a special public meeting on January 14, 2010. Based on the legal effect of the EQC objection, pursuant to Section 2-4-305(9), MCA, of delaying the publication of any decision by the BER to adopt the proposed rule amendments and new rules until June 24, 2010, the BER decided to terminate the rulemaking. An effective date in late June 2010 would not address the need to have lower permit thresholds in place if EPA finalizes a GHG regulation under the FCAA before that time.

Thank you for the opportunity to respond.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'J. Russell', is written over the typed name and title.

Joseph W. Russell, M.P.H.
Chairman