

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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IN THE MATTER OF: )CASE BER 2007-07-AQ  
SOUTHERN MONTANA ELECTRIC )  
GENERATION AND TRANSMISSION )  
COOPERATIVE - HIGHWOOD )  
GENERATING STATION )  
AIR QUALITY PERMIT NO. 3423-00)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
December 21, 2007  
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL;  
BOARD MEMBERS HEIDI KAISER, GAYLE  
SKUNKCAP, BILL ROSSBACH, ROBIN SHROPSHIRE,  
LARRY MIRES; and DON MARBLE (by telephone)

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1 Board. My name is Abigail Dillen. I'm here to  
2 represent the Petitioners, the Montana  
3 Environmental Information Center and Citizens for  
4 Clean Energy.

5 I want to start by saying thank you for  
6 holding this special meeting today to hear this  
7 appeal. The issues before you are extraordinarily  
8 important. First and foremost, are we in Montana  
9 going to enforce the law and require coal plants  
10 -- the single largest contributors to global  
11 warming in the US -- to cut their CO2 emissions?  
12 And this question is before you because the US  
13 Environmental Protection Agency, EPA, is looking  
14 at an unprecedented environmental threat in the  
15 form of global warming, and they are choosing to  
16 do nothing.

17 This is an agency which until April of  
18 this year was taking the position that there was  
19 no conclusive link between increased CO2 emissions  
20 and global warming. This is an agency that had to  
21 be hauled all the way to the United States Supreme  
22 Court to be told once and for all that CO2 is a  
23 pollutant, and that it is a pollutant subject to  
24 regulation by EPA and other state agencies,  
25 including the Montana DEQ, under the Clean Air

1 Act.

2 So when you are faced with arguments  
3 today that EPA is not requiring regulation of CO2,  
4 this is no surprise. This is an agency that had  
5 to be dragged kicking and screaming even to  
6 recognize that CO2 is a pollutant.

7 We know in Montana how serious the  
8 consequences of global warming are. We're living  
9 with them. We lived through last summer's fire  
10 season. My clients here today, many of them are  
11 farmers and ranchers, and they're trying to make a  
12 living in a drought that's been lasting for years  
13 now, and is showing no signs of abating.

14 EPA, in the wake of the Supreme Court's  
15 ruling, is not showing any signs that it's ready  
16 to step up and take an affirmative role, and give  
17 us some guidance in how to cut emissions of CO2.  
18 Under these circumstances, the State's own  
19 obligations to enforce their own environmental  
20 laws and address global warming are critically  
21 important. And contrary to what I suspect you're  
22 going to hear from the Department and from the  
23 permittee today, you don't have to make a new  
24 policy. You don't have to create a new legal  
25 program to make a major difference on global

1 warming. All you have to do is enforce existing  
2 requirements under the law as it stands today.  
3 And those requirements are requirements to install  
4 the Best Available Control Technology to cut CO2  
5 emissions.

6 I know in the briefing that you probably  
7 read a lot of back and forth about the question:  
8 Do BACT requirements apply to CO2? While there is  
9 a lot of briefing on this issue, it's a straight  
10 forward question. BACT requirements apply -- and  
11 I'm quoting. This is the same language in all of  
12 the governing BACT requirements under federal and  
13 state law. "BACT requirements apply to each  
14 pollutant subject to regulation under the Clean  
15 Air Act and the Clean Air Act of Montana." You  
16 are as capable of reading those words as anybody  
17 else in the world.

18 "Subject to regulation." What does that  
19 mean? Is CO2 subject to regulation? That's the  
20 question that you need to decide. And there is an  
21 easy answer. Yes.

22 In 1990, Congress passed Section 821 of  
23 the 1990 Clean Air Act amendments. Congress had  
24 recognized that we were facing a looming threat of  
25 global warming, and in the face of that threat,

1 Congress said, "We're going to target CO2, we're  
2 going to identify the facilities that emit the  
3 most CO2," and coal fired power plants are at the  
4 top of that list, "And we are going to require  
5 those facilities to monitor their CO2 emissions,  
6 report them to EPA, and in that way, the public  
7 and EPA are going to be able to track the  
8 contribution of these emissions to global  
9 warming."

10 In order to implement this requirement,  
11 Congress directed EPA to promulgate regulations in  
12 the Code of Federal Regulations, and EPA did that.  
13 As of today, any facility, a major emitting  
14 facility that's a coal plant, such as the proposed  
15 Highwood Coal Plant, cannot operate unless it  
16 installs continuous emissions monitoring for CO2,  
17 unless it keeps detailed records of its CO2  
18 emissions, and unless it submits quarterly reports  
19 to EPA reporting those emissions.

20 Now, by anyone's definition, this  
21 constitutes regulation of CO2. What that means is  
22 that CO2 is subject to BACT requirements. In  
23 order to avoid this result, the Department and SME  
24 have come up with two arguments as to why there is  
25 not an obvious answer here, why Section 821 is not

1       dispositive of your decision in this case.

2               The first argument that they make is  
3       that monitoring is not in fact required of CO2 for  
4       its own sake, that monitoring for CO2 is only  
5       required as part of the Acid Rain Program. There  
6       is a way to monitor your emissions of acid  
7       pollutants -- and those are nitrogen oxide, NOx,  
8       and sulphur dioxide, SOx -- that if you track your  
9       CO2 emissions, you know what your NOx emissions  
10      are. You can also track your O2 emissions and  
11      know what your NOx emissions are.

12              However, in addition, Congress has also  
13      required CO2 emissions monitoring for purposes of  
14      global warming, so if you were a facility that was  
15      tracking your NOx emissions rates under the Acid  
16      Rain Program, and you chose to use O2, not CO2,  
17      you would still be under the obligation to track  
18      your CO2 emissions as well and report those to  
19      EPA.

20              There is no question about this, and in  
21      their reply briefs, when you look back at them,  
22      you will see that the Department and SME have  
23      conceded this point. We know that there are  
24      monitoring requirements that apply only to CO2 for  
25      its own sake, for global warming purposes. This



1 is not just the Acid Rain Program. So we can put  
2 that argument aside.

3 The second argument they make is that  
4 somehow requirements to monitor, record keep,  
5 report, don't add up to regulation. Now, in my  
6 experience, this is the only time I have ever  
7 heard industry argue that expensive and burdensome  
8 requirements to monitor, keep records, and report,  
9 are not regulation.

10 And there is no case law authority for  
11 the proposition that monitoring and reporting  
12 isn't regulation. When the government tells you  
13 you have to do something, and you cannot operate  
14 your facility otherwise, the general sense is that  
15 you're being regulated. And there is nothing in  
16 the case law to suggest otherwise; there is  
17 nothing in EPA's own adjudicative decisions that  
18 suggest otherwise; and DEQ and SME don't point to  
19 any such authority.

20 What they rely on is a definition of  
21 regulated pollutants that EPA has recently  
22 promulgated in 2002, and that definition of  
23 "regulated pollutant" identifies four categories  
24 of pollutants that qualify as regulated pollutants  
25 under the New Source Review Program, which

1 includes the BACT requirements.

2 I want to make sure. I know that I'm  
3 covering a lot of ground here, so I hope if you  
4 have a question, you go ahead and interrupt me,  
5 and I can clarify it as we go along.

6 The four categories that EPA has made  
7 clear are regulated pollutants are pollutants that  
8 are, number one, subject to the National Ambient  
9 Air Quality Standards, the NAAQS; number two,  
10 pollutants that are subject to New Source  
11 Performance Standards, NSPS standards you may have  
12 heard; number three, ozone depletion standards;  
13 and number four -- and this is the important point  
14 -- pollutants that are otherwise subject to  
15 regulation.

16 The normal plain reading of "otherwise  
17 subject to regulation" would include monitoring  
18 and reporting requirements. And DEQ and SME have  
19 not explained why this catch-all category does not  
20 encompass Section 821 and its implementing  
21 regulations.

22 So just as the first argument has gotten  
23 them nowhere, this argument, too, does not present  
24 any reason to avoid the clear result that CO2 is  
25 regulated, has been regulated by Congress and EPA

1 since 1990, and is therefore subject to BACT  
2 requirements. That's the only question that you  
3 need to answer to decide this motion. Simply by  
4 affirming the fact that CO2 is regulated, the  
5 self-executing requirements of the BACT program --  
6 requirements that DEQ is very familiar with  
7 applying -- will kick in, and at that point on  
8 remand, DEQ and SME can look at the options that  
9 are available, decide what's cost effective, and  
10 determine what is the appropriate emissions limit  
11 for CO2. That's what my clients are asking this  
12 Board to do with respect to CO2 today.

13           Unless you have any questions, I'll turn  
14 now to the second question before you, and that is  
15 -- The second question before you today is: Are  
16 we going to continue to permit major polluting  
17 facilities in Montana, and renovation of major  
18 polluting facilities in Montana, without requiring  
19 state of the art controls to reduce emissions of  
20 very fine particulate matter.

21           And to be clear, this doesn't raise the  
22 same issues that come up with respect to CO2.  
23 There is no argument that BACT requirements apply  
24 to PM2.5. It's a pollutant that's subject to  
25 National Ambient Air Quality Standards. We know

1 that we have to achieve the maximum possible  
2 reductions, taking into account cost and energy  
3 and environmental impacts for PM2.5.

4           And before I dive into this legal issue,  
5 I want to take a step back for a moment. When  
6 we're talking about the overarching threat of  
7 global warming, it is easy to lose sight of other  
8 environmental concerns. They're overwhelmed by  
9 the pressing threat of global warming. But PM2.5  
10 is a major issue in its own right, and for that  
11 reason, I want to flag why my clients are so  
12 concerned about it, and why we think the Board  
13 should be concerned about it as well.

14           PM2.5 is a category of particulate  
15 matter. Particulate matter just means -- All  
16 particulate matter isn't the same. The bigger  
17 particles, the ones that you can see, or the solid  
18 particles that make up total particulate, those  
19 our bodies can filter out. They're big enough  
20 that our sinuses won't let them through to our  
21 lungs. So when you get to particulate matter that  
22 is in the very smallest size range, 2.5 microns  
23 and less, those are a part of what we inhale, and  
24 they lodge deep into the lungs, and they stay  
25 there, and they cause serious illnesses.

1           Over the past ten years, when EPA first  
2       -- since EPA first recognized PM2.5 as a major  
3       health concern, we've seen over 100 medical  
4       studies published that are conclusively linking  
5       inhalation of PM2.5 -- short term exposures,  
6       relatively low concentrations -- resulting in  
7       asthma, heart attacks, and premature death. And  
8       the most vulnerable people in our communities are  
9       the ones who are suffering the most. Those are  
10      the elderly people; people with pre-existing  
11      respiratory conditions; and most of all, children  
12      whose lungs are still developing, and are  
13      accordingly the most vulnerable.

14           In the face of this medical data, EPA  
15      has been obliged to revise its National Ambient  
16      Air Quality Standards, and make them nearly as  
17      twice as effective as they once were. And I want  
18      to make this clear. EPA has not done this  
19      willingly or eagerly. It had to be hauled into  
20      court in the District of Columbia, and compelled  
21      to comply with Court ordered deadlines to revise  
22      these NAAQS, and make them sufficiently  
23      protective.

24           So just as with CO2, where EPA is  
25      refusing to deal with a recognized pollution

1 problem, so, too, with PM2.5. EPA is not stepping  
2 up and doing its job. We have now been waiting  
3 ten years since EPA first set National Ambient Air  
4 Quality Standards for PM2.5 to get a final  
5 implementation rule, and this delay is  
6 particularly egregious because there is nothing  
7 stopping us, as we sit here today, from achieving  
8 incredible 99 percent control of PM2.5. There are  
9 well established controls, they're off the shelf,  
10 they're available now, we know how much they cost,  
11 we have the information to do a BACT analysis  
12 tomorrow.

13           The practical considerations that EPA  
14 once identified, its hurdles to doing a BACT  
15 analysis, have been resolved, and the agency  
16 itself has admitted this. We have plenty of EPA  
17 monitoring data now, we have reliable models, and  
18 we also have test methods to measure PM2.5.

19           But these are practical concerns that  
20 the Board does not need to consider for purposes  
21 of resolving the issue before you today, and that  
22 is: Given the problem that PM2.5 presents us --  
23 and I would like to turn to the problem that it's  
24 presenting precisely in Montana in a moment -- but  
25 given that problem, can we refuse to apply the

1 plain language of the Clean Air Act and the Clean  
2 Air Act of Montana, which is that BACT applies to  
3 each pollutant subject to regulation under the  
4 Clean Air Act. There is nowhere an exemption that  
5 says you can do analysis for larger particulate  
6 matter that is not so dangerous, that can't be  
7 controlled as easily as PM2.5, and avoid analysis  
8 of PM2.5 itself.

9 In Montana, this is a pressing issue.  
10 On December 11th, as many of you know I'm sure,  
11 the Governor has designated two counties as being  
12 non-attainment with PM2.5 standards: Missoula  
13 County and Ravalli County. So if you're living in  
14 Missoula, or you're living in Hamilton, or Libby,  
15 the air you're breathing is not safe, and these  
16 are not the only areas of Montana that we should  
17 be concerned about. Butte, Helena, Seeley Lake,  
18 these are also areas that have been identified as  
19 ready to bump up against the NAAQS, and switch  
20 over into non-attainment. And what non-attainment  
21 means is that we are not achieving the baseline  
22 standards that are deemed acceptable from a human  
23 health standpoint.

24 So this is not an issue that's going to  
25 go away. SME will tell you that this case is

1 about a single power plant, a single question of  
2 whether it alone should install controls for  
3 PM2.5. But we need to get a handle on PM2.5  
4 emissions across this state, and there are  
5 polluting facilities that exist now that are going  
6 to renovate, and new facilities that are going to  
7 be built. This issue is going to come up over and  
8 over again. This is the time to decide that we  
9 need to start installing the best available  
10 pollution control for PM2.5.

11 The legal questions, easy. We know that  
12 BACT applies. No one disputes that. Second, we  
13 know with respect to the Highwood plant, a PM2.5  
14 analysis was not done; there is no PM2.5 permit  
15 limit. The only reason that DEQ and SME say that  
16 this is legal is that EPA issued guidance ten  
17 years ago that said you could rely on analysis for  
18 PM10 -- larger particles, less dangerous --- to  
19 avoid doing analysis for PM2.5.

20 This is the question: Can EPA guidance  
21 trump the plain language of the Montana Clean Air  
22 Act and the Clean Air Act of the federal  
23 government? And the answer is no. EPA cannot  
24 strip your authority to protect human health in  
25 Montana, and enforce BACT requirements that are



1 uncontroversial; and moreover, EPA guidance does  
2 not have the force of law; and finally, it does  
3 not have even the force of reason at this point  
4 because there are no practical impediments to  
5 doing a PM2.5 BACT analysis.

6 I want to end these arguments with  
7 respect to PM2.5 just by countering a couple of  
8 factual concerns that have been raised by DEQ and  
9 SME, and the first is they have argued that they  
10 have in fact done more than what's required and a  
11 very conservative analysis for PM2.5, and that  
12 therefore you shouldn't be worried. That's not  
13 true. And this gets into some technical details.  
14 Again, it's not necessary for the Board to wade  
15 into these details, but I don't want you to be  
16 troubled by them or confused by them in the  
17 briefing because I know they went by quickly.

18 What DEQ did was to look at particulate  
19 matter of the filterable stage, and that's  
20 particulate matter when it's still in a solid form  
21 that can be caught in the form of solid particles;  
22 and then it looked at particulate matter at the  
23 condensible stage, when it's a gas that escapes  
24 out of the stack, and once it's allowed to exit  
25 the stack, then it retakes a solid form and

1 becomes a PM2.5 again.

2 At the filterable stage, they only  
3 looked at total particulate matter. They only  
4 looked at control efficiency for the whole realm  
5 of particulate matter. So at that stage of the  
6 game, there was no analysis of PM10, much less  
7 PM2.5.

8 I'm happy to address questions, because  
9 it took me awhile to understand this myself. It's  
10 a technical issue. But I want to make sure that  
11 the Board understands that even if it were  
12 appropriate to do a PM10 surrogate analysis,  
13 that's not what was done in this case. What we  
14 have here is the best controls for the PM that  
15 hurts us the least. What we need to have are the  
16 controls for the smallest particles that pose the  
17 greatest danger to us.

18 So what we are asking with respect to  
19 PM2.5 is that the Board again remand this permit,  
20 just clarify that a BACT analysis for PM2.5 has to  
21 be done in the first instance, and then DEQ and  
22 SME can take the step that they have never yet  
23 taken, which is to go out, look at the controls,  
24 and look at the costs, see what can be done.

25 And again, even if there were -- there

1 is a reference test method that will work to  
2 assure compliance emissions limits -- but even if  
3 there were not, DEQ and SME certainly have  
4 authority to set operation limits or design  
5 limits. They do not have to set a numeric  
6 emission limit. They could simply require that  
7 the controls that they know are most effective be  
8 used at this plant. To wait any longer to enforce  
9 these basic requirements is unconscionable.

10 Finally, I would like to address a theme  
11 that was hit hard throughout the briefing, and  
12 that is: We've heard so much about what other  
13 states and EPA are not doing to protect the  
14 environment. But we can do better than that in  
15 Montana, and we're required to do better. We have  
16 such an impressive tradition in this state. We  
17 are the only state in the union that recognizes  
18 the right to a clean and healthful environment,  
19 and we have always -- and certainly since 1972 --  
20 made a commitment to take a leadership role in  
21 environmental protection.

22 You members of the Board have such a  
23 rare opportunity to make a difference, not only  
24 for Montana, but to set a national example that  
25 will engender change, and engender change with

1 respect to global warming. We can't make a  
2 mistake here. This is the fight of our lives,  
3 and it's a fight that doesn't have to begin with  
4 the federal government. It can begin at the state  
5 level, it is beginning at the state level. Across  
6 the nation, we're seeing states from Florida, to  
7 California, to Kansas, stepping up and taking  
8 responsibility to protect the environment. We can  
9 continue that fight here in Montana. It can start  
10 here in earnest with you. Thank you.

11 CHAIRMAN RUSSELL: Thank you. Do you  
12 have questions for --

13 MR. ROSSBACH: I'm going to go  
14 backwards, and start with PM2.5. If I understand  
15 you correctly, you say there is a method for  
16 evaluating PM2.5 emissions without using PM10 as a  
17 surrogate.

18 MS. DILLEN: Yes.

19 MR. ROSSBACH: What is that? Is that  
20 agreed to by the other side, or is that a fact  
21 that's in dispute?

22 MS. DILLEN: Let me begin with the facts  
23 that are not in dispute.

24 MR. ROSSBACH: I'm asking you whether --  
25 is that a fact in dispute, whether 2.5 is an

1 appropriate -- is there an appropriate methodology  
2 to evaluate PM2.5?

3 MS. DILLEN: No, I don't believe it's a  
4 fact in dispute. EPA has acknowledged that there  
5 are referenced test methods; they have  
6 acknowledged that there are controls that are  
7 available to effectively reduce PM2.5 emissions.  
8 It's certainly not a fact in dispute, given that  
9 SME's expert has acknowledged that there are  
10 controls that are particularly effective, and that  
11 there is a great reference test method that could  
12 be used tomorrow.

13 MR. ROSSBACH: But there is no -- But  
14 EPA hasn't set forth a reference test method for  
15 2.5?

16 MS. DILLEN: EPA has a conditionally  
17 approved test method. It has not finally approved  
18 it. But I would like to step back for a moment.  
19 The question how you would do the BACT analysis,  
20 what reference test method you should use, if any,  
21 those are all questions that should be addressed  
22 in the actual process of doing a BACT analysis.  
23 All we're asking today is whether we can still  
24 avoid doing a BACT analysis simply by relying upon  
25 the EPA guidance. So the legal question --

1                   MR. ROSSBACH: How would a BACT analysis  
2 have been different if they had used a different  
3 reference test?

4                   MS. DILLEN: Well, when you're looking  
5 at -- I think it would be quite different, and for  
6 two reasons: The first is that when you're doing  
7 a BACT analysis for PM10, there are controls that  
8 are very effective at controlling larger  
9 particles, but less effective at controlling  
10 PM2.5. So you might identify a control for PM10  
11 that is 99 percent efficiency.

12                   MR. ROSSBACH: I understand that.  
13 That's not my question. I guess I'm sorry I  
14 didn't make my question clear. If you have -- If  
15 you're using -- I understand the argument why  
16 using PM10 as a surrogate is not an appropriate  
17 method for evaluating PM2.5. But let's assume  
18 that we have to use -- that there is a fact that  
19 using the surrogate method is the only method  
20 that's been approved. Just assume that.

21                   How would a BACT analysis have been  
22 different if we only had PM10 -- used a surrogate  
23 as a reference test? How would it have come out  
24 any different? Didn't they use PM10? Didn't they  
25 evaluate PM10 in the process that they did use?

1 They used a BACT analysis for PM10; is that  
2 correct?

3 MS. DILLEN: That's what they had  
4 purported to do. One of our arguments is that in  
5 fact even with respect to PM10, they actually  
6 looked at total PM and not just --

7 MR. ROSSBACH: That is a fact in dispute  
8 then; isn't that true?

9 MS. DILLEN: No. You can simply look at  
10 the permit limits. It has a PM limit, and then a  
11 PM10 -- the PM10 limit is made up of the  
12 filterable PM limit, and then a condensible limit.  
13 So there is no -- We can simply look at the permit  
14 and know that.

15 However, that's not our first argument,  
16 and our first argument is that there is no EPA  
17 approval process that's necessary to figure out  
18 how to do a BACT analysis for PM2.5. In every  
19 BACT analysis, you're sort of making it up as you  
20 go along. You have a five step process. You go  
21 out and you see what controls there are. It's not  
22 a fact in dispute that there are controls --

23 MR. ROSSBACH: You have to determine how  
24 much PM2.5 there is, and you have to determine --  
25 you have to use a test to evaluate or determine

1       how much PM2.5 you're expecting to come out of  
2       that, and if there is a dispute as to the proper  
3       methodology for that, isn't that a factual  
4       dispute?

5               MS. DILLEN:  I think that would be a  
6       factual dispute in another case.  Here we're at  
7       the point where no one has ever tried to do a  
8       PM2.5 analysis.  In the event that a PM2.5  
9       analysis were done, and we were to come before you  
10      and say, "We don't think it's good enough.  We  
11      don't agree with how they calculated emissions or  
12      controls efficiencies," we can argue about all  
13      that then, but now is the time to just do the  
14      analysis in the first instance.

15             It's not enough to say, "We have some  
16      practical difficulties here, so we're going to  
17      avoid doing any analysis for PM2.5."  There have  
18      been practical difficulties for the test method  
19      for PM10 for years, and that hasn't precluded a  
20      BACT analysis for PM10, and in fact, too, that's  
21      the issue before you in SME's own appeal of its  
22      permit.  It itself is asking for a conditional  
23      test method for PM10.

24             MR. ROSSBACH:  But you're not --- you're  
25      only challenging the legal basis for this permit,



1 not the factual basis for this permit?

2 MS. DILLEN: No. We have no suggestion  
3 as to what BACT would be, what it is. We haven't  
4 hired an expert to do a BACT analysis. I, as I  
5 stand here today, would have no recommendation as  
6 to what controls should be used, or what the  
7 emission limit should be. All that we're asking  
8 is to confirm a basic point of law, which is that  
9 BACT is required for PM2.5, and let's start trying  
10 to do it, because if we wait for EPA to promulgate  
11 an implementation rule, who knows? It could be  
12 ten more years.

13 And in that time frame, what's happening  
14 is more and more facilities are polluting PM2.5.  
15 We're getting closer and closer to the NAAQS, and  
16 even bumping over into non-attainment, and at that  
17 point, we don't have any room to grow anymore.  
18 The next facility that comes along can't be built  
19 because it's going to violate the PM2.5 NAAQS. So  
20 it's not only in the interest of the environment,  
21 but it's certainly in the interest of Montana's  
22 economy to get a handle on PM2.5 emissions right  
23 now. And you certainly have the authority to do  
24 that under the BACT requirements of the Clean Air  
25 Act of Montana.

1           MR. ROSSBACH: Let me go then and ask  
2 you some questions about CO2. Let's just assume  
3 for the sake of argument that they're correct that  
4 there is no, quote unquote, regulation of CO2 yet.  
5 I understand your argument about the Section 821.  
6 But assume that there is no, quote unquote,  
7 regulation of CO2 currently. There is monitoring  
8 and not regulation. Let's just assume that we  
9 agree with them.

10           Then I want to look at then sort of the  
11 second prong of your argument, the sort of  
12 "subject to regulation" argument. How do you deal  
13 with the Alabama versus Costle case that they  
14 referenced in their brief? I didn't see any in  
15 your reply brief. I didn't see how you tried to  
16 distinguish that case. I didn't have the case  
17 available to me. So how do you deal with that  
18 particulate case?

19           MS. DILLEN: The Alabama case has a  
20 footnote which -- This was a very tiny side issue  
21 that the Court dealt with in passing, and it's  
22 going to take me a moment to set it up for you, so  
23 if you'll bear with me.

24           Basically Alabama was the case where the  
25 D.C. Circuit was looking at the whole PSD program

1 and trying to figure out how to implement it, and  
2 at that time, EPA had wanted to make -- to carve  
3 out a big exemption for particulate matter for  
4 certain smaller sources that they didn't feel  
5 should be subject to the wholesale requirements of  
6 the PSD Program, and so they had said, "If we set  
7 a NAAQS for this particulate matter which we need  
8 to do, these facilities are going to have to  
9 comply with the PSD Program, and we don't want  
10 to."

11 And the D.C. Circuit said to them,  
12 "Listen. You can't do this exemption, it's not  
13 legal, but you can get to the same result that you  
14 want to do by excluding the largest particulate  
15 matter that these guys emit from your NAAQS  
16 standard, and then you could impose a New Source  
17 Performance Standard on these same facilities, and  
18 get at their emissions that way, so that they  
19 would have to comply with BACT requirements, but  
20 not have to demonstrate compliance with the  
21 NAAQS." So it was a very -- It was on a very fine  
22 tuned issue.

23 The question whether pollutants are  
24 subject to regulation under the Clean Air Act,  
25 that just wasn't a question that the Court was

1 addressing, and it's not a question that any Court  
2 has addressed. It's true that the EPA has issued  
3 a decision in which they have stated that a  
4 pollutant has to be actually regulated in order to  
5 be subject to regulation. In that case, North  
6 County, which you may have seen in the briefs, the  
7 issue whether CO2 was a pollutant subject to  
8 regulation under the act was not at issue, and  
9 that, too, was a case where the statement was made  
10 in passing without a real dispute over this issue  
11 that we have before you today.

12 MR. ROSSBACH: Do you consider the -- I  
13 didn't hear you arguing the Massachusetts EPA  
14 case, to the extent to say that -- Does that case,  
15 in your view, hold that CO2 is subject to  
16 regulation, or that -- I know it held that air  
17 pollutant. Does it hold that it's subject to  
18 regulation, or can you argue that it does?

19 MS. DILLEN: No. The other side is  
20 absolutely right. The Supreme Court doesn't come  
21 out and say, "CO2 is a pollutant, and therefore it  
22 is subject to regulation under the Clean Air Act,"  
23 and we don't argue that. We think that the  
24 Massachusetts v. EPA argument is important  
25 principally because it changes the legal

1 landscape. State agencies have rightfully been  
2 reluctant to even think about regulating CO2 when  
3 EPA has been taking the position that no agency  
4 has regulatory authority under the Clean Air Act  
5 to get at CO2.

6 So what we wanted to point out with the  
7 Massachusetts v. EPA case is there is no more  
8 argument. You have the authority to regulate CO2,  
9 and we know that.

10 The other way in which I think CO2 being  
11 a pollutant is significant is that it's not the  
12 case that "subject to regulation" would have no  
13 meaning, as the Department and SME have argued, if  
14 you don't take "subject to regulation" to mean  
15 actually regulated. This is a case where "subject  
16 to regulation" could mean a lot of different  
17 things, and we're arguing for what is a natural  
18 reading.

19 Their argument against this is "subject  
20 to regulation" would mean nothing if it doesn't  
21 actually mean regulated. But of course BACT is  
22 limited to pollutants that are emitted in  
23 significant amounts; it's limited to pollutants  
24 that actually pose a human health and welfare  
25 risk. CO2 falls within both of those categories.

1 And so our argument is sure, it's certainly a  
2 pollutant that is subject to EPA's authority to  
3 regulate.

4 MR. ROSSBACH: Are you aware of any case  
5 that says other than CO2, or even CO2 that says --  
6 that's different or counter to the Alabama v.  
7 Costle case with regard to what "subject to  
8 regulation" means? Is there any EPA guidance  
9 anywhere that you're aware of?

10 MS. DILLEN: I'm not aware of any case  
11 aside from Alabama v. Costle that even arguably  
12 addresses this question, and I think it's because  
13 this question doesn't come up very often, and all  
14 of the pollutants that major facilities emit in  
15 major amounts have been regulated for quite a  
16 while now. So it just hasn't been a live issue.

17 I am aware of the EPA case which I  
18 mentioned before which does go against our  
19 reading; and I am aware of the recent EPA  
20 permitting decision that has been submitted to the  
21 Board by DEQ and the Department, and the EPA has  
22 rejected that argument.

23 I don't think it's surprising. This is  
24 an agency that does not want to read the Clean Air  
25 Act to apply to CO2. There is no question that we

1 are asking the Board to do something that EPA is  
2 not willing to do itself, and that's the point of  
3 this case. That's why we're here.

4 MR. ROSSBACH: Is there any other state  
5 or comparable agency to ours that has ruled as  
6 you're requesting us to do?

7 MS. DILLEN: This issue has come to the  
8 fore in the wake of Massachusetts v. EPA, and it  
9 is in litigation across the country. I'm not  
10 aware of any decision that's been reached that  
11 could give the Board any guidance in this regard.

12 There has been one decision in Georgia  
13 which dismissed this sort of claim along with many  
14 others, but it is a claim that is proceeding in  
15 litigation in other states. I'm aware that it's  
16 in litigation in Illinois, I believe. But I  
17 believe that you are the first body to be  
18 addressing the merits of this argument.

19 MR. ROSSBACH: Do you know how many  
20 others are looking at it?

21 MS. DILLEN: I would have to figure that  
22 out, and I'd be happy to submit briefing on that.

23 MR. ROSSBACH: Somewhere I read about a  
24 -- it may have been a Federal Register statement  
25 that said, that came out of EPA in 1996 that

1 suggested that a pollutant need not to be  
2 specifically regulated by Section 111 or 112  
3 standard to be considered regulated. And that's  
4 from 61 Federal Register 38-250-38309 from 1996.  
5 Are you aware of that? Has anybody -- Do you have  
6 any -- have you heard of that particular Federal  
7 Register?

8 MS. DILLEN: Could you tell me the --  
9 was it a final rulemaking?

10 MR. ROSSBACH: I don't know. It was  
11 just a cite that I read of somewhere in --

12 MS. DILLEN: I am aware of statements of  
13 this kind. They've come up within the context of  
14 whether hazardous air pollutants should be subject  
15 to BACT requirements, and these are the kind of  
16 statements that I think drove EPA to include the  
17 catch-all category of "otherwise subject to  
18 regulation" in its definition of pollutant. And I  
19 think that definition is very telling. EPA is  
20 clearly not saying that you have to be regulated  
21 as a NAAQS pollutant or an NSPS pollutant, as the  
22 Department and SME have argued, in order to  
23 qualify as a pollutant subject to regulation for  
24 purposes of the NSR program.

25 I do want to say I know that you posed



1 the hypothetical, "Let's assume that CO2 is not  
2 regulated," but I really don't want the members of  
3 the Board to lose sight of the fact that CO2 is  
4 regulated, and there has been no argument as to  
5 why Section 821 does not constitute regulation.

6 MR. ROSSBACH: We have a State  
7 Implementation Plan -- people call it SIP. Is  
8 there anything in the SIP that you would think --  
9 any language in the SIP which could be used to  
10 say, or to help us decide whether CO2 comes within  
11 the regulation of our implementation plan?

12 MS. DILLEN: Well, the SIP tracks the  
13 Federal Clean Air Act requirements quite closely.  
14 So to the extent that the plain language of the  
15 BACT definition is helpful, it's there in the SIP  
16 as well as in the federal law, there is not a lot  
17 of law in this, either in the form of statutes or  
18 regulations or case law. And again, I think it's  
19 because this situation of CO2 is a pollutant  
20 that's emitted in such massive quantities, and yet  
21 has never been addressed by EPA, it's really  
22 anomalous.

23 And so I regret that there are not more  
24 guideposts for the Board. However, we can read  
25 the language. It says, "Each pollutant subject to

1 regulation," and we know that Congress has  
2 targeted CO2 for regulation.

3 MR. ROSSBACH: Thank you.

4 CHAIRMAN RUSSELL: Anyone else?

5 MR. MIRES: Bact to your comment on the  
6 methods of monitoring BACT. How long has this  
7 been in effect in operation?

8 MS. DILLEN: How long has it been since  
9 EPA has developed reference test methods? Well, I  
10 don't want to speculate, but let me tell you what  
11 I do know.

12 In 2005, EPA published a proposed  
13 implementation rule in the Federal Register, and  
14 at that time, they referenced the test, at least  
15 two test methods, one which is a well accepted  
16 test method that's used for PM10. That's method  
17 202(a). The other is conditional test method 39,  
18 and that's a test method that SME's own expert has  
19 agreed is a great method that gets rid of a lot of  
20 the problems that other test methods have had over  
21 the years.

22 So in answer to your question, I know  
23 that they were in existence as of 2005. They've  
24 been referenced again in 2006 and 2007. I don't  
25 know when they first came into being.

1           CHAIRMAN RUSSELL: Any other questions?

2           (No response)

3           CHAIRMAN RUSSELL: I'm not sure if I  
4 want to hold mine or -- I just have this thought,  
5 something that you said. I think I'm going to  
6 wait. It's more appropriate for the Department to  
7 answer the question that I have. Thanks.

8           MS. DILLEN: Thank you.

9           CHAIRMAN RUSSELL: Speaking of the  
10 Department, Board, do you want to take a quick  
11 break before the -- I'm sure the Department is  
12 going to take less time than that. Let's take a  
13 break then. Ten minutes.

14                           (Recess taken)

15           CHAIRMAN RUSSELL: We're going to get  
16 started again. The Department.

17           MR. RUSOFF: Thank you very much. For  
18 the record, I'm David Rusoff. I'm a staff  
19 attorney for the Montana Department of  
20 Environmental Quality. And what I'd like to do  
21 this morning is summarize -- probably not as  
22 briefly as Ms. Dillen, but I'll try to be brief --  
23 the reasons stated in the Department's briefs as  
24 to why the Department's BACT determination for  
25 Highwood Generating Station was not unlawful. And

1 I also encourage you to ask any questions that you  
2 have, either as I go along or when I'm finished.

3 Before I get into my presentation,  
4 though, I think I'd like to respond to some of the  
5 questions that Mr. Rossbach had. He asked Ms.  
6 Dillen whether there were any Court cases that  
7 addressed the proper interpretation of the  
8 "subject to regulation" language in the Federal  
9 Clean Air Act other than Alabama versus Costle  
10 case.

11 And I think that the predominant case is  
12 the Massachusetts versus EPA case. In that case,  
13 the United States Supreme Court would not have  
14 spent 30 pages discussing whether or not CO2 is an  
15 air pollutant if the highest Court in this country  
16 found that CO2 was already regulated under the  
17 Federal Clean Air Act. There wouldn't be any  
18 question as to whether or not it's an air  
19 pollutant if it was already regulated under the  
20 Clean Air Act.

21 Another question that Mr. Rossbach had  
22 concerned whether or not the EPA guidance  
23 concerning the "subject to regulation" language --  
24 and he referred to a Federal Register notice. And  
25 he's correct that there is EPA guidance as to

1 EPA's interpretation of that language. And I'm  
2 not sure if this specific page was attached to the  
3 Department's brief, but in the response to public  
4 comments concerning the recent Deseret Coal Fired  
5 Plant permit, that EPA issued earlier this year in  
6 August of 2007, on Page 5 of the comments and  
7 responses, and we did attach at least portions of  
8 this to our brief.

9 EPA states in response to a comment  
10 specifically concerning the lack of emission  
11 limits for CO2 in the Deseret permit that, "EPA  
12 has historically interpreted the term 'subject to  
13 regulation under the Act' to describe pollutants  
14 that are presently subject to a statutory or  
15 regulatory provision that requires actual control  
16 of emissions of that pollutant." And EPA then  
17 cites two Federal Register notices, one from 1978,  
18 and the 1996 Federal Register notice that Mr.  
19 Rossbach mentioned.

20 The other point that I wanted to address  
21 was: Ms. Dillen stated that a PM2.5 BACT analysis  
22 was not done for the Highwood Generating Station,  
23 and that in fact a PM10 BACT analysis was not  
24 done. So I'll address the second comment first.

25 I believe you have the air quality

1 permit. I know at least portions of that were  
2 cited in our briefs, and I think I attached the  
3 portions that relate to the particulate BACT  
4 analysis, and I think I also attached the actual  
5 limitations section of the permit itself. And if  
6 you look at Page 5 of the permit, Paragraphs 4 and  
7 5, the permit clearly sets a PM10 emission limit.  
8 The permit sets a filterable particulate emissions  
9 limit of 0.12 pounds per million Btu, and 33.25  
10 pounds per hour.

11 And then Paragraph 5, the permit states,  
12 "Particulate matter with an aerodynamic diameter  
13 less than or equal to ten microns, or a PM10  
14 emissions filterable and condensible from the CFB  
15 boiler stack shall be limited to 0.026 pounds per  
16 million Btu, and 72.04 pounds per hour." This is  
17 based upon the permit analysis for particulate.

18 And on page 25 of the permit analysis,  
19 the Department analyzed control technologies that,  
20 quote, "can be used to effectively control  
21 filterable PM/PM10."

22 On page 27 of the permit analysis, there  
23 is a summary table that lists, quote, "filterable  
24 PM/PM10 technologies."

25 And then on page 38 of the permit

1 analysis, Paragraph 6 discusses control  
2 technologies for, quote, "condensable PM10  
3 emissions."

4 So it's just not correct, and there  
5 really should be no dispute as to whether or not  
6 the Department did a PM10 analysis and set limits  
7 for PM10.

8 Further, Ms. Dillen stated that a PM2.5  
9 BACT analysis was not done. But as you'll hear  
10 later this morning, the Petitioners own asserted  
11 expert witness in this case, Hal Taylor, said that  
12 a PM2.5 BACT analysis was done using PM10 as a  
13 surrogate.

14 The Department's motion for summary  
15 judgment is based on two very basic things: The  
16 fact that the Petitioners have the burden of proof  
17 in this contested case; and the fact that the  
18 Petitioners cannot meet that burden of proof.

19 As the parties bringing the challenge to  
20 the air quality permit for the Highwood Generating  
21 Station, the Petitioners have the burden to prove  
22 that the Department's decision was unlawful. And  
23 the standard for summary judgment in a case is a  
24 summary judgment should be entered when there are  
25 no issues of fact necessary to deciding the legal

1 issues.

2 In this case, all parties have filed  
3 their own motions for full summary judgment on all  
4 of the Petitioners' claims, so all parties concede  
5 that there are no factual issues that the Board  
6 must decide at a hearing in order to reach a  
7 decision on the Petitioners' claims.

8 So because they have the burden of  
9 proof, in order for you to find in favor of the  
10 Petitioners, the Petitioners are required to  
11 demonstrate that they, rather than the Department,  
12 are entitled to judgment as matter of law, and  
13 they have failed to do this. Rather as the  
14 Department has shown in its briefs, the Department  
15 acted lawfully, and the Department followed the  
16 same standards in this case that are followed by  
17 EPA -- not only EPA, but the other permitting  
18 authorities in the country.

19 No permitting authority in the country  
20 has made a BACT termination for CO2, and no  
21 permitting authority in the country is making BACT  
22 determinations for PM2.5 without using PM10 as a  
23 surrogate. The Petitioners have provided no  
24 demonstration to the contrary.

25 It seems very unlikely that the



1 Department acted unlawfully by following the same  
2 standards followed by the other air quality  
3 permitting authorities in the country; but the  
4 Department also has shown affirmatively in its  
5 briefs that it did not act unlawfully.

6 The Petitioners are asking the Board to  
7 require the Department to ignore the limits on its  
8 legal authority because it serves the Petitioners'  
9 purpose in this case to try to stop construction  
10 of a new power plant in Montana. However, that's  
11 not the function of the Department's Air Quality  
12 staff. They're required to implement the statutes  
13 enacted by the Legislature, and the rules adopted  
14 by this Board.

15 In the long run, I don't believe even  
16 the Petitioners or the State of Montana would  
17 benefit from the Department's staff deciding for  
18 themselves on a case-by-case basis what they  
19 believe the statutes and rules should be.

20 I want to emphasize that the Department  
21 takes its mission to protect air quality in the  
22 state very seriously. However, the Department  
23 also is required to treat the regulating community  
24 fairly consistently, and must be able to defend  
25 its decisions before the regulated community. In

1 making the kind of policy determinations that the  
2 Petitioners are asserting the Department should  
3 have made in the present case without any  
4 regulatory guidance, and in the face of consistent  
5 precedent throughout the country to the contrary,  
6 would be very difficult for the Department to  
7 defend.

8           At some time in the future, it's likely  
9 that CO2 will become subject to regulation, and  
10 EPA will provide the states with the tools  
11 necessary to evaluate PM2.5 without using PM10 as  
12 a surrogate. However, that was not the case when  
13 the Department issued the air quality permit for  
14 the Highwood Generating Station, and it's still  
15 not the case today.

16           Also the Petitioners continue to confuse  
17 the issue of the environmental and health effects  
18 of CO2 and PM2.5 with the real issues raised by  
19 the Petitioners's claims, which are whether the  
20 Department acted unlawfully.

21           There is no dispute in this case  
22 regarding the environmental or health effects of  
23 CO2 or PM2.5, and the effects of CO2 and PM2.5 are  
24 not relevant to the Board's decision as to whether  
25 or not the Department violated legal requirements.

1           Similarly, decisions on proposed power  
2 plants in Florida and Kansas referred to by Ms.  
3 Dillen, which were decisions by a Public Service  
4 Commission based on the cost of electricity to the  
5 consumer, and in the case of Kansas, was based on  
6 a statute that doesn't exist in Montana, are  
7 irrelevant to your decision. Neither of those  
8 situations involves the scope of the PSD BACT  
9 requirement, or whether the PSD BACT requirement  
10 applies specifically to CO2.

11           The "subject to regulation" language in  
12 the BACT requirement limits the scope of the BACT  
13 requirement, so that BACT requirement is not  
14 required for all air pollutants. That's an  
15 important point in this case. Within the context  
16 of the definition of BACT, the phrase "subject to  
17 regulation" reasonably can mean only that the  
18 particular pollutant is regulated under either the  
19 Federal Clean Air Act or the Clean Air Act of  
20 Montana.

21           Contrary to Ms. Dillen's argument,  
22 interpreting this language as including any air  
23 pollutant that could be regulated under either the  
24 Federal Clean Air Act or the Clean Air Act of  
25 Montana would render this limiting language

1 meaningless. The Department is not authorized by  
2 law to make a BACT determination for CO2 because  
3 CO2 is not regulated at this time under either the  
4 Federal Clean Air Act or the Clean Air Act of  
5 Montana.

6           Neither the information gathering  
7 requirements of the Federal Clean Air Act or EPA's  
8 acid rain regulations cited by the Petitioners  
9 restrict CO2 emissions in any way. Those  
10 provisions relate only to monitoring of CO2  
11 emissions for purposes of gathering information  
12 regarding greenhouse gas emissions, and for  
13 purposes of establishing nitrogen oxide or NOx  
14 emission rates.

15           The requirement to monitor a pollutant  
16 does not require any kind of control or other  
17 limitation of that pollutant, and cannot  
18 reasonably be considered to constitute regulation  
19 of that pollutant for BACT purposes.

20           Mr. Rossbach referred to the Alabama  
21 Power Company versus Costle, in which the Court  
22 notes that a pollutant may constitute an air  
23 pollutant within the meaning of the Federal Clean  
24 Air Act, but not be subject to regulation for  
25 purposes of the BACT requirement.

1           The Court stated in that case that once  
2 a standard of performance has been promulgated for  
3 excluded particulates, those pollutants become  
4 subject to regulation within the meaning of  
5 Section 165 of the Federal Clean Air Act, which  
6 requires a BACT determination prior to PSD permit  
7 approval.

8           And I believe Mr. Rossbach also referred  
9 to the North County Resource Recovery Association  
10 case cited in the Department's briefs, in which  
11 the US Environmental Appeals Board affirmed that  
12 the PSD program was intended to apply only to air  
13 pollutants that are actually regulated under the  
14 Federal Clean Air Act.

15           In that case, the EAB stated that, "EPA  
16 lacks the authority to impose limitations or other  
17 restrictions directly on the emission of  
18 unregulated pollutants. EPA clearly has no such  
19 authority over emissions of unregulated  
20 pollutants."

21           Again, CO2 is an unregulated pollutant.  
22 There is no dispute in the case that neither EPA  
23 nor Montana has issued any ambient air quality  
24 standards for CO2, and there are no New Source  
25 Performance Standards for CO2.

1 MS. SHROPSHIRE: Are there standards for  
2 mercury?

3 MR. RUSOFF: Mercury is a listed  
4 hazardous air pollutant under Section 112 of the  
5 Federal Clean Air Act, and under Section 112 --  
6 actually I have to take that back. It was listed  
7 -- or it is listed. It is a listed hazardous air  
8 pollutant under Section 112, and pursuant to  
9 Section 112, the Environmental Protection Agency  
10 is required to promulgate Maximum Achievable  
11 Control Technology standards for mercury.

12 And the only situation that I'm familiar  
13 with from my work for the Department is the  
14 situation of utilities, and EPA originally  
15 determined that utilities should be regulated  
16 under Section 112, and then as I recall withdrew  
17 that determination; and I think EPA was sued for  
18 that, and I can't tell you what the ultimate  
19 decision was there. Mercury is obviously  
20 regulated now under the Clean Air Act of Montana  
21 by this Board's mercury rulemaking.

22 MS. SHROPSHIRE: But it doesn't have a  
23 standard?

24 MR. RUSOFF: It does under the Board's  
25 rules.

1           MS. SHROPSHIRE: Let me go back. Have  
2 you required companies to do a BACT analysis for  
3 mercury prior to that?

4           MR. RUSOFF: I believe so. I know that  
5 we've made BACT determinations in permits. I  
6 haven't looked at the permit applications, but I  
7 know we have made BACT determinations for mercury  
8 prior to the Board's adoption of the mercury rule,  
9 and I believe we continue to do that, so that if  
10 BACT for some reason drove a more stringent  
11 emission limit, then that would be required. Plus  
12 I guess the Board's mercury rule isn't effective  
13 yet anyway, so we would be continuing to do BACT  
14 for mercury.

15           MS. SHROPSHIRE: Thank you.

16           MR. RUSOFF: CO2 also, as Ms. Dillen  
17 stated, is not an ozone depleting substance  
18 subject to the ozone depletion restriction in the  
19 Federal Clean Air Act, and similarly so, too,  
20 emissions are not restricted under any other  
21 provision of the Federal Clean Air Act, EPA's  
22 regulations, the Clean Air Act of Montana, or  
23 Montana's air quality rules.

24           If Congress had intended the BACT  
25 requirement to apply to all air pollutants, it

1 reasonably would not have qualified the definition  
2 of BACT as applying to, quote, "each pollutant  
3 subject to regulation under this chapter," rather  
4 simply would have applied the BACT requirement to  
5 each air pollutant. However it didn't, and it's  
6 not permissible to read the phrase "subject to  
7 regulation" out of the statutes and rules.

8 EPA's RACT/BACT/LAER Clearinghouse, or  
9 the RBLC as it's known, is a important source of  
10 information for BACT analyses and determinations.  
11 And Petitioners have not demonstrated that the  
12 RBLC contains any examples of a permit limit for  
13 CO2 for any emission source in the country. On  
14 the contrary, their own expert regarding BACT for  
15 greenhouse gases, Bill Powers, testified in his  
16 deposition in this case that he would not expect  
17 to find any CO2 control technologies listed in the  
18 RBLC, and that he's not aware of any EPA guidance  
19 to assist in performing a BACT analysis for CO2.

20 And further the Petitioners have cited  
21 no cases in which any administrative agency or  
22 Court has ruled that the "subject to regulation"  
23 language in the definition of BACT includes all  
24 air pollutants that could be regulated, or CO2  
25 specifically.



1 MS. SHROPSHIRE: I have a question.  
2 Along those lines, one of the things I've been  
3 thinking about is that a lot of the arguments have  
4 been that no one has ever done this before, and it  
5 seems -- just because no one has done this before,  
6 how will somebody do it for the first time?

7 MR. RUSOFF: You're asking me how would  
8 a permitting authority --

9 MS. SHROPSHIRE: Because of the timing  
10 of this, is it, in your opinion, against the law  
11 to do this for the first time because no one else  
12 has done it before?

13 MR. RUSOFF: No. But in doing a BACT  
14 determination, you have to have information in  
15 order to make that determination, or we would be  
16 here today with SME challenging the BACT  
17 determinations, arguing that you did your CO2 and  
18 your PM2.5 BACT determinations totally in a  
19 vacuum, you had no -- No one else in the country  
20 is doing this, first of all, so you're for some  
21 reason interpreting the BACT requirements  
22 differently than every other permitting authority  
23 in the country, and you don't have the necessary  
24 tools to do those BACT determinations, especially  
25 in the case of PM2.5, as I'll discuss in a few

1 minutes.

2                   So no, I'm not going to stand up here in  
3 front of you and say that Montana should not be  
4 the first to do a BACT determination for CO2  
5 because no other permitting authority has done  
6 that. I don't think that's a valid legal  
7 argument. I think it may be a technical problem.

8                   MR. ROSSBACH: I've got a lot of other  
9 questions. But what is the technical problem with  
10 doing a BACT on CO2?

11                   MR. RUSOFF: Well, the Department hasn't  
12 argued that there is a technical problem with  
13 doing a CO2 BACT determination --

14                   MR. ROSSBACH: I said you thought that  
15 it was a technical problem to be doing a BACT for  
16 CO2.

17                   MR. RUSOFF: We haven't argued that. In  
18 response to Ms. Shropshire's question, I'm saying  
19 -- I guess what I intended to say was that there  
20 are no other emission limits in the country for  
21 CO2 for any kind of emitting unit to look to for  
22 guidance the way you typically would in a BACT  
23 analysis. There wouldn't be any information  
24 concerning cost effectiveness for particulate  
25 control technologies, or as to what ultimately

1 happens with the CO2 that you've captured later.

2 So if you're the first permitting  
3 authority in the country to do this, you're really  
4 way out there, but that's not to say legally that  
5 you're violating the law because you're the first  
6 to do it. Someone is going to be the first.

7 MR. ROSSBACH: Well, we did BACT  
8 analysis on mercury before we had an emission  
9 standard, didn't we?

10 MR. RUSOFF: Yes.

11 MR. ROSSBACH: So you can do a BACT  
12 analysis of CO2 without an emission standard for  
13 CO2. You don't need an emission standard to do a  
14 BACT analysis, do you?

15 MR. RUSOFF: I agree with that.

16 MR. ROSSBACH: And so isn't it very  
17 similar to a BACT analysis for mercury? The  
18 questions about the effectiveness of the  
19 technology in mercury, a lot of it wasn't --  
20 hasn't been totally tested in the same situations  
21 for particular plants that we're looking at. It's  
22 many of the same technical problems, isn't it?  
23 And we still went ahead and did it, didn't we?

24 MR. RUSOFF: We did do BACT  
25 determinations and do do BACT determinations for

1 mercury. I can't tell you that technically that  
2 those two pollutants are now analogous for the  
3 purposes of doing a BACT determination.

4 I suspect if you don't grant summary  
5 judgment in this case -- and I think that you  
6 should as a matter of law -- but if you don't, I  
7 think you'll hear considerable testimony at the  
8 hearing, at an evidentiary hearing in this case,  
9 as to the technical and economic feasibility of  
10 CO2 capture and sequestration. I'm not an expert  
11 on that, our air quality permitting staff are not  
12 experts on that, because we've not considered CO2  
13 to be subject to BACT requirement. So we're not  
14 going to present testimony on that issue.

15 The Department does have an expert on  
16 greenhouse gases and climate change, but not for  
17 purposes of permitting. He works with the  
18 Governor's office and other folks throughout  
19 country coordinating information on greenhouse gas  
20 emissions and climate change.

21 MR. ROSSBACH: But isn't that what a  
22 BACT analysis does, is to try to determine  
23 feasibility, and if there isn't a technologically  
24 and economically feasible alternative to do  
25 capture, then your BACT analysis says that? Isn't

1       that what a BACT analysis does?

2               MR. RUSOFF:  Yes, it does.  It considers  
3       whether or not there are control technologies,  
4       what the impacts of those, of the pollutant and  
5       control technologies are, and the impacts of the  
6       control technologies, the economic impacts, etc.

7               MR. ROSSBACH:  That's what a BACT  
8       analysis does.

9               MR. RUSOFF:  Exactly.

10              MR. ROSSBACH:  So we don't have to hear  
11       testimony about the feasibility of doing carbon  
12       capture, CO2 capture, to decide whether a BACT  
13       analysis should be done?

14              MR. RUSOFF:  I don't think you need to  
15       hear that testimony in order to decide whether a  
16       BACT analysis for CO2 is legally required, or  
17       whether the Department has authority to do a BACT  
18       analysis for CO2, but I think --

19              MR. ROSSBACH:  Let me interrupt again.  
20       Are you saying that -- Are you disagreeing with  
21       the idea that the Department has the authority to  
22       do a BACT analysis?  They could do a BACT analysis  
23       on CO2 if you wanted to, couldn't you?

24              MR. RUSOFF:  As a practical matter?

25              MR. ROSSBACH:  No, as a legal matter.

1           MR. RUSOFF: I don't believe the  
2 Department has the authority to do a BACT -- to  
3 require a facility to submit a BACT analysis, and  
4 for the Department to impose a BACT determination  
5 for CO2 at this time.

6           MR. ROSSBACH: How does that -- But you  
7 had authority to do a BACT analysis for mercury  
8 without an emission standards; isn't that correct?

9           MR. RUSOFF: That is correct.

10          MR. ROSSBACH: What is it that's  
11 different then that says that you don't have  
12 authority to do CO2?

13          MR. RUSOFF: Well, I think that a  
14 difference, again, is the fact that restrictions  
15 for mercury are required under the Federal Clean  
16 Air Act.

17          MR. ROSSBACH: Let me go back.

18          CHAIRMAN RUSSELL: I think we're going  
19 to get this again in the afternoon. Go ahead,  
20 Bill.

21          MR. ROSSBACH: What are we going to --

22          CHAIRMAN RUSSELL: We're going to get  
23 rebuttal, and we're --

24          MR. ROSSBACH: Let me just -- CO2 is an  
25 air pollutant; is that right?

1           MR. RUSOFF: The United States Supreme  
2 Court has ruled that it is, and the Department has  
3 never taken the position that it is not.

4           MR. ROSSBACH: It is harmful to health  
5 and the environment; isn't that true?

6           MR. RUSOFF: Well, to the best of my  
7 knowledge, climate change has the potential to be  
8 harmful to health and the environment, yes.

9           MR. ROSSBACH: And the Clean Air Act  
10 regulates air pollutants, does it not?

11          MR. RUSOFF: It does.

12          MR. ROSSBACH: And it could be subject  
13 to regulation, CO2 could be subject to regulation  
14 under the Clean Air Act as an air pollutant,  
15 couldn't it be?

16          MR. RUSOFF: It could be, and I suspect  
17 that it will be eventually.

18          MR. ROSSBACH: Section 821 imposes  
19 regulations, does it not, that deal with CO2?

20          MR. RUSOFF: Well, it requires  
21 facilities to monitor for CO2, yes.

22          MR. ROSSBACH: And the requirement is in  
23 a regulation, is it not?

24          MR. RUSOFF: Yes.

25          MR. ROSSBACH: And so CO2 is a subject

1 of that regulation, isn't it?

2 MR. RUSOFF: One could argue that, as  
3 MEIC has.

4 MR. ROSSBACH: And let me ask then. You  
5 said that no other state has regulated CO2 in a  
6 coal fired plant. Is that what your testimony is?  
7 And I think that's probably agreed to; isn't that  
8 correct?

9 MR. RUSOFF: I'm not sure that I said  
10 that. I know no permitting authority, to the best  
11 of my knowledge, has interpreted the "subject to  
12 regulation" language as requiring a BACT  
13 determination for CO2. I believe that there are  
14 states that are developing regulations to control  
15 CO2 from coal fired power plants.

16 MS. SHROPSHIRE: Are there coal fired  
17 power plants that are controlling CO2 without  
18 regulation?

19 MR. RUSOFF: To the best of my  
20 knowledge, no. I think that there are proposals  
21 to control, to try to control, recognizing that  
22 the capture of CO2 also involves the necessary  
23 technology to sequester the CO2. You have to do  
24 something with it afterwards, after you capture  
25 it. Otherwise you haven't controlled it at all.



1 So to the best of my knowledge, there is no coal  
2 fired power plant that is controlling CO2.

3           There is a gassification plant in  
4 Beulah, North Dakota. I don't believe that that's  
5 a power plant, and I don't believe it's a  
6 commercial utility. It is capturing CO2, and is  
7 sending it to an oilfield in Canada for use in oil  
8 recovery. I'm not sure how much of the CO2 is  
9 ultimately released in that process, and how much  
10 is actually sequestered.

11           MS. SHROPSHIRE: But using coal as a  
12 source, they are capturing or -- Personally I  
13 think the sequestration part is -- people are  
14 doing that. That technology exists, the capture  
15 part. So at this Beulah plant, they're capturing  
16 the CO2?

17           MR. RUSOFF: Yes.

18           MR. ROSSBACH: The Massachusetts v. EPA  
19 case was May of 2007, I believe; is that correct?  
20 Something like that. Assume --

21           MR. RUSOFF: I can tell you exactly in a  
22 second here. April 2, 2007.

23           MR. ROSSBACH: Do you know how many  
24 power plants have received Clean Air Act permits  
25 since then?

1           MR. RUSOFF: I don't. I've cited the  
2           Deseret permit in the Department's briefs. That  
3           permit was issued in August, and there is no CO2  
4           emission limit in that permit. That's the only  
5           one that I'm familiar with.

6           MR. ROSSBACH: And has any state -- and  
7           some of these states -- I think Ms. Dillen  
8           suggested that there is ongoing litigation similar  
9           to this in other states contesting the air permits  
10          for failing to do BACT analysis on CO2. Are you  
11          familiar with other litigation on this?

12          MR. RUSOFF: The only one that I'm  
13          familiar with -- I don't doubt that, but the only  
14          one that I'm familiar with is that my recollection  
15          is that a permit was challenged before the US  
16          Environmental Appeals Board on this issue.

17          MR. ROSSBACH: The Taylorville plant in  
18          Illinois?

19          MR. RUSOFF: That could be. That sounds  
20          familiar. I've not seen any status report on that  
21          case, but I haven't followed it either. So I  
22          don't know what the status of that case is.

23          MR. ROSSBACH: But do you know of any  
24          state permitting authority which has rejected --  
25          has since April of 2007 looked at this issue and

1 said, "No, we cannot, because it is not subject to  
2 regulation"? I know you've said there is no  
3 authority of any state board to say, "We do  
4 believe we have authority," but is there any state  
5 that has said, "No, we don't have authority," even  
6 despite Massachusetts versus EPA?

7 MR. RUSOFF: I don't have personal  
8 knowledge of that, other than the fact that  
9 permits don't contain CO2 emission limits.

10 MR. ROSSBACH: So you know that -- You  
11 don't know of any state that has looked at this,  
12 that is subject to some contested case hearing  
13 similar to this, where they have made a decision,  
14 "We conclude as a legal authority we do not have  
15 that to regulate CO2"?

16 MR. RUSOFF: I don't have personal  
17 knowledge of that, but take that for what it's  
18 worth, I guess. I've not researched that. I  
19 guess that my knowledge is basically, in this  
20 case, is based on the fact that the Petitioners  
21 have provided no evidence of, and in fact have  
22 conceded that no air quality permit in the country  
23 contains an emission limit for CO2.

24 MR. ROSSBACH: You've not brought any  
25 information either to say that some other state

1 authority has specifically rejected CO2  
2 regulations since Massachusetts versus EPA?

3 MR. RUSOFF: No, I haven't, but the  
4 Department doesn't have the burden of proof in  
5 this case either.

6 MR. ROSSBACH: Well, but you made the  
7 suggestion -- I have trouble using the term  
8 "burden of proof" when we're not disputing the  
9 facts. Burden of proof sounds like facts you have  
10 to bring forward. I don't know whether you have  
11 to have the burden of proof when you're making a  
12 legal argument. So --

13 MR. RUSOFF: Well, as the plaintiff,  
14 they would have to prove that they're entitled to  
15 judgment in the case regardless of whether there  
16 are disputed issues of fact or not.

17 MR. ROSSBACH: I understand that. You  
18 have the burden of proof for your summary judgment  
19 also, don't you? If you're going to use that  
20 terminology.

21 MR. RUSOFF: I do, and I've actually  
22 thought about this a little bit because things get  
23 a little murky when you confuse the two burdens of  
24 proof. But you always have to keep in mind that  
25 in looking at a summary judgment motion as to

1       whether or not the plaintiffs can ultimately prove  
2       their case if summary judgment is not granted, and  
3       so the position we've taken obviously is that they  
4       can't, that they've presented everything that  
5       they've got that's relevant to interpretation of  
6       the applicable statutes and rules, and they  
7       haven't shown that they're entitled to judgment,  
8       and I don't think that's going to change if we go  
9       through an evidentiary hearing.

10               MR. ROSSBACH: I'm troubled by the use  
11       of the words "burden of proof" in this context if  
12       we're arguing summary judgment.

13               MR. RUSOFF: I agree with you. In terms  
14       of a motion for summary judgment, it's probably  
15       more appropriate to speak in terms of their burden  
16       in order to establish that MEIC or the Department  
17       or SME are entitled to summary judgment. But in  
18       my experience, one of the things that parties have  
19       argued as being relevant to whether or not a party  
20       is entitled to summary judgment is whether or not  
21       the plaintiff in the case has demonstrated that it  
22       ultimately could meet its burden to prove by a  
23       preponderance of the evidence that it's entitled  
24       to judgment.

25               I'm going to try to skip through some of

1 my argument, the things that we've covered in  
2 answer to questions. So I'm not going to give a  
3 lengthy discussion of the US Supreme Court's  
4 decision in the Massachusetts case, other than to  
5 reiterate again that the Court spent an awful a  
6 lot of time and paper deciding whether or not CO2  
7 is an air pollutant, and to me the obvious  
8 inference there is that the parties did not argue  
9 and the Court did not find that CO2 was already  
10 subject to regulation, and therefore it must be an  
11 air pollutant, because the Clean Air Act regulates  
12 only air pollutants.

13 But further in the Massachusetts case, I  
14 think it's important to note that the US Supreme  
15 Court did not require EPA to regulate greenhouse  
16 gas emissions. The Court ruled only that EPA has  
17 authority to promulgate regulations to restrict  
18 CO2 emissions for motor vehicles, which EPA had  
19 asserted that it did not have that authority. So  
20 that was the issue in the case, was whether or not  
21 EPA had authority to promulgate regulations that  
22 then would make CO2 subject to regulation under  
23 the Federal Clean Air Act.

24 MR. ROSSBACH: Joe, may I do one quick  
25 -- If EPA has the authority to promulgate

1 regulations of CO2 under the Clean Air Act for  
2 cars, how is that any different from the authority  
3 of the Montana Department of Environmental  
4 Quality, as the delegated agency in this state for  
5 Clean Air Act regulations, why does it not also  
6 have authority to regulate CO2 under our Clean Air  
7 Act authority for coal fired power plants? What's  
8 the difference?

9 MR. RUSOFF: If I'm not answering your  
10 question, please let me know. I don't think there  
11 is any difference between the authority of the EPA  
12 to promulgate regulations restricting CO2  
13 emissions from motor vehicles and the authority of  
14 this Board to adopt Montana rules regulating  
15 emissions of CO2 from stationary sources. I think  
16 the Board could do that. The Board just has not  
17 done that.

18 I guess what I'm trying to say is the  
19 Department doesn't have the authority, of course,  
20 to promulgate regulations, only the Board does.  
21 But in the absence of CO2 actually being subject  
22 to regulation, the Department does not have  
23 authority to impose a BACT termination for CO2.

24 MR. ROSSBACH: But you're not contesting  
25 that there is authority under -- It's very clear

1 now that there is authority for a state agency to  
2 regulate carbon dioxide?

3 MR. RUSOFF: Yes, and as I think I  
4 stated a few minutes ago, I don't think the  
5 Department has ever gone on record as asserting  
6 that either EPA or this Board lacked authority to  
7 regulate CO2 as an air pollutant.

8 So not only has no permitting authority  
9 in the country made a BACT determination for CO2,  
10 but the Petitioners' own CO2 BACT expert witness,  
11 Bill Powers, as we pointed out in our briefs,  
12 conceded that although he's an expert on BACT  
13 analyses, and he's performed numerous BACT  
14 analyses for various types of facilities, he has  
15 never conducted a BACT analysis for CO2, and that  
16 he's not aware of any air quality permit in the  
17 United States that contains a BACT determined  
18 emission limit for CO2, and that was as of several  
19 weeks ago when his deposition was taken in this  
20 case.

21 So the Petitioners are asking the Board  
22 to find that the Department acted unlawfully by  
23 not making a BACT determination for CO2, and  
24 they're asking the Board to direct the Department  
25 to be the first permitting authority in the



1 country to interpret the BACT requirement as  
2 applying to an air pollutant that merely could be  
3 regulated, and make a greenhouse gas BACT  
4 determination for the Highwood Generating Station,  
5 without the assistance of any EPA regulations or  
6 guidance, and without reference -- as we discussed  
7 a few minutes ago -- to any prior emission  
8 limitations by other permitting authorities for  
9 greenhouse gases.

10           However, again, the Petitioners haven't  
11 and can't point to any Court decision, decision of  
12 the US Environmental Appeals Board, or other  
13 evidence that would allow the Petitioners to meet  
14 their burden of proof that greenhouse gas  
15 emissions are subject to regulation under either  
16 the Federal Clean Air Act or the Clean Air Act of  
17 Montana, so the Petitioners can't prove that the  
18 Department violated BACT requirements by excluding  
19 evaluations of CO2 from the Department's BACT  
20 determination for the Highwood Generating Station,  
21 and the Department is entitled to judgment as a  
22 matter of law on that claim.

23           Similarly in regard to the Petitioners'  
24 PM2.5 claim, the Department's use of PM10 as a  
25 surrogate for PM2.5 in the PM2.5 BACT

1 determination for the Highwood Generating Station  
2 was not unlawful because test methods for  
3 measuring PM2.5 emissions have not yet been  
4 validated and approved by EPA, which is charged  
5 with promulgating approved air quality testing  
6 methods to be used throughout the country; and  
7 because PM10 includes PM2.5, as you know, EPA's  
8 policy is that until the technical problems  
9 related to testing are resolved, states should  
10 implement New Source Review requirements,  
11 including PSD requirements for PM2.5, by using  
12 PM10 as a surrogate for PM2.5.

13           And contrary to Ms. Dillen's assertion,  
14 MEIC's own witness, Hal Taylor, acknowledged in  
15 his deposition that SME conducted a BACT analysis  
16 for PM2.5 using PM10 as a surrogate, and I've  
17 attached that portion of his deposition to the  
18 Department's brief.

19           I won't go into a lengthy explanation of  
20 EPA's 1997 policy which we cited, but clearly EPA  
21 has affirmed that that policy is still in effect.  
22 EPA issued a memorandum in 2005, stating that the  
23 1997 Seitz memo which provided guidance to the  
24 states to use PM10 as a surrogate for PM2.5, but  
25 was still in effect as of 2005.

1           And as of just this last September, EPA  
2       issued a proposed regulation to implement the  
3       PM2.5 rule in New Source Review permitting --  
4       which is what we're talking about today -- and  
5       which again is several months after the Department  
6       made its decision in this case. And EPA affirmed  
7       that the surrogate policy remains in effect.

8           And EPA stated in that rulemaking notice  
9       -- and I won't read all of the language -- but  
10      contrary to what Ms. Dillen has asserted here  
11      today, that the necessary emission inventories and  
12      testing methods for PM2.5 that are required to  
13      conduct a PM2.5 BACT determination still do not  
14      exist. EPA stated just this last September,  
15      following final action on this proposal, and the  
16      PM2.5 implementation rule for NSR, "The federal  
17      2.5 NSR programs will no longer have to rely on  
18      the PM10 program as a surrogate, as has been the  
19      practice under our existing guidance. A state  
20      implementing an NSR program in an EPA approved  
21      State Implementation Plan or SIP may continue to  
22      rely on the interim surrogate policy until we  
23      approve a revised SIP addressing these  
24      requirements.

25           "EPA's final PSD regulations for PM2.5

1 are necessary to alleviate the technical  
2 impediments to implementing PSD requirements for  
3 PM2.5 without using PM10 as a surrogate by  
4 providing the necessary tools to calculate the  
5 emissions of PM2.5 and related precursors. Having  
6 final EPA approved reference methods for measuring  
7 PM2.5 emissions is critical to determining  
8 emission rates and determining compliance with  
9 those rates. At this time, there is no EPA  
10 approved stack test method for measuring PM2.5  
11 emissions."

12 By definition, a BACT determined  
13 emission limit must be achievable, and facilities  
14 are required to demonstrate compliance with all  
15 emission limits, including BACT determined limits,  
16 and the Department is required to enforce all  
17 emissions limits in an air quality permit.  
18 Without a valid approved test method, SME would be  
19 unable to demonstrate compliance with PM2.5  
20 emission limits that did not rely on PM10 as a  
21 surrogate, and the Department would be unable to  
22 enforce any PM2.5 limits that similarly do not  
23 rely on PM10 as a surrogate.

24 Petitioners' own witness, Hal Taylor,  
25 testified that he's not aware of any power plant

1 permit issued in the United States that contains a  
2 BACT analysis for PM2.5 that does not rely on PM10  
3 as a surrogate, and he also testified in his  
4 deposition -- and I think that this is really  
5 telling --- that in relying on EPA's surrogate  
6 approach, the Department acted within its  
7 authority, and that it was not, in his opinion,  
8 MEIC's witness's opinion, improper for the  
9 Department to use the surrogate approach.

10           And as I discussed before I began my  
11 formal presentation today, in the BACT analysis  
12 and determination for the Highwood Generating  
13 Station, SME and the Department did analyze both  
14 filterable and condensible particulate emissions  
15 and other pollutants from the Highwood Generating  
16 Station that would constitute the PM2.5 emissions  
17 from the facility; and further, that SME and the  
18 Department also compared concentrations of PM10,  
19 treating all PM10 as if it were PM2.5 -- which of  
20 course it likely would not be -- compared those  
21 emissions to the PM2.5 ambient standards, rather  
22 than the PM10 standard, which is EPA's suggested  
23 approach.

24           So in that way, the Department did  
25 conduct a more protective analysis of PM2.5 in

1 this case than it would even be required to do  
2 under EPA's surrogate approach. And again, MEIC's  
3 witness, Hal Taylor, acknowledged that in his  
4 deposition that the Department went beyond EPA's  
5 protocol of merely modeling for compliance with  
6 the more lenient PM10 ambient standards, and he  
7 said that the Department's approach resulted in a  
8 more conservative -- which is a more protective  
9 analysis -- of PM2.5 impacts than even required by  
10 EPA's policy.

11 MS. SHROPSHIRE: My understanding is  
12 that it's more conservative for some parts of  
13 PM10, but less conservative for other  
14 constituents. So it's not conservative for  
15 everything that's included in PM10.

16 MR. RUSOFF: Well, what I'm saying is  
17 that the Department's analysis was more  
18 conservative than if it merely followed EPA's  
19 surrogate approach and just modeled PM10 impacts.  
20 I'm not saying that it's the most conservative  
21 approach that could ever be done, if it were  
22 technically feasible to do a BACT determination  
23 and different type of modeling analysis for PM2.5.  
24 But PM10 includes PM2.5, so if you've included  
25 PM2.5 in your PM10 analysis, it has been

1 considered. Whether or not you end up with the  
2 same result that you would get if you just looked  
3 at PM2.5, I'm not saying that.

4 MS. SHROPSHIRE: Well, even within  
5 PM2.5, there is constituents within that are over  
6 estimated, and some are under estimated. So it's  
7 not necessarily conservative for all of those  
8 constituents; is that true?

9 MR. RUSOFF: I don't know the technical  
10 aspects well enough to answer that question. I'm  
11 sorry. I understand what you're saying, and I  
12 just want to make it clear that I'm not arguing  
13 that our PM2.5 analysis, the BACT determinations  
14 or modeling analyses were the most conservative  
15 approaches that could ever be taken, if one had  
16 the tools to do that. I'm saying that it's more  
17 conservative than EPA's policy -- which is the  
18 accepted practice -- would require, which merely  
19 requires making a BACT determination for PM10, and  
20 modeling against the PM10 ambient standard.

21 MS. SHROPSHIRE: Do you know of any  
22 examples of analyses being done without an EPA  
23 approved method? Do you have to have an EPA  
24 approved method to use it?

25 MR. RUSOFF: I guess what I would say --

1 I don't know the answer to your question, but I  
2 think what I would say is: I'm not arguing that  
3 legally it's necessary to have an EPA approved  
4 test method in order to test for a particular  
5 pollutant, but I guess what I'm saying is there  
6 aren't any valid and approved PM2.5 test methods  
7 at this time, and the Department needs to be able  
8 to defend its decision to use any particular test  
9 method, and it needs to be able to defend the  
10 emission limit that comes out of a BACT  
11 determination, and whatever emission inventory it  
12 uses.

13 Up front, what you have to have is an  
14 idea of the PM2.5 emissions coming out of a  
15 facility before you can determine what control  
16 technologies would be appropriate, and how  
17 effective they'd be technically, and how cost  
18 effective they would be, and those tools don't  
19 exist. But I'm not arguing that there isn't a  
20 test method that could be used -- I'm not arguing  
21 that it's necessary for EPA to approve a test  
22 method before a state could go ahead and implement  
23 the PM2.5 standard without using -- it's not  
24 legally necessary -- without using PM10 as a  
25 surrogate.



1           And I think that the EPA's policy  
2           clearly is based upon practicalities. It's just  
3           not possible to do a straight BACT analysis for  
4           PM2.5 right now, as I understand it.

5           MS. SHROPSHIRE: There is now -- I don't  
6           know if it's an interim or a method that's  
7           proposed, is that correct, for 2.5?

8           MR. RUSOFF: Well, there are particulate  
9           testing methods, and there are conditional test  
10          methods. And I think maybe if I can find EPA's  
11          most recent discussion of that, I'll close with  
12          that. Maybe this will answer your questions  
13          hopefully. And I could go on at length on this.

14          But what I'm referring to is -- Again,  
15          what I'm going to refer to is EPA's April 2007 SIP  
16          development rule, which the Petitioners have cited  
17          in their brief in support of their proposition  
18          that test methods are available, and it's just  
19          absolutely not correct that this rule notice  
20          supports that proposition.

21          First of all, I guess I would just point  
22          out briefly that the rule notice itself on the  
23          first page states that, "Note that this rule does  
24          not include final PM2.5 requirements for the New  
25          Source Review Program. The final NSR rule will be

1 issued at a later date." So this rule does not  
2 relate to permitting, but there is considerable  
3 discussion in this rule notice about the current  
4 state of test methods for PM2.5, and if I could  
5 just read some of those, I think that would be  
6 helpful, and I'd refer you to the rule notice for  
7 further discussion.

8 "We received numerous comments on  
9 whether these requirements, the requirements in  
10 the proposed SIP rule --" And again, SIP  
11 regulations, for those of you that have not worked  
12 with them, are used to develop control plans for  
13 particular pollutants in non-attainment areas, and  
14 control can be achieved by numerous different  
15 ways, but not necessarily through New Source  
16 Review permitting.

17 Sips, especially for particulate, are  
18 going to deal with a wide variety of sources, that  
19 might even include non-stationary sources like  
20 roads, wood stoves, and that sort of thing. But  
21 there is considerable discussion in here of PM2.5  
22 testing methods.

23 "We received numerous comments on  
24 whether these requirements were unreasonable in  
25 light of the current state of knowledge of and

1       uncertainties around the measurement of direct  
2       PM2.5. Many commenters raised concerns about the  
3       availability and implementation of test methods.  
4       In recognition of these concerns, the final rule  
5       reflects EPA's adoption of a transition period  
6       during which we will assess possible revisions to  
7       available test methods. The period of transition  
8       --" And I'm reading from Page 20652 of the April  
9       25, 2007 SIP rule notice.

10               "The period of transition for  
11       establishing emission limits for condensible  
12       direct PM2.5 will end January 1, 2011. We expect  
13       states to address the control of direct PM2.5  
14       emissions, including condensible PM, with any new  
15       actions taken after January 1st, 2011. Within  
16       eighteen months, we intend to propose, if  
17       necessary, modifications to method 202 or similar  
18       methodologies suitable for measuring condensible  
19       PM2.5. We may propose Conditional Test Method 40  
20       to be used in combination with Method 202 for  
21       measuring direct PM2.5, with additional guidance  
22       on appropriate approaches to testing for direct  
23       PM2.5 emissions.

24               "Some commenters suggested that EPA  
25       should allow states to base their initial 2008

1 SIPs on filterable PM or PM10 as a surrogate for  
2 filterable PM2.5, rather than require state and  
3 local agencies to develop direct PM2.5 emissions  
4 regulations immediately. We agree that a  
5 transition period should be allowed to allow time  
6 to resolve and adopt appropriate testing  
7 procedures for condensible PM emissions. A number  
8 of respondents --" and I'm almost done here --  
9 "commented that EPA needs to promulgate a PM2.5  
10 test method, and adopt regulatory language that  
11 determines the PM2.5 limits based on that  
12 promulgated PM2.5 test method as soon as possible.

13 "We agree that notice and comment  
14 rulemaking is appropriate for establishing  
15 effective regulations. As noted above, we are  
16 already undertaking a study of the available test  
17 methods to determine the need for regulatory  
18 revisions."

19 So it's absolutely not correct that the  
20 current test methods, including conditionally  
21 approved test methods, which have not been  
22 validated and approved by EPA, are sufficient to  
23 conduct a BACT determination for PM2.5.

24 MS. SHROPSHIRE: It's my understanding  
25 that there is a few cities in Montana that are

1 currently required to monitor for PM2.5.

2 CHAIRMAN RUSSELL: They're not required.

3 MS. SHROPSHIRE: They're not?

4 CHAIRMAN RUSSELL: They're monitoring.

5 There is a difference between requiring and --

6 MS. SHROPSHIRE: So there are maybe

7 non-attainment areas that are monitoring for

8 PM2.5.

9 MR. RUSOFF: That's correct.

10 MS. SHROPSHIRE: What methods are they

11 using to measure that?

12 MR. RUSOFF: They're using air quality

13 monitors. They're not using stack testing.

14 They're just monitoring ambient concentrations in

15 the air, and they're not testing existing or new

16 stationary sources. There is a difference between

17 monitoring methods. Actually they're both loosely

18 referred to as monitoring emissions, but the

19 monitoring in the PM2.5, or suspected PM2.5

20 non-attainment areas is ambient monitoring. It's

21 not stack testing.

22 MS. SHROPSHIRE: Thank you.

23 MR. RUSOFF: Just to wrap up here, there

24 isn't any practical way for the Department to make

25 a PM2.5 BACT determination without using PM10 as a

1 surrogate; and without being able to determine the  
2 PM2.5 emissions from the Highwood Generating  
3 Station, the PM2.5 reductions achievable by the  
4 Highwood Generating Station with particular  
5 control technologies, and without the cost  
6 effectiveness or information concerning the cost  
7 effectiveness of that control, all of which  
8 require a valid and approved test method in order  
9 to be able to defend the decision.

10           Again, in summary, the Petitioners have  
11 the burden of proof in this contested case. And  
12 we believe that the Department has demonstrated in  
13 its briefs that ultimately the Petitioners would  
14 not be able to carry that burden if an evidentiary  
15 hearing were held, and that rather the Department  
16 is entitled to judgment as a matter of law.

17           And as we've stated in our briefs, the  
18 purpose of summary judgment is to eliminate the  
19 burden and expense of conducting an unnecessary  
20 evidentiary hearing; and in the present case, to  
21 avoid that unnecessary burden and expense of  
22 conducting a hearing on claims for which there are  
23 no material issues of fact, as all of the parties  
24 have asserted, the Board should decide those  
25 claims before the hearing as a matter of law, and

1 we respectfully request that the Board grant  
2 summary judgment in favor of the Department.  
3 Thank you very much. I'll be glad to answer any  
4 further questions now or later.

5 CHAIRMAN RUSSELL: If there is only a  
6 few, let's get them done.

7 MS. SHROPSHIRE: Could the information  
8 from the Beulah plant potentially have been used  
9 in a BACT analysis for carbon dioxide?

10 MR. RUSOFF: Speaking from my own  
11 personal knowledge, I think any information  
12 concerning capture and sequestration of CO2 could  
13 be used in a BACT analysis or a BACT determination  
14 by a permitting authority, yes; but I don't have  
15 personal knowledge of the specifics of how they're  
16 controlling CO2 beyond what I stated earlier.

17 MS. SHROPSHIRE: Thank you.

18 CHAIRMAN RUSSELL: Let's take a quick  
19 break. Try to limit it. Let's try to be back  
20 moving at 11:20. We're not going to do the 11:30  
21 lunch. It will be more a little after noon.

22 (Recess taken)

23 CHAIRMAN RUSSELL: Let's get started.

24 MR. REICH: Thank you, Mr. Chairman. My  
25 name is Kenneth Reich. I represent Southern

1 Montana Electric, along with Mike McCarter, who is  
2 seated at the table there over to the left. I  
3 suppose I have the unenviable position of going  
4 last before lunch. I'll try to keep it as brief  
5 as reasonable, but I hope you appreciate that I do  
6 have some important arguments to make.

7           Before I get started into the argument,  
8 we did file -- Southern Montana did file a motion  
9 to supplement the record with an expert report  
10 that was not attached to our various briefing  
11 papers. It's an expert report of a Colin  
12 Campbell, who is a rebuttal expert actually to one  
13 of MEIC's experts. I'm happy to take that up  
14 later in the day if the Board would like.

15           Global warming is certainly a very  
16 important policy issue. What our submission is  
17 that it's not a policy issue that's the subject of  
18 this appeal. The subject of this appeal is two  
19 very narrow legal issues: One, whether or not DEQ  
20 erred by not requiring a BACT analysis for CO2;  
21 the other whether or not DEQ erred by not  
22 requiring a specific analysis for PM2.5 rather  
23 than using the EPA guidance, which it did.

24           MEIC could not prove that DEQ erred as a  
25 matter of law, and SME and the State have proved



1 that the DEQ's actions were proper, and therefore  
2 summary judgment should be granted in our favor,  
3 and the case dismissed.

4 Now, MEIC's arguments really stretch or  
5 seek to stretch the law well beyond what was the  
6 law when DEQ considered this permit. The relief  
7 sought could be provided by this Board, but we  
8 believe it could only be provided as part of a  
9 rulemaking, or alternatively as a legislative  
10 action, not in the context of a single permit  
11 appeal involving a single source.

12 We submit that DEQ did follow the law at  
13 the time it made its decision, and that that  
14 permit decision should be upheld.

15 With the Board's indulgence, I want to  
16 just give a very brief background of the Clean Air  
17 Act as it relates to this appeal, because I think  
18 it's important to put words like "subject to  
19 regulation" into some perspective.

20 First of all, Southern Montana, who are  
21 they? Southern Montana is a rural electric  
22 cooperative, it's a nonprofit. It provides  
23 electric energy to its some 60,000 customers.  
24 It's growing. Currently it obtains 100 percent of  
25 its power from hydroelectric. Unfortunately, 80

1 percent of that hydroelectric power supply is  
2 going away beginning in 2008, and going away  
3 altogether in 2011.

4           Therefore, SME was faced with a  
5 tremendous crisis in terms of providing power to  
6 its current and growing list of customers. It  
7 looked at alternatives -- IGCC, gas, wind, nuclear  
8 -- looked at all of these, as did the federal  
9 government and the state government in issuing an  
10 EIS for this project, and it was found that a  
11 modern circulating fluidized bed plant -- which is  
12 what SME proposes to build -- was the best  
13 alternative for this site and at this time. And  
14 it should be added that SME is also adding wind  
15 turbines to its plant.

16           As I said, that decision was ratified by  
17 the federal and state governments. And at this  
18 point, SME is looking very closely at how it  
19 could, if necessary, capture and sequester CO2.  
20 It is a very difficult problem. It's being faced  
21 by every power plant in the country, and indeed  
22 the announcement just two days ago that DOE had  
23 awarded a grant for the so-called Future Gen  
24 project indicates that this is not technology  
25 that's off the shelf. There is billions of

1 dollars that are going into the research from the  
2 federal government and at the industry level to  
3 try to figure out a way to capture and sequester  
4 CO2. We submit it's not there yet, but you don't  
5 have to decide that for purposes of summary  
6 judgment.

7           In terms of the Clean Air Act, the Clean  
8 Air Act regulates air pollutants, but it doesn't  
9 regulate every single pollutant. It only  
10 regulates significant pollutants that have been  
11 identified either by the federal government or by  
12 the states.

13           There are a national standards for some  
14 specific listed pollutants; CO2 was not one of  
15 them. There are hazardous pollutant lists under  
16 so-called Section 112 of the act; CO2 is not on  
17 that list. There are PSD -- prevention of  
18 significant deterioration -- increments for a  
19 number of pollutants; CO2 is not one of them. In  
20 short, CO2 is not on any list of, quote unquote,  
21 regulated pollutants under the act, and there is a  
22 reason for that.

23           The reason is that CO2 was just declared  
24 to be a pollutant literally months ago by the  
25 Supreme Court, and it could hardly be subject to

1 regulation if it was just declared to be a  
2 pollutant. So there will be regulation of  
3 pollutant, I predict at both the federal level and  
4 the state level, but CO2 is not yet so regulated.

5 The New Source program obviously is a  
6 specific subset of the Clean Air Act, and the New  
7 Source program regulates new sources or modified  
8 sources, and it has a very stringent set of  
9 specific terms and conditions that apply to that  
10 program. One of these, of course, is the BACT  
11 determination, and a BACT determination is made  
12 for air pollutants subject to regulation. That is  
13 the exact quote.

14 But what does that really mean? Does it  
15 mean any pollutant that has any monitoring  
16 requirement attached to it, any pollutant that's  
17 listed anywhere in the act? We submit it does  
18 not, and the Costle case sustains that position.

19 Basically BACT has to apply to  
20 pollutants that have been identified in such a way  
21 that practically people are working on technology  
22 to figure out how to limit it, because a BACT is  
23 limitation. That's what you come up with at the  
24 end of the story. You have to have a limitation.  
25 And it's helpful if there are standards, federal

1 and state standards, by which the state doing the  
2 BACT analysis can judge whether they're doing an  
3 adequate BACT analysis.

4 For instance, there is a requirement  
5 that a BACT limitation not exceed a national air  
6 quality standard or a New Source Performance  
7 Standard. If none are in effect, it makes it that  
8 more much more difficult for the state to do the  
9 BACT analysis.

10 The permit writer needs guidance when  
11 they're doing BACT. They can't just kind of do  
12 BACT out of thin air. That would neither be  
13 appropriate, nor would it be fair to the  
14 permittee.

15 So the New Source Review program is  
16 based on specific sets of pollutants, with some  
17 indication of how they're going to be regulated.  
18 So in this case did DEQ err by not requiring a  
19 BACT analysis of CO<sub>2</sub>? We say certainly not. As I  
20 just mentioned, it has to be an air pollutant  
21 subject to regulation.

22 Now, does that mean any pollutant? No.  
23 It means certain pollutants that already have an  
24 emission standard attached to them, or they're on  
25 some list. For instance, we talked about mercury,

1 and I'll address that.

2 Mercury is on a list of hazardous air  
3 pollutants. It's been on that list for many, many  
4 years. That's one of the lists that's referred to  
5 in the regulations that we cited in our brief that  
6 list out what is subject to regulation for New  
7 Source Review. One of them is Section 112.  
8 Mercury is on that list.

9 So mercury has -- it's already in a  
10 regulatory context for purposes of the Clean Air  
11 Act. It's not just being monitored. It actually  
12 requires that the state set a Maximum Achievable  
13 Control Technology for mercury, and that of course  
14 is what EPA did. There is now an EPA standard.  
15 The state, of course, has followed with the  
16 mercury standard. And that's how mercury becomes  
17 subject to a BACT analysis, because it's already  
18 listed as a type of pollutant that is already  
19 regulated.

20 As Mr. Rusoff indicated, "subject to  
21 regulation" doesn't mean could be regulated. In  
22 this context, it means regulated. Now, let me  
23 take a simple example of why the language has to  
24 be looked at in context.

25 You go to Arizona, and you ask somebody,

1 "Is it cold out?," and if it's 50 degrees, they're  
2 going to say, "Yes, it's pretty cold out." You go  
3 to somebody in Boston, where I'm from, and you  
4 say, "Is it cold out?," and if it's 50 degrees,  
5 we're going to say, "It's like spring time." So  
6 it's context. You can't just take these words out  
7 of context. "Subject to regulation" has to mean  
8 something.

9           What about this argument that it's being  
10 monitored, therefore it's regulated. No question  
11 that the monitoring requirement is some type of  
12 regulation, but is it the type of regulation that  
13 the EPA and Congress meant when they set up the  
14 New Source Review Program? Absolutely not.  
15 Otherwise just about any pollutant that has any  
16 requirement attached to it in the Clean Air Act  
17 could be the subject of a BACT analysis, and that  
18 would make a BACT analysis almost a hopeless task.

19           What the BACT analysis is intended to do  
20 is to limit and set limits for a specific set of  
21 clearly defined pollutants, and that's exactly the  
22 guidance that DEQ followed here.

23           MEIC has conceded today that the Supreme  
24 Court did not find that CO2 is a pollutant subject  
25 to regulation. They only found that it is an air

1 pollutant. And we, of course, do not dispute  
2 that. But there is a big difference between being  
3 an air pollutant and actually being regulated.

4           If MEIC was correct that CO2 has been  
5 regulated since 1990, then it's hard to  
6 understand, first of all, why the Supreme Court  
7 would have had a very narrow decision, five to  
8 four decision, in trying to figure out if it's  
9 even an air pollutant. But also why are we now  
10 just having tremendous debates in Washington about  
11 what type of regulation should be implemented for  
12 CO2? Why is it that no state in the United States  
13 has ever set a BACT limit for CO2? Why now, if  
14 CO2 has clearly been regulated for the last 17  
15 years?

16           Measurement is not regulation for  
17 purposes of BACT. It may be for some other  
18 purposes, but for purposes of a BACT analysis, the  
19 fact that something is measured really means  
20 nothing. You measure the temperature. It doesn't  
21 mean you're controlling the temperature. And  
22 that's the same thing here.

23           So basically MEIC's argument cannot  
24 succeed. It does not succeed. It's incorrect.

25           Now, what MEIC is really trying to do is



1 to have the Board apply what may be a future law  
2 or maybe even a future regulation implemented by  
3 the Board retroactively against a single source in  
4 a single permit appeal. And respectfully, the  
5 Board doesn't have that authority. You don't have  
6 that legal authority to do a retroactive  
7 application of a law that's never been applied to  
8 anybody against one permittee in an appeal.

9           You basically have a number of hats, as  
10 you well know. One of them is a rulemaking hat;  
11 another is an appeal hat. You're here today  
12 sitting with your appeal hat on. What MEIC would  
13 like to do is to put your rulemaking hat on, and  
14 have you make a rule kind of instantaneously that  
15 applies to only one facility, that doesn't apply  
16 to all the other coal fired plants, or refineries,  
17 or any other sources of CO2 in the state, but only  
18 applies in this context. And we think that that's  
19 improper.

20           Does the Board have authority to  
21 regulate CO2? That question was asked of Mr.  
22 Rusoff. Absolutely. Of course you have the  
23 authority to regulate it. If you find that it's  
24 an air pollutant, and then as in the mercury  
25 rulemaking, you decide that you wish to regulate

1 CO2 in a public proceeding with all of the  
2 interested parties there, and applying a rule  
3 fairly across the board, that is your authority.

4 But we submit you don't have the  
5 authority to tell DEQ that it erred by not  
6 basically foreseeing what the law might be in the  
7 future, and you don't have that authority to do  
8 that in the context of a permit appeal.

9 As the Board well knows, there are a lot  
10 of sources of CO2, not just coal fired plants, but  
11 trucks; cars; airplanes; existing power plants, of  
12 which there are many in the state; agriculture;  
13 and if the Board wants to regulate those sources,  
14 it certainly can do that, it has the authority to  
15 do that, and some would say it should do that.  
16 But again, we're not here for that purpose. We're  
17 here to see whether or not DEQ erred as a matter  
18 of law, and our submission is it did not.

19 Now, the other issue is whether or not  
20 DEQ erred by failing to require a BACT for PM2.5.  
21 I think this has been addressed pretty  
22 comprehensively in our briefs, and also by Mr.  
23 Rusoff, but let me just make a couple of points.

24 DEQ did require a BACT analysis for  
25 PM2.5 using the established guidance and

1 procedures that every state in this country has  
2 used, and that EPA has used. If DEQ had the tools  
3 to be able to regulate PM2.5 and to do a BACT  
4 analysis, it might have; but EPA has said those  
5 tools aren't there, the permit writers don't have  
6 those tools, and without those tools, they're kind  
7 of shooting in the dark when they do a PM2.5  
8 analysis.

9           What did DEQ do here? PM2.5 is an  
10 important pollutant. It does have health effects  
11 associated with it. What actually did DEQ require  
12 SME to do in this permit? They required SME to  
13 take the PM10 -- which is a large set of the  
14 particulate -- and analyze that as if everybody  
15 bit of that was PM2.5. PM2.5, there is no  
16 dispute, is a subset of PM. So basically you're  
17 looking at all of the PM10 as if it's all PM2.5,  
18 and analyzing, "Is there going to be a violation  
19 of the national air quality standard for PM2.5?  
20 What are the kinds of technology we can look at  
21 that would capture this entire PM10 analysis, PM10  
22 universe?"

23           It was a conservative analysis for  
24 several reasons. First of all, EPA guidance does  
25 not require DEQ to compare projected emissions

1 from the Highwood plant or any other plant against  
2 the PM2.5 air quality standard. But DEQ did do  
3 that in this case, and found that there was no  
4 exceedence.

5           Secondly, DEQ did require an analysis  
6 for both filterable particulate and condensible.  
7 Condensible is the particulate that has a heavy  
8 subset of PM2.5. There was not only an analysis  
9 for condensible, but there is a limit in the  
10 permit for condensible. It's part of the overall  
11 limit for PM10. So condensible was looked at.  
12 That means that PM2.5 was looked at.

13           In addition, there is a number of other  
14 components of PM2.5 that were looked at separately  
15 by DEQ in this permit: NOs, SOx, acid gases, and  
16 so forth. So it's incorrect to say that the DEQ  
17 did not do a BACT analysis for PM2.5. They did.  
18 What did they find? They found that the best  
19 control for both filterable particulate and  
20 condensible particulate was a fabric filter, and  
21 that fabric filter had about a 99.85 percent  
22 efficiency. They looked at other --

23           MR. ROSSBACH: Did I just hear you say  
24 that in your view, they did a PM2.5 BACT analysis  
25 effectively?

1           MR. REICH: They did a PM2.5 BACT  
2 analysis using the EPA guidance.

3           MR. ROSSBACH: You're arguing they  
4 didn't have to do one, but they did one; is that  
5 what you're saying?

6           MR. REICH: No.

7           MR. ROSSBACH: The cross motions for  
8 summary judgment are that they violated the Clean  
9 Air Act by failing to do a PM2.5 BACT analysis,  
10 and you're saying they did a PM2.5 analysis.

11          MR. REICH: They absolutely did in  
12 accordance with EPA guidance and --

13          MR. ROSSBACH: But are you also saying  
14 that they didn't have to?

15          MR. REICH: That they didn't have to do  
16 a PM2.5 analysis?

17          MR. ROSSBACH: BACT analysis.

18          MR. REICH: No, no. They had to do a  
19 BACT analysis, and they used the tool that every  
20 regulated entity is being governed by now, which  
21 is this surrogate --

22          MR. ROSSBACH: And in effect did a  
23 PM2.5?

24          MR. REICH: And in effect did a PM2.5.  
25 And what I was trying to say, and obviously didn't

1 get it across as well as I should have, is that  
2 they looked at a number of the components of PM2.5  
3 in addition to looking at just PM10, and so you  
4 end up with a very conservative analysis of PM2.5  
5 through the PM10 analysis. They looked at the  
6 types of technologies that people talk about for  
7 PM2.5; they evaluated those, and they found the  
8 technology that works and that is protective.

9 As Mr. Rusoff indicated, there are  
10 practical problems in doing a PM2.5 analysis, just  
11 addressing yourself to PM2.5, and the practical  
12 problem is you don't have measurement standards;  
13 you don't have final monitoring requirements; you  
14 don't have final reference standards that work.  
15 In fact, there is a reference standard out there  
16 that everyone concedes for condensable doesn't  
17 work, including EPA concedes that.

18 So you don't have all the tools  
19 together, and EPA just affirmed in September of  
20 this year, just a couple months ago, that they're  
21 going to try to put those tools in place through  
22 the regulations, and when these regulations are  
23 finalized, at that point the states will be in  
24 position to go one better.

25 Therefore, for the reasons we stated

1 already, MEIC cannot prove that DEQ erred in  
2 failing to do a PM2.5 analysis, and as I  
3 indicated, they did a PM2.5 analysis according to  
4 all of the standards.

5 That's the conclusion of my argument.  
6 I'd be happy to answer any questions.

7 CHAIRMAN RUSSELL: Questions?

8 MR. ROSSBACH: What I heard you saying  
9 earlier is that the technology for CO2 control is  
10 difficult or in question, that there is lots of  
11 investigation being done on it right now,  
12 particularly with this particular power plant  
13 technology. If there had been a BACT analysis of  
14 CO2, wouldn't the result have been that there is  
15 no available control technology?

16 MR. REICH: That's certainly our  
17 position, and I think it's a probably disputed  
18 question of fact, in that we have experts on both  
19 sides that will talk about whether the technology  
20 is available. But our argument is not based on  
21 the technology.

22 MR. ROSSBACH: I understand that, but  
23 I'm asking you just from just a hypothetical point  
24 of view. If a BACT analysis had been done, what  
25 do you think the results would have been?

1           MR. REICH: I think the result would  
2     have been that DEQ would have found that there is  
3     no available feasible technology to control CO2,  
4     it's not cost effective, and all of the other  
5     conditions that you have to meet.

6           And I'd like to address Ms. Shropshire's  
7     question about the Beulah Plant. Let's be clear.  
8     The Beulah plant is a gassification plant. It's  
9     not an IGCC plant, it's not a power plant. It's a  
10    chemical plant that gassifies coal; it produces  
11    CO2, and methane, and other gases. It pipes that  
12    up to Canada. I don't think anybody has said that  
13    Beulah captures 100 percent of the CO2. They  
14    capture some percentage. I can't tell you what it  
15    is. They do send it up to Canada. It's then used  
16    in the oil recovery system. Again, how much of  
17    that is lost -- It's still being monitored. It's  
18    not -- This is not a program that's gone on for 30  
19    years, so it's in its infancy.

20           But to our knowledge and to our own  
21    expert's knowledge, there is no power plant in the  
22    country that is currently applying CO2 capture,  
23    and certainly not CO2 capture and sequestration,  
24    to anything like the amount of pollutants, the  
25    amount of CO2 that comes out of a typical power



1 plant. So that technology is not out there, but  
2 again, the Board doesn't need to reach that  
3 decision in order to find that there was no error  
4 by DEQ.

5 CHAIRMAN RUSSELL: All right.

6 MR. REICH: I guess people are hungry.  
7 In the afternoon, I'll be happy to address any  
8 other questions folks might have.

9 CHAIRMAN RUSSELL: Well, thank you. I'm  
10 hoping our lunch will be here within minutes, and  
11 we'll break until somewhere around a quarter to, I  
12 guess. Hopefully we'll be back in session about  
13 quarter to one.

14 (Lunch recess taken)

15 CHAIRMAN RUSSELL: We're going to get  
16 started. We'll hear from the parties in rebuttal.  
17 I believe that, just based on how long the initial  
18 discussion on the primary motion was, I'll bet we  
19 could go in 20 minutes, no later, each. Maybe  
20 less. Less would be good. Less is more. So  
21 we'll go ahead and get started.

22 MS. DILLEN: Thank you, Mr. Chairman. I  
23 just want to clear up a few points that I think  
24 has spread some confusion, and the first is what  
25 capacity is this Board acting in today. Mr. Reich

1 has made a distinction between rulemaking and  
2 appellate review of what the DEQ has done.

3 Now, a crucial part of reviewing the  
4 DEQ's action is determining what the legal  
5 requirements are that are applicable to this air  
6 permit and every other air permit that comes  
7 before the DEQ in the future.

8 So when we're asking this Board to  
9 decide whether existing law, existing BACT  
10 requirements apply to CO2 and to PM2.5, we're not  
11 asking you to create some new law. We're simply  
12 requiring you to interpret the existing law, and  
13 give DEQ some guidance in the context of this  
14 permitting process -- which is not finalized until  
15 you make your decision -- and in the future, when  
16 it addresses other permitting processes, whether  
17 it needs to look at CO2, whether it needs to look  
18 at PM2.5 specifically as opposed to just PM10.

19 (Brief pause to get

20 Mr. Marble on the telephone)

21 MS. DILLEN: Mr. Marble, this is Abigail  
22 Dillen speaking in rebuttal, and I had just made  
23 the point that the Board is clearly within its  
24 authority now to decide what the law means to  
25 interpret whether BACT requirements, these

1 existing requirements, apply to CO2 and to PM2.5,  
2 and that MEIC is certainly not requesting that new  
3 laws or policies be made in the context of this  
4 appeal.

5 Now, the Board has rightly analogized  
6 this case to the mercury BACT requirements that  
7 went forward in the Hardin plant process. Mr.  
8 Reich has suggested that mercury is a regulated  
9 pollutant because it's regulated as a hazardous  
10 air pollutant under Section 112 of the Clean Air  
11 Act.

12 This is a really important point. BACT  
13 requirements under both the Federal Clean Air Act  
14 and the Montana Clean Air Act specifically exempt  
15 one category of pollutants from BACT requirements,  
16 and those are hazardous air pollutants. So the  
17 fact that mercury was a hazardous air pollutant on  
18 Section 112 was a reason for you not to do a BACT  
19 analysis. You chose to do one anyway because you  
20 were well within your authority to do so, and I  
21 wanted to make that point clear.

22 On this question whether monitoring  
23 requirements -- Mr. Reich has conceded that there  
24 are certainly some type of regulation, but has  
25 suggested that they can't be the type of

1 regulation that is meant in the phrase "subject to  
2 regulation" for purposes of triggering BACT  
3 requirements. And in that regard, he's made the  
4 practical argument that if all pollutants subject  
5 to monitoring requirements are subject to BACT  
6 requirements, we would be doing BACT for every  
7 pollutant under the sun. That's just not true.  
8 Section 821 is unique. CO2 is the only -- Mr.  
9 Rossbach.

10 MR. ROSSBACH: Can I interrupt. Is  
11 there any other -- I want to get to the heart of  
12 this, and I understand about 821. Is there any  
13 other analogous pollutant that has no emission  
14 standards, and is there anything else like CO2  
15 where there is an 821 and no other emission  
16 standards? Is there anything like that?

17 MS. DILLEN: Yes and no. Section 821 is  
18 very unique, in that it only requires monitoring  
19 and reporting, and so CO2 is very unique in that  
20 regard. However, there are similar situations.

21 When Congress passed the 1990 Clean Air  
22 Act, at the same time it imposed these monitoring  
23 requirements on CO2. It also required EPA to list  
24 ozone depleting substances for purposes of  
25 tracking global warming. And when Congress passed

1 that provision -- and this is all in our briefing  
2 -- they said, "This will not subject these ozone  
3 depleting substances to any further regulation."  
4 So Congress knew how to impose listing and  
5 monitoring requirements and yet exempt them from  
6 any further regulation under BACT, but they didn't  
7 do it with respect to CO2. So there is an  
8 analogous situation in the same amendments during  
9 which Section 821 was promulgated.

10 MR. ROSSBACH: But other than those, is  
11 there any other that has a monitoring requirement  
12 and a measurement requirement without regulation,  
13 quote unquote?

14 MS. DILLEN: To my knowledge, there is  
15 not. I would like to make one more small point  
16 with regard to ozone depleting substances while  
17 we're on the subject, and that is SME and DEQ are  
18 both taking the position that regulation has to  
19 mean emissions control, but under Title 6 of the  
20 Clean Air Act, they're not emissions controls that  
21 are applicable to ozone depleting substances,  
22 they're just requirements that products using  
23 these substances be phased out over time. So  
24 these are standards that EPA recognizes as  
25 subjecting pollutants to regulation for purposes

1 of the NSR program, and yet they're not emissions  
2 controls.

3           So when we look at EPA's definition of  
4 what is a regulated pollutant -- and everyone  
5 agrees that provides some acceptable guidance to  
6 the Board in this regard -- they identify  
7 pollutants that are subject to NAAQS, pollutants  
8 that are subject to the NSPS standards, pollutants  
9 that are subject to the ozone standards, but then  
10 they do have this "otherwise subject to  
11 regulation" category.

12           DEQ and SME are arguing that if you're  
13 not a NAAQS pollutant, and you're not an NSPS  
14 pollutant, you can't be a regulated pollutant; but  
15 that would read out of EPA's definition "otherwise  
16 subject to regulation." It has to mean something.  
17 And if monitoring and reporting requirements don't  
18 fall into that category of "otherwise subject to  
19 regulation," it's difficult to know what it would  
20 mean.

21           I also want to address the point that we  
22 can infer from the Supreme Court's decision in  
23 Massachusetts v. EPA that CO2 has never been  
24 regulated. The issue in Massachusetts v. EPA was  
25 whether EPA, a federal agency, could of its own

1       volition regulate CO2. Section 821 was something  
2       that Congress had promulgated, so it was never an  
3       issue in the Supreme Court, and it would not have  
4       been very helpful in deciding the case to know  
5       that Congress could add a section to the Clean Air  
6       Act and require regulation of CO2 when the issue  
7       was: Do EPA's regular existing authorities allow  
8       it to regulate CO2?

9               And I want to make something clear. The  
10       Supreme Court's decision didn't change the law.  
11       What they were saying is CO2 has always been a  
12       pollutant. "You, EPA, when you've been faced  
13       with, please, to regulate CO2, your excuse is you  
14       can't regulate it." But they gave those arguments  
15       the back of the hand, and they said, "One thing we  
16       know is that CO2 is obviously a pollutant under  
17       the Clean Air Act."

18               So this is not something new that now  
19       requires a new suite of regulations. What the  
20       Supreme Court was doing was confirming existing  
21       reality. Now the next step is to confirm that in  
22       fact CO2 is regulated, it's properly subject to  
23       regulation under the Clean Air Act, and therefore  
24       it's subject to BACT requirements as well.

25               MR. ROSSBACH: Before you go past this,

1       there was -- To me, one of the crux here is how  
2       has EPA interpreted "subject to regulation," and  
3       I've heard differences here. I had understood  
4       that there was a Federal Register site that  
5       suggested that it did not mean that it was only  
6       those where there was emissions standards under  
7       NAAQS or otherwise. You said that there isn't.

8                 Is there some citations that I have  
9       missed in this briefing where "subject to  
10      regulation" has been defined by the EPA or  
11      litigated other than this Costle case?

12                MS. DILLEN: Yes. The EPA's definition  
13      of NSR regulated pollutant is what the parties  
14      have been looking to primarily. The Federal  
15      Register citation that you read, I'm afraid I may  
16      have missed it, and I would like to provide you  
17      with some briefing in that regard if the Board is  
18      open to further submissions.

19                MR. ROSSBACH: I heard them saying that  
20      citation and another citation were EPA's  
21      interpretations that "subject to regulation" meant  
22      only those that had specific NAAQS or other --

23                MS. DILLEN: To be clear, EPA, when it  
24      was implementing new source, these so-called new  
25      source reform rules -- they were trying to



1 overhaul the system of doing PSD permits -- they  
2 had listed a number of pollutants which clearly  
3 are subject to BACT requirements. It's just a  
4 list. And that list was incomplete. For  
5 instance, it doesn't list PM2.5, which as of that  
6 time was clearly subject to BACT requirements; it  
7 didn't list, I believe, some other pollutants that  
8 we have referenced in our briefing. So there is a  
9 list that EPA has put out, but our position is  
10 that it's not complete.

11           Whether EPA has addressed -- Let me step  
12 back for a moment. EPA has never addressed the  
13 question whether Section 821 subjects CO2 to  
14 regulation. Let's put that aside. What "subject  
15 to regulation" means, the only court case that  
16 arguably deals with this -- and it's not a holding  
17 that was subject to adversarial dispute -- is an  
18 Alabama footnote, and there is the North County  
19 case which is cited in both briefs -- in which EPA  
20 does take the position that the pollutant needs to  
21 be regulated. But EPA has never -- let me take  
22 that back. There is also the recent permitting  
23 decision by EPA in which it said that it wasn't  
24 going to require CO2 limits for a permit.

25           But again, EPA's position in this regard

1 has been consistent. They don't want to regulate  
2 CO2. They haven't even wanted to admit that it's  
3 a pollutant. So the fact that EPA hasn't been  
4 eager to regulate CO2 in my mind does not dispose  
5 of what the Clean Air Act actually requires.

6 And I want to be clear. The places  
7 where EPA has made these statements, these are not  
8 decisions that are binding on this Board. In the  
9 case of the Deseret permit, which has been  
10 highlighted by the Department and SME, that's just  
11 a permitting decision. It's subject to appeal  
12 like any other, and it's not warranted any  
13 particulate weight in this Board. It's only  
14 useful to you insofar as it's persuasive, and our  
15 position is that it's not persuasive. You are as  
16 equipped as anyone else to read what the Clean Air  
17 Act says in this regard.

18 Have I answered your question?

19 MR. ROSSBACH: Sort of.

20 MS. DILLEN: To the best of my ability.

21 MR. ROSSBACH: I might ask for some  
22 additional authority on this, because I heard them  
23 say something else that I did not see specifically  
24 in the briefing.

25 MS. DILLEN: The only Federal Register

1 documentation that I'm aware of in the briefing  
2 that has been cited by other parties is the list,  
3 and the NSR definition of regulated pollutant, and  
4 that definition I think helps MEIC's position.

5           And I think the Board raised questions  
6 in this regard, but I want to touch on it once  
7 again.

8           What technically a BACT analysis would  
9 entail for CO2, that's a decision that DEQ and SME  
10 and other permittees need to sit down and figure  
11 out in the first instance. If we have a hearing  
12 with our expert and their expert, we're not going  
13 to get the whole universe of options that should  
14 be considered. It's the case in every BACT  
15 analysis that there are judgment calls, there is  
16 investigation to be done to figure out what  
17 available controls there are, whether they're cost  
18 effective or not, and what emissions limit should  
19 be accordingly.

20           Because that hasn't been done here,  
21 we're not prepared to make those factual calls at  
22 this point. We need to take the first step, which  
23 is to say as a legal matter BACT applies to CO2,  
24 and then we can wade into these technical details  
25 at a later date. But we have provided -- Ms.

1 Shropshire has asked some questions about the  
2 Beulah gassification plant. We do have an expert  
3 report that we've submitted. It deals with  
4 precisely what sort of plant this is. It is an  
5 IGCC facility, although as Mr. Reich indicated, a  
6 chemical plant. It is capturing its CO2. It is  
7 sequestering it. That's one thing that DEQ could  
8 look at.

9           But we're not suggest what BACT is or  
10 should be. We're just suggesting it be done.  
11 It's not a terribly far reaching action that  
12 Petitioners are asking this Board to take.

13           Moving on to the issues associated with  
14 PM2.5, there has been a lot of talk about whether  
15 the analysis that was done was conservative. And  
16 Ms. Shropshire again asked a question: Wasn't it  
17 conservative in some respects and not others? And  
18 that is right, and I wanted to explain exactly why  
19 that's so.

20           There are two requirements that are  
21 necessary under the PSD program. The first is  
22 that you show that your emissions aren't going to  
23 violate any national ambient air quality standard.  
24 So you have to do modeling that demonstrates  
25 compliance with the NAAQS.

1           In this case, DEQ and SME took all of  
2 their PM10 emissions, and they compared it to a  
3 PM2.5 NAAQS level. So in that regard, their  
4 demonstration of compliance with the NAAQS may  
5 well have been reasonable, and we're not  
6 challenging that here. It's fine for them to say  
7 that's a relatively conservative approach.

8           But the NAAQS are not everything under  
9 PSD. The whole point of the Prevention of  
10 Significant Deterioration Program is to avoid  
11 polluting up to the NAAQS, which represent a floor  
12 on acceptable pollution. So the purpose of BACT  
13 requirements is to achieve the maximum reduction  
14 in emissions that are possible, so you don't end  
15 up in a position where you've used up all your  
16 NAAQS, and you can't permit any new facilities.

17           With respect to the BACT requirements,  
18 the analysis was not conservative. First of all,  
19 as DEQ concedes, the analysis was done for PM10 at  
20 best, not for PM2.5, and because this is not a  
21 fact in dispute, because there are controls that  
22 do better for PM2.5, if you're looking only at  
23 PM10, you may be missing the boat, and not  
24 achieving the emissions reductions that you could  
25 otherwise achieve.

1           In this case, they did look at  
2       condensable emissions. That's a good thing.  
3       Those emissions are largely comprised of PM2.5.  
4       But the other half of the PM2.5 equation are  
5       called filterable emissions, and at that stage of  
6       the game, DEQ was not looking at PM2.5 or PM10, it  
7       was looking at total PM. And this is covered in  
8       our briefing. But if you look at the PM10 permit  
9       limit, it is made up of the condensable emissions  
10      limit and the filterable PM limit.

11           So Mr. Rusoff can stand here and tell  
12      you there is a PM10 limit for filterable  
13      emissions, but if you look at the permit, that  
14      limit is made up of the total PM limit plus a  
15      condensable limit. So our point is with respect  
16      to these filterable emissions, this has not been a  
17      conservative analysis.

18           Again, however, this is an issue where  
19      we're confronting all of these arguments about  
20      technical difficulties before we've even decided  
21      whether a BACT analysis is required. Usually the  
22      way this goes is a permittee knows that they have  
23      to do BACT for a certain pollutant, and then they  
24      come to the agency, and they say, "How are we  
25      going to do it? What are the controls? What are

1 the standards?"

2           And it's true. In this case, there  
3 isn't a long history of doing BACT for PM2.5 or  
4 certainly for CO2, so it's not going to be the  
5 easiest BACT analysis ever, but someone has got to  
6 do it for the first time. We've seen for every  
7 pollutant, there was a first time.

8           And this isn't a situation where anyone  
9 has argued there are no controls, no ways to  
10 reduce emissions. When we're talking about  
11 problems of this magnitude, to say in the first  
12 instance, "This is too difficult, so we're not  
13 going to even look at it," that's wrong, and it's  
14 wrong as a matter of law. BACT is applicable to  
15 each pollutant subject to regulation under the  
16 act. Doing BACT for PM10 is not the same for  
17 doing PM2.5. No one has disputed that fact.

18           All that we are asking the Board to do  
19 is make the legal determination that BACT is in  
20 fact required for PM2.5, and that EPA guidance  
21 from ten years ago doesn't trump that plain  
22 language requirement of the Clean Air Act.

23           Finally, there has been quite bit of  
24 discussion of MEIC's expert supposedly conceding  
25 the legal point that it's fine to rely on the

1 Seitz memo and the EPA guidance in using a  
2 surrogate analysis. Let me be clear. This is an  
3 expert who was brought in solely to look at the  
4 question whether we could do to a PM2.5 BACT  
5 analysis. He's an engineer, he's not a regulator,  
6 and he made it clear that, as SME has cited in  
7 their brief, that he's the nuts and bolts guy. So  
8 he's said over and over again, "I don't know what  
9 the legal requirements are."

10 And I just want to read from a portion  
11 of his deposition which we've submitted to you.  
12 But he said, "I don't like to get involved in that  
13 end of the regulatory requirements, just because  
14 I'm not a big fan of any test methods. They all  
15 have their faults and problems."

16 He was asked earlier by me, I believe  
17 this was in regard to whether EPA had -- whether  
18 it was appropriate to rely on the EPA guidance.  
19 He said, "Well, I said that was yes in light of  
20 the Seitz document. Again, getting back to this  
21 discussion in the regulatory end and legal end,  
22 that's only guidance. So I still say since it's  
23 just guidance, I would have to say there is no  
24 regulatory or certainly technical impediments to  
25 conducting a BACT."



1           So this is not an expert who has  
2 anything dispositive to tell you about what the  
3 law requires, he's not offered in that regard, but  
4 he certainly didn't make any statements that  
5 across the board, "It's always okay to use a  
6 surrogate analysis." He did correct those  
7 statements later in his deposition.

8           Finally, Mr. Mires, you had asked me  
9 about the test methods and their availability, and  
10 we've heard a lot of testimony today that such  
11 methods are not actually available. I did want to  
12 refer the Board to our briefing, and in particular  
13 our reply brief on Page 16. We had the Federal  
14 Register cites which go over the availability of  
15 these tests, their status, and in particular, the  
16 conditional method CTM39.

17           I also want to point you to the EPA  
18 statements in the Federal Register also cited on  
19 this page, where they say -- and this was in 2005  
20 -- "Practical difficulties have been resolved in  
21 most respects," and those were the practical  
22 difficulties identified in the Seitz memo which is  
23 being relied upon by the Department.

24           Finally with respect to these test  
25 methods, this is what SME's own expert has to say

1 about Conditional Test Method 39.

2 "I personally think that that's a really  
3 great way to do it and get rid of all those false  
4 readings and other problems they're having. So  
5 that's a method that hopefully is going to be  
6 accepted, and found acceptable, and put into place  
7 as a method for determining PM2.5 emissions from  
8 stationary sources."

9 So we know that somebody -- and EPA has  
10 hired consultants -- thinks there is a great test  
11 method out there. It's true, it hasn't been  
12 finalized by EPA, but I would point out that SME  
13 in its own appeal of the Highwood permit is  
14 requesting that a test method be applied to its  
15 PM10 limits that has not been finally approved by  
16 EPA. So they are in no position to argue before  
17 you that the absence of a finally approved test  
18 method precludes doing an analysis of PM 2.5  
19 that's long overdue.

20 If the Board has no further questions at  
21 this time, I can submit this argument.

22 CHAIRMAN RUSSELL: Thank you. The  
23 Department.

24 MR. RUSOFF: For the record, this is  
25 David Rusoff again, staff attorney for the Montana

1 Department of Environmental Quality, and I'd just  
2 like to start off by saying something that I don't  
3 usually say, but in bringing this case to this  
4 point before you here today on motions for summary  
5 judgment, all the attorneys in this case have been  
6 extremely cooperative, and I just want to say on  
7 the record that it's been a pleasure to work with  
8 Abigail Dillen, and Ken Reich, and Mike McCarter  
9 in this case.

10           Everyone has been extremely cooperative  
11 in setting dates for depositions, and agreeing to  
12 any extensions any of the parties needed. And  
13 anyway I'm just proud to have worked with these  
14 attorneys in this particular case. Unfortunately  
15 I don't think Ms. Dillen's clients' claims are  
16 founded, but anyway I just wanted to say that.  
17 It's very much appreciated, and not always seen in  
18 every case I've been involved in in my legal  
19 career. I'm going to try to be very brief here,  
20 which hopefully will be appreciated as much as  
21 flattery, but that wasn't my purpose at all.

22           I just want to go over a couple of  
23 points that Ms. Dillen talked about, and that I  
24 think specifically respond to some of the  
25 questions we heard this morning especially. This

1 may not still be clear, but the Department does do  
2 BACT determinations for mercury, and it has done  
3 BACT determinations for mercury for several years.  
4 Mercury is listed as a hazardous air pollutant  
5 under the Federal Clean Air Act under Section 112,  
6 which does require controls for facilities that  
7 EPA has determined should appropriately be  
8 regulated under Section 112. There also are  
9 national emissions standards for hazardous air  
10 pollutants for mercury.

11 Under Part 61 of the Code of Federal  
12 Regulations, there is a national emission standard  
13 for mercury for stationary sources which process  
14 mercury or to recover mercury. So there really  
15 isn't any question that mercury is subject to  
16 regulation under the Federal Clean Air Act.

17 And also further, Ms. Dillen talked  
18 about the definition of BACT excluding HAPs, and  
19 that's what we didn't do BACT determination for  
20 mercury. As I just said, we have been doing them,  
21 and also the State definition of BACT in Montana  
22 is in your Subchapter 7 rules, which apply to  
23 minor and major sources, does not contain the  
24 language excluding BACT determinations for HAPs  
25 that is found in the PSD definition of HAP.

1           So again, we do BACT determinations for  
2 mercury because mercury is clearly subject to  
3 regulation.

4           And I guess in case this needs to be  
5 clarified, in response to Ms. Dillen's comments,  
6 the Department did do a BACT determination for  
7 PM2.5, again using PM10 as a surrogate, and the  
8 Department did consider PM10 filterable emissions  
9 and condensible emissions, and PM2.5 is part of  
10 that PM10 filterable and condensible emissions. I  
11 won't go through the permit again, but I think all  
12 of those provisions are attached to my initial  
13 brief in support of the Department's motion for  
14 summary judgment.

15           And clearly we did do a BACT  
16 determination for filterable and condensible  
17 emissions within the PM10 category, which by  
18 definition includes all particulate, not only of  
19 ten microns in diameter, but anything smaller than  
20 that, which would include PM2.5.

21           I want to clarify another statement that  
22 I think I made in response to a question this  
23 morning. I received a question as to whether or  
24 not it would be illegal to do a BACT determination  
25 for CO2 the first time, and when I said no, what I

1       meant there -- and maybe this was clear to all of  
2       you -- but just the fact that you're the first  
3       permitting authority to make a BACT determination  
4       certainly doesn't render it illegal, which I  
5       thought was the question. I did not intend to say  
6       that I thought it would not be illegal to make a  
7       BACT determination -- for the Department to have  
8       made a BACT determination, and imposed that on SME  
9       in this particular case. I do think the  
10      Department would not have any authority to do  
11      that, and that's why we didn't do that.

12                 If CO2 becomes subject to regulation --  
13      and I assume that it will at some point -- then  
14      some permitting authority is going to be the first  
15      permitting authority to make a BACT determination  
16      for CO2.

17                 And I just wanted to make sure that you  
18      were clear on this, too, and I think Ms. Dillen  
19      corrected herself, and came back and said that EPA  
20      has interpreted the "subject to regulation"  
21      language as referring only to those pollutants for  
22      which emissions are actually restricted, as  
23      opposed to pollutants, for example, for which  
24      facilities are merely required to monitor those  
25      pollutants for informational purposes, or to

1 determine emissions of another pollutant, like  
2 NOx.

3 MR. ROSSBACH: Let me get this. It's  
4 interpreted, but is there anything published as a  
5 part of the public record, Federal Register, CFR,  
6 where there is an interpretation of the terms  
7 "subject to regulation"? What has the EPA done  
8 about that in any kind of rulemaking, Federal  
9 Register, anything other than some statement or a  
10 position in a case? I want to know: Is there an  
11 interpretation -- and it doesn't have to be about  
12 CO2. I'm talking about in a general sense, how  
13 have they interpreted the language "subject to  
14 regulation"?

15 MR. RUSOFF: In the language that I  
16 cited, Mr. Rossbach, from that Deseret permit -- I  
17 think you had some information about one of the  
18 Federal Register notices when you came to this  
19 meeting today. EPA cites two Federal Register  
20 notices, and I think I've read the 1996 Register  
21 notice in another context. I did not go back and  
22 look at either of those Federal Register notices  
23 for that purpose.

24 EPA says in the Deseret permit that they  
25 have consistently historically taken that

1 position, and cited those two Federal Register  
2 notices for that premise.

3 MS. SHROPSHIRE: Can we go back just a  
4 little ways, back to the -- maybe I can ask this  
5 question at the end. I'll wait until you're done  
6 and I'll ask it.

7 MR. RUSOFF: That way it will at least  
8 appear that I was briefer than Ms. Dillen maybe.  
9 That's my goal here.

10 Also there was a question of Ms. Dillen  
11 about whether or not there is another pollutant  
12 for which monitoring requirements are set in the  
13 Federal Clean Air Act for which BACT is not done,  
14 and I think the answer to that is found in Ms.  
15 Dillen's earlier argument this morning, which is  
16 that facilities can monitor either CO<sub>2</sub> or O<sub>2</sub> to  
17 determine their NO<sub>x</sub> emissions under the Acid Rain  
18 regulations. So that is the other example that  
19 I'm aware of O<sub>2</sub>, and BACT is not done for O<sub>2</sub>,  
20 which is oxygen.

21 MR. ROSSBACH: Excuse me, David. Is  
22 there any -- Is oxygen an air pollutant?

23 MR. RUSOFF: It can be. That's my  
24 understanding. What I was told is if you fill a  
25 room up with just oxygen, that one will suffer ill



1 health effects from that.

2 MR. ROSSBACH: So is there --

3 MR. RUSOFF: I asked your same question.

4 I thought it was a good question. And I asked

5 Department staff that, and was referred to 02,

6 which Ms. Dillen had referred to in her argument

7 as having a monitoring requirement similar to the

8 CO2 monitoring requirement.

9 The other thing that I -- two more

10 things, and then I'll be done. Ms. Dillen

11 referred, I believe -- I missed part of this in

12 trying to take notes -- that her expert witness

13 Hal Taylor's deposition testimony to the effect

14 that the Department did not act unlawfully or even

15 improperly should be disregarded, that that was

16 not the purpose for which he was hired to testify

17 in this case.

18 And in the report, which I believe the

19 Petitioners submitted with their briefs, Mr.

20 Taylor did in fact assert a legal opinion that,

21 "The failure to establish any BACT standard

22 limiting PM2.5 emissions from the Highwood

23 facility is inconsistent with the plain language

24 of governing legal requirements." If that's not a

25 legal opinion, I don't know what is.

1           MR. ROSSBACH:   Wouldn't then that be  
2   excluded as inappropriate expert testimony?

3           MR. RUSOFF:    If she had asked him that  
4   question at the hearing, I would object.

5           MR. ROSSBACH:   But it was submitted as  
6   part of his expert report, so it would be  
7   improper, calling for a legal conclusion, would it  
8   not, in his expert report?

9           MR. RUSOFF:    I believe it is, but it was  
10   the legal opinion that the Petitioners had him  
11   assert in this case in his expert report, and I'm  
12   just pointing out that now they're trying to  
13   distance themselves from him being any authority  
14   on whether or not it was unlawful or improper for  
15   the Department to use PM10 as a surrogate in his  
16   PM2.5 BACT determination.

17          MR. ROSSBACH:   Have you joined in their  
18   motion to exclude the testimony of their expert on  
19   legal conclusions?

20          MS. DILLEN:    Can I clarify?  We have not  
21   submitted this expert report, so we're not relying  
22   on it in terms of this summary judgment.

23          MR. RUSOFF:    I apologize.  I thought  
24   that it was.  I thought that several of the expert  
25   reports had been attached to motions in this case.

1 But in any event, that was his statement.

2 Finally, Ms. Dillen referred to Gary  
3 McCutchen's statements concerning the validity of  
4 a currently available testing method, and she took  
5 that out of context, and what I would like to read  
6 in closing here is all of his statements regarding  
7 the availability of PM2.5 testing methods. What  
8 Mr. McCutchen testified to, and I've quoted this  
9 in my reply belief is:

10 "EPA seems very close to abandoning  
11 Method 202, and moving towards one of these  
12 conditional test methods, and I personally think  
13 that's a really great way to do it, and get rid of  
14 all these false readings and other problems that  
15 they're having. So that's a method that hopefully  
16 is going to be accepted, and found acceptable, and  
17 put into place as the method for determining PM2.5  
18 emissions from stationary sources."

19 He goes on to say, "And I can't  
20 underestimate for you --" obviously he meant  
21 overestimate in this context -- "for you the value  
22 of having a reference method, because from that  
23 comes everything. The emissions inventories,  
24 which I referred to this morning as being  
25 necessary, so that the agencies will know what to

1 do, they'll know what is being emitted, they'll be  
2 able to set realistic emission limits, and then  
3 have a compliance method for ensuring that those  
4 methods are met. I mean it's just the heart and  
5 key to the entire program, and it's just amazing  
6 to me that ten years after the first PM2.5 NAAQS  
7 was set, we still don't have this key to the whole  
8 program, a valid, replicable, and repeatable test  
9 method."

10           So it's just not correct again to assert  
11 that there is a test method that can be used at  
12 this time for measuring, accurately measuring  
13 PM2.5 emissions, and setting a BACT emission  
14 limitation.

15           So once again in closing, the  
16 Petitioners have the burden of proof in this case,  
17 and I think we've demonstrated in our own motion  
18 for summary judgment that there are no issues of  
19 fact necessary to the Board's decision in this  
20 case, and that the Petitioners have failed to  
21 demonstrate that they could prevail as a matter of  
22 law in this case, and that the Department has  
23 demonstrated instead that it is entitled to  
24 judgment as a matter of law that it did not err,  
25 it did not violate air quality requirements, and

1 it did not act unlawfully in not making a BACT  
2 determination for CO2, which no other permitting  
3 authority has done either, and in using PM10 as a  
4 surrogate for PM2.5 emissions in its BACT  
5 determination for PM2.5 in the same manner that  
6 other permitting authorities in the country still  
7 are doing.

8 Thank you very much, and I'll be glad to  
9 answer any questions.

10 MS. SHROPSHIRE: Back to the PM2.5/PM10  
11 surrogate issue, can you just clarify that there  
12 were two separate analyses, one for condensible  
13 and one for filterable, that -- were they analyzed  
14 separately?

15 MR. RUSOFF: Yes. I'll try to refer you  
16 to the specific pages of the permit. On page 24  
17 of the permit analysis, Paragraph 2 is captioned,  
18 "Filterable PM emissions," and refers to -- and if  
19 you go through that analysis, it refers to PM10  
20 filterable and condensible in the next paragraph a  
21 couple of times. And you'll see that it goes on  
22 to state in a couple of places that PM10 control  
23 technologies that are available, and to rank  
24 those.

25 And Page 25, the summary table, is

1 captioned, "Available filterable PM control  
2 options," and --

3 MS. SHROPSHIRE: My question is: Were  
4 PM -- Was regular particulate matter PM  
5 substituted for PM2.5 rather than the PM10 being  
6 substituted for PM2.5?

7 MR. RUSOFF: No.

8 MS. SHROPSHIRE: In either condensible  
9 or filterable PM?

10 MR. RUSOFF: No. If you read the  
11 language -- I think possibly Ms. Dillen's argument  
12 comes from the fact that Paragraph E on page 28 is  
13 labeled, "Filterable PM BACT determination," but  
14 if you actually read that filterable BACT  
15 determination, there are numerous references to  
16 PM10, and it's clear I think that the Department  
17 and SME analyzed filterable PM10 BACT within that  
18 filterable PM determination.

19 And then in Paragraph 6 on page 38  
20 begins the analysis of condensible PM10 emissions.

21 So yes, the Department did analyze  
22 separately filterable and condensible PM10  
23 emissions, which would also include PM2.5.

24 MS. SHROPSHIRE: Then when you used the  
25 PM10 as a surrogate, are you assuming that they

1       behave exactly the same way?

2                   MR. RUSOFF:  No.

3                   MS. SHROPSHIRE:  So you make

4       compensation for that?

5                   MR. RUSOFF:  What you're assuming is  
6       that PM10 includes PM2.5.  And I don't necessarily  
7       agree with Ms. Dillen's statement that all of the  
8       parties agree that -- something to the effect that  
9       there are control technologies that -- with what  
10      she phrased anyway -- that would be more effective  
11      for PM2.5 than PM10.  I guess I agree that that  
12      may be the case, but that doesn't necessarily make  
13      it BACT.  There are several different factors that  
14      you have to consider.

15                   But it's a surrogate approach.  I don't  
16      think anybody would dispute the fact that it's not  
17      going to be as accurate as focusing solely on  
18      PM2.5 when you do your PM2.5 BACT determination,  
19      but it's the best approach that's available, it's  
20      the only approach that's available, given the  
21      existing knowledge of PM2.5 emissions from  
22      facilities, and the test methods that are  
23      currently available, or the status of the current  
24      test methods to evaluate those emissions after  
25      you've permitted a facility to make sure that

1 they're in compliance with that emission limit  
2 that you've set.

3           So I think it would be better to have  
4 those emission inventories, and to have a test  
5 method that's specifically been approved, been  
6 approved specifically for PM2.5, but we don't have  
7 that, and we did the best that we could do.

8           MS. SHROPSHIRE: I don't want to go on  
9 -- I just want to make sure I understand this  
10 properly.

11           There are different modeling techniques  
12 for PM2.5 and PM10, and your BACT analysis, that  
13 was a modeling exercise?

14           MR. RUSOFF: No. Modeling and BACT  
15 determinations are separate issues. We were  
16 merely stating that in addition to the fact that  
17 we followed EPA's surrogate policy in conducting a  
18 BACT determination, we also ensured that there  
19 would not be an exceedence of the PM2.5 ambient  
20 air quality standards. But they're two separate  
21 issues.

22           The real issue, as I understand it now,  
23 is not the availability of modeling tools, but the  
24 availability of emission inventories. EPA has  
25 said that their AP42 emission factors don't have a



1 high degree of reliability for PM2.5, and that the  
2 test methods to determine what specific facilities  
3 are emitting in terms of PM2.5 are not fully  
4 developed at this time. So they're two separate  
5 issues.

6 Did I answer that sort of? Modeling and  
7 testing?

8 MS. SHROPSHIRE: I may come back to it.  
9 Thank you.

10 MR. RUSOFF: Modeling is done for  
11 purposes -- as I understand it -- for purposes of  
12 determining compliance with ambient air quality  
13 standards, which are the concentrations in a given  
14 area of the atmosphere at any particular time;  
15 whereas a test method, typically you would pull a  
16 sample out of a stack, and measure the amount of  
17 the pollutant that's being emitted from a specific  
18 facility, and that's what we don't have the  
19 ability to do at this time.

20 We can determine compliance with the  
21 ambient standards, and that factors in not only  
22 one specific facility, but all background  
23 concentrations that happen to be in a particular  
24 facility or a particular area where you're doing  
25 your modeling. You're not just looking at one

1 facility. What you're looking at is to make sure  
2 that that proposed new or modified facility will  
3 not cause or contribute to an exceedence of an  
4 ambient air quality standard.

5 CHAIRMAN RUSSELL: Any additional  
6 questions for David?

7 (No response)

8 CHAIRMAN RUSSELL: Thanks, David.

9 MR. REICH: Thank you, Mr. Chair,  
10 members of the Board, I just want to respond to a  
11 couple of comments that were made by Ms. Dillen.

12 First let me address this argument that  
13 under Title 6 -- which is one of the titles that's  
14 listed under the EPA regulations that define water  
15 pollutant subject to regulation for purposes of  
16 new sources -- she said Title 6 doesn't really  
17 regulate because it doesn't set any emission  
18 standards, but she also said it does phase out the  
19 ozone depleting substances, and phase out, I  
20 guess, the ultimate emission limit because it  
21 takes you to zero. So I think it clearly shows  
22 that these ozone depleting substances are  
23 regulated and aren't just monitored.

24 Mr. Rusoff has already referred to  
25 mercury, but let me just reiterate it again.

1 Under the BACT definition, you have to show that  
2 the BACT emission limit does not exceed various  
3 standards, and one of them is the standards under  
4 Section 112. Those are the hazardous air  
5 pollutants. Mercury is a hazardous air pollutant.  
6 That is why mercury is regulated for those  
7 purposes.

8 Really if "subject to regulation" means  
9 what MEIC says it means, then Congress really  
10 didn't need to define BACT as a pollutant, an air  
11 pollutant subject to regulation. They could have  
12 just said an air pollutant. "Subject to  
13 regulation" would have been redundant frankly.  
14 But they did say, "an air pollutant subject to  
15 regulation," and as I said earlier, that has a  
16 specific meaning.

17 In terms of the Supreme Court decision  
18 that Ms. Dillen referred to, again, just to  
19 reiterate, the Supreme Court did say that CO2 was  
20 an air pollutant by a five/four vote, so it wasn't  
21 unanimous. It was very close actually. So it  
22 wasn't -- clearly wasn't obvious when the Supreme  
23 Court ruled that CO2 was a pollutant. In fact,  
24 the ABA in a treatise that wrote -- the American  
25 Bar Association in a treatise that wrote on global

1 warming and greenhouse gases, in 2007, came out  
2 just before the Supreme Court ruled, said that  
3 there is, "A seminal debate," on whether or not  
4 CO2 was an air pollutant, and this was from an ABA  
5 treatise written by a number of experts on the  
6 subject.

7           So it clearly was a debated issue as of  
8 2007 when the Supreme Court ruled, and as we know,  
9 the Department decided this case -- I'm sorry --  
10 issued this permit just about the time that the  
11 Supreme Court did rule. So we can't really task  
12 the Department with being able to be that  
13 foresighted as to figure out what the Supreme  
14 Court would have done literally within a month of  
15 its issuing this permit.

16           In terms of EPA interpretation, as David  
17 referred, and I'll just refer again, there is this  
18 Deseret permit, which is a federal air quality  
19 permit issued to a facility I believe in Utah, and  
20 this is attached as an exhibit to Mr. Rusoff's  
21 first brief. Portions of it are attached to our  
22 brief. I would just like to read you a paragraph  
23 out of that permit, because it does cite to  
24 consistent EPA regulation.

25           The permit says -- and this is in a

1 comment in the analysis section about why they  
2 didn't set a BACT limit for CO2. EPA says, "It is  
3 well established that, quote, 'EPA lacks the  
4 authority to impose PSD permit limitations or  
5 other restrictions directly on the emission of  
6 unregulated pollutants.'" They cite to the North  
7 County Resource case, which is in our briefs.

8 "The Clean Air Act and EPA's regulations  
9 require PSD permits to contain emission  
10 limitations for," and they quote, "each pollutant  
11 subject to regulation under the act. In defining  
12 those PSD permit requirements, EPA has  
13 historically interpreted the term, 'subject to  
14 regulation under the act,' to describe pollutants  
15 that are presently subject to a statutory or  
16 regulatory provision that requires actual control  
17 of emissions of that pollutant," and then it  
18 refers to two Federal Register cites, and one of  
19 those is the one that Mr. Rossbach referred to  
20 earlier.

21 It goes on to say, "In 2002, EPA  
22 codified this approach for implementing PSD by  
23 defining the term 'regulated NSR pollutant,' and  
24 clarifying that the Best Available Control  
25 Technology is required for 'each regulated NSR

1 pollutant at major source that would have the  
2 potential to emit in significant amounts.'" "

3           So there is a very consistent EPA  
4 policy, and not only policy, but it's been in  
5 Federal Register notices published, that have been  
6 subject to public comment, as well as in this  
7 Deseret permit that was just issued, in which EPA  
8 has taken the definitive position that "subject to  
9 regulation" means what we've said it means, which  
10 is that there has to be a pollutant that has some  
11 type of control associated with it.

12           I want to turn to the PM10/PM2.5 issue  
13 for a second. There was a filterable analysis,  
14 there was a condensible analysis, as Mr. Rusoff  
15 said, and the BACT analysis for the filterable and  
16 condensible emissions came up with a fabric filter  
17 which the BACT analysis said was the best  
18 technology to capture all filterables and all  
19 condensibles. So there was a BACT determination  
20 made, a very top flight technology was chosen, and  
21 they did look at other technologies that have been  
22 asserted could control condensibles and PM2.5.

23           In terms of both CO2 and BACT, I think  
24 it was interesting that Ms. Dillen said that one  
25 of the guideposts of BACT is that a permittee like

1 Southern Montana has to be able to approach a  
2 regulatory agency and say, "Tell me what I need to  
3 meet. What are the standards and guideposts for  
4 me in doing a BACT analysis?"

5           Clearly if, in this case, neither DEQ  
6 nor EPA had any such guideposts, had not published  
7 any, then it's a little difficult to see how a  
8 permittee could have approached DEQ and gotten any  
9 guidance whatsoever on doing a BACT analysis, and  
10 that's precisely our point. There wasn't such  
11 guidance.

12           The other point I wanted to make about  
13 PM2.5 is in addition to there not being monitoring  
14 requirements that have been codified or final  
15 reference standards, there is not even a PSD  
16 increment that has been established for PM2.5. So  
17 PM2.5 was -- the national air quality standard was  
18 revised just a year ago, and EPA is getting around  
19 to trying to set up standards for measuring these  
20 small particulates, but the fact they don't even  
21 have PSD increments out there makes the job of a  
22 regulating agency like DEQ very tough, and that's  
23 our point, and that's why the guidance from EPA  
24 has been followed.

25           We talked earlier about the authority

1 and role of the Board, and I would just like to  
2 close with that. There is no question that the  
3 Board has a role in regulation, and there is no  
4 question that if you choose to, you could  
5 determine to require permittees to do analyses for  
6 CO2 or to control CO2, and you could do the same  
7 for PM2.5.

8 But that's not the question here. The  
9 question here is not whether you could do some  
10 regulation. The question is: Was that set of  
11 regulations on the books at the time this permit  
12 was applied for and decided on? And the answer is  
13 it wasn't. The Board could go ahead and do that  
14 kind of rulemaking, and that would certainly be  
15 fair because you would do it in the context of  
16 requiring controls across the board, not only new  
17 plants, existing plants, any other types of  
18 sources. It would be a fair rule like the mercury  
19 rule was, as opposed to being imposed in one  
20 particular case on one particular permittee.

21 You could be the first in the country  
22 perhaps -- not really the first in the country to  
23 necessarily regulate CO2 -- but the first in the  
24 country to require BACT analysis for CO2. You  
25 could do that. But we submit the way you do that



1 is through a rulemaking, as you did with mercury.  
2 You don't do that by imposing a standard after the  
3 fact on a licensee.

4 In sum, we believe that it was lawful  
5 for DEQ not to require a BACT for CO2, and it  
6 would have been unlawful for them to have done so.  
7 Therefore they did not commit error.

8 With respect to PM2.5, DEQ did what  
9 every regulatory agency in the country has done,  
10 and what EPA has done, and that is it used the  
11 best available guidance for doing a PM2.5 analysis  
12 using a surrogate analysis. They did that. They  
13 can't be said to have erred in doing that. And  
14 therefore, we urge this Board to accept the  
15 motions for summary judgment from the State and  
16 from SME to deny the motion from MEIC and to  
17 dismiss the appeal. Thank you very much.

18 MR. ROSSBACH: Just one question. I'm  
19 trying to find the Deseret permit, and I cannot  
20 find it attached to any of the documents I have  
21 available to me. We don't have it. I thought he  
22 was reading from --

23 MR. REICH: A relevant portion was  
24 attached to the --

25 MR. ROSSBACH: I thought he said it was

1 attached to --

2 MR. REICH: The relevant portion was  
3 attached to Mr. Rusoff's portion.

4 MR. ROSSBACH: I didn't see any  
5 attachments from Mr. Rusoff.

6 MR. REICH: David, do you have it?

7 MR. ROSSBACH: It's not in the materials  
8 that were sent to us.

9 MR. RUSOFF: (Provides document)

10 MR. REICH: The relevant portion that I  
11 read from is essentially a permit analysis, and I  
12 read from Page 5 of that permit analysis.

13 MR. ROSSBACH: Excuse me. What is it  
14 attached to?

15 MR. REICH: It's attached, I believe, to  
16 Mr. Rusoff's initial summary judgment brief.

17 MR. ROSSBACH: It wasn't in the  
18 materials that was sent to us. DEQ's motion for  
19 summary judgment?

20 MR. REICH: Yes, memorandum in support.

21 MS. BREWER: David, was that sent to me  
22 electronically?

23 MR. ROSSBACH: Do you have it? I don't  
24 have it on mine.

25 MS. BREWER: Then it probably was not

1 sent to me electronically.

2 MR. RUSOFF: I could probably address  
3 that. For the record, this is David Rusoff. And  
4 I may have not provided that. I provided the  
5 Board secretary with an electronic version of my  
6 brief, and I don't recall whether I gave her  
7 copies of -- I did not have an electronic version  
8 of the exhibits. They would have had to have been  
9 scanned in. And I thought some documents were  
10 going to be scanned in, but I don't recall  
11 specifically whether I gave those to the Board  
12 secretary or not. If I didn't, then you didn't  
13 receive them. They were attached to my brief that  
14 the parties received and the Board received, but  
15 Board members may not have received it.

16 MR. ROSSBACH: There is still -- This is  
17 our first effort at trying to get electronic, so  
18 I'm sure there is to going to be glitches. I'm  
19 not critical of anyone for that. I'm just trying  
20 to find it so that I can review --

21 MR. RUSOFF: It wouldn't have been cited  
22 in my brief, and there were numerous attachments  
23 to my brief.

24 MR. ROSSBACH: I didn't think I missed  
25 it.

1           MR. REICH: We certainly are happy to  
2           copy the entire permit, or the section that I read  
3           from, and just provide it to the Board right away.  
4           That's not an issue.

5           MR. ROSSBACH: That's fine. I can't  
6           read it and digest it right away.

7           MR. REICH: But the relevant section  
8           that I read from is literally two pages. That's  
9           what I believe was attached to Mr. Rusoff's brief.

10          MS. ORR: Mr. Chairman, I do have that  
11          attached in the materials I received.

12          MS. BREWER: I probably have it in the  
13          paper copy that was not provided in electronic.

14          CHAIRMAN RUSSELL: That's what Katherine  
15          has, right?

16          MS. ORR: Good old paper.

17          MR. ROSSBACH: Our carbon budget was  
18          exceeded however.

19          CHAIRMAN RUSSELL: Notwithstanding all  
20          of the energy we're using with all these new  
21          laptops.

22          MR. REICH: Were there other questions  
23          from the Board?

24          CHAIRMAN RUSSELL: Robin has one.

25          MS. SHROPSHIRE: I think you could

1 probably answer it or David. But what was the --  
2 I should know the answer to this. But what was  
3 the date of the Massachusetts EPA decision, and  
4 what was the date of the permit?

5 MR. ROSSBACH: April 2007 was the  
6 Massachusetts.

7 MR. REICH: April 2007 was the  
8 Massachusetts. The permit I think was finally  
9 issued on May 31st.

10 MS. DILLEN: May 11th.

11 MS. SHROPSHIRE: The permit was issued  
12 after the Massachusetts --

13 MR. REICH: A couple of weeks after, but  
14 of course --

15 MS. SHROPSHIRE: I just wondered.

16 CHAIRMAN RUSSELL: I guess I do. When  
17 you say May or April for the Supreme Court  
18 decision, how long does it take for them to  
19 publish their decisions?

20 MR. REICH: With the electronics, I  
21 think it literally came out the next day. My  
22 point was that SME applied for this permit in  
23 November of 2005. When a permittee like SME  
24 applies, they have to do a BACT analysis at the  
25 time of the application. The BACT analysis.

1 Doesn't get done two years later, the date the  
2 permit is issued. It has to be done right away,  
3 then that BACT analysis, of course, is made part  
4 of the draft permit that goes out to the public.  
5 In this case, there were several drafts that were  
6 issued and up for public comment.

7           So as a practical matter, first of all,  
8 of course our position is that Massachusetts  
9 versus EPA didn't cite anything relevant to this  
10 case, but even if it had, as a practical matter to  
11 say that DEQ should have dropped everything  
12 literally a week or two after a decision came  
13 down, even before giving the opportunity to  
14 analyze it, I think is certainly extreme.

15           But again, Massachusetts versus EPA did  
16 not say that CO2 is a pollutant subject to  
17 regulation. It merely said it is a pollutant.  
18 That was my point.

19           Are there any other questions from the  
20 Board?

21           CHAIRMAN RUSSELL: Questions?

22           (No response)

23           CHAIRMAN RUSSELL: Thank you.

24           MR. RUSOFF: Mr. Chairman, could I  
25 clarify something in regards to the attachments to

1 my brief?

2 CHAIRMAN RUSSELL: Sure. You might be  
3 subject to more questions.

4 MR. RUSOFF: This is David Rusoff. I  
5 just wanted to clarify that -- I hope I didn't  
6 imply that it was the Board secretary's fault that  
7 that didn't -- She was very painstaking about  
8 making sure she had everything, and if she didn't  
9 get it to scan it in, it's because she didn't get  
10 it from me, and didn't realize that it had not  
11 been sent electronically. So I just wanted to  
12 make that clear.

13 CHAIRMAN RUSSELL: And probably a good  
14 point to make clear.

15 MR. REICH: Mr. Chair, let me clarify  
16 that, if I might. I had mentioned at the  
17 beginning of my argument that I had filed a motion  
18 to supplement the record just to add a rebuttal  
19 expert report, and I said I'd be happy to take  
20 that up later. It's now later. If the Board  
21 wants to take that up, we can.

22 CHAIRMAN RUSSELL: I think the Board  
23 needs to figure where they're going to go before  
24 we understand that we need that information.

25 Abigail, since everyone else has been --

1 do you have anything else before we take a break?

2 MS. DILLEN: I hesitate to do this, but  
3 I do want to clear up one new thing that came up.

4 CHAIRMAN RUSSELL: This would be the  
5 time to do it.

6 MS. DILLEN: Mr. Rossbach had asked if  
7 there were any other pollutants that were subject  
8 to free standing monitoring requirements in and of  
9 themselves, and Mr. Rusoff had cited O2. O2 is  
10 not analogous. O2 is just a surrogate for CO2,  
11 and as DEQ and SME have made clear in their  
12 briefing, they don't even think that qualifies as  
13 monitoring.

14 O2, there is no free standing provision  
15 of the Clean Air Act that requires monitoring of  
16 O2, and I just wanted to make that point clear.

17 CHAIRMAN RUSSELL: But wouldn't the same  
18 point for CO2?

19 MS. DILLEN: No. The difference between  
20 O2 and CO2 is that O2 is only used as a practical  
21 way to track your NOx emissions, which is a  
22 regulated pollutant under the Acid Rain Program;  
23 whereas for CO2, there is a separate provision  
24 that requires monitoring of CO2 under the Section  
25 821 global warming information requirements.



1           So even if you were using CO2 to track  
2 your NOx emissions, you would still be obligated  
3 to be tracking your CO2 emissions. And to be  
4 clear, if you are a facility like the proposed  
5 Highwood coal plant, you cannot operate without  
6 doing this CO2 monitoring. So if you are not  
7 doing it, you can be considered in violation of  
8 the Clean Air Act, and punished accordingly. To  
9 argue that that's not regulation we submit is  
10 against common sense.

11           CHAIRMAN RUSSELL: We're going to take a  
12 break, and figure out where we need to go from  
13 here.

14                           (Recess taken)

15           CHAIRMAN RUSSELL: We're going to spend  
16 about thirty minutes on the motions to exclude  
17 testimony, and we'll start with MEIC.

18           MS. DILLEN: Thank you, Mr. Chair,  
19 members of the Board, and I will take  
20 significantly less. This isn't a tough legal  
21 issue. The rules of evidence are clear that  
22 expert testimony is only admissible to help you  
23 deliberate on what the factual evidence means, and  
24 determine issues of fact. And as we've discussed  
25 earlier today, the issues before you are legal.

1 The opinions that have been offered by SME's  
2 expert Gary McCutchen go to ultimate legal  
3 matters, his opinions. And I will refer you to  
4 our briefing -- they're set forth there in both of  
5 our briefs -- our legal opinion as to whether BACT  
6 requirements apply to CO2 and other similar  
7 issues.

8 I'll just refer you to what the Montana  
9 Supreme Court has said in this regard, that expert  
10 opinion that states a legal conclusion or applies  
11 the law to the facts is inadmissible. This is  
12 precisely the nature of the opinions that were  
13 presented in Mr. McCutchen's report.

14 If the Board has any further questions  
15 about what the standard is or what the opinions  
16 offered by Mr. McCutchen are, I'd be happy to  
17 cover that. But we've covered this so extensively  
18 in our briefing, I certainly don't want to exhaust  
19 you at the end of a long day. And I understand  
20 that SME will not be trying to admit these  
21 opinions that we've disputed.

22 I would also refer you to Mr.  
23 McCutchen's opinions about the availability of  
24 control technologies. I understand that SME has  
25 now designated another expert to provide evidence

1 on this matter because Mr. McCutchen himself has  
2 conceded that he's not an expert in this regard.  
3 We've cited that deposition testimony to you, and  
4 we will certainly assert again that he should not  
5 be qualified as an expert in that regard, and I  
6 don't anticipate that he will be offered as such  
7 an expert.

8 CHAIRMAN RUSSELL: Thank you.

9 MR. McCARTER: Mr. Chairman, members of  
10 the Board, that is going to be tough to top. Let  
11 me clarify just a couple of things.

12 Firstly, SME is respectful of the role  
13 of the Board. The Board actually is sitting here  
14 both as a finder of fact and also the determiner  
15 of law, and as a determiner of law --

16 MR. LIVERS: Mike, could you identify  
17 yourself for the record.

18 MR. McCARTER: I'm sorry. I'm Mike  
19 McCarter, I'm one of the SME attorneys. I have a  
20 tendency to get up and just plow into it.

21 But SME is respectful of the dual role  
22 of the Board. The Board is both the finder of  
23 fact and it's also the determiner of the law. And  
24 as a general matter, legal opinions are not  
25 binding on a Judge or the Board sitting in that

1 capacity, and we will be respectful of that at the  
2 hearing.

3           There is some rules of statutory  
4 interpretation that does allow the Board, in cases  
5 where agency rules and agency statutes are  
6 involved, to look at agency interpretations and  
7 applications. And the evidence of Mr. McCutchen,  
8 if offered, would primarily go to those issues as  
9 far as his experience with the EPA. As you're  
10 aware, he has long experience with the EPA, and he  
11 has qualified as an expert before this Board. But  
12 we will be respectful of the role of the Board as  
13 the ultimate determiner of the law.

14           In that regard, what I would suggest is  
15 that rulings on specific questions or specific  
16 testimony be deferred.

17           Generally motions in limine are  
18 primarily to put a barrier between the finder of  
19 fact and the determiner of the law. It's usually  
20 applied in jury trials. In order for a fact  
21 finder which is also sitting as the legal  
22 determiner to make a determination as to whether  
23 evidence should be excluded or not, they have to  
24 hear what that evidence is going to be, and the  
25 whole purpose of motions in limine is basically to

1 preclude the fact finder from hearing that  
2 evidence. So I think you're in just as good a  
3 position to make the determinations that the  
4 evidence is offered, if it is offered, when it  
5 comes at the hearing.

6           With respect to Mr. McCutchen not being  
7 an expert with respect to BACT, certainly Mr.  
8 McCutchen testified that he is certainly not the  
9 best expert in BACT. However, he has experience  
10 in BACT. The sorts of things that regulators rely  
11 on are things that he has some knowledge of. I  
12 would analogize that situation to, for example,  
13 like a family physician. A family physician is  
14 qualified to come into court and testify as to  
15 mental illness, even though that family physician  
16 is not a psychiatrist. He can so testify. That  
17 really goes to the weight of the testimony.

18           And again, I think any rulings as far as  
19 any testimony as far as BACT, if you get to that,  
20 ought to be reserved for hearing. And again,  
21 whether or not you get to this at all is going to  
22 depend on your ruling on the motions for summary  
23 judgment. I think those are the critical issues  
24 before the Board today, and I think these other  
25 issues as far as any specific testimony can

1 ultimately be resolved at hearing. Thank you.

2 MS. DILLEN: Mr. Chairman, may I briefly  
3 respond? Mr. Chairman, members of the Board,  
4 there is one fundamental problem with the approach  
5 that Mr. McCarter has suggested, and that is that  
6 Mr. McCutchen presented opposing Counsel with an  
7 expert report. We have addressed every single  
8 opinion provided in that expert report, and  
9 briefed extensively as to why each of those  
10 opinions is not admissible as evidence. We have  
11 not had an opportunity to depose Mr. McCutchen as  
12 to other evidence he might provide.

13 And so in the event that the Board sees  
14 fit to hear Mr. McCutchen on some issues that he  
15 has not presented to opposing Counsel so far, we  
16 would certainly need an opportunity to vet his  
17 testimony in advance of any hearing. This would  
18 really prejudice Petitioners' case. Thank you.

19 MR. McCARTER: Could I respond briefly  
20 to that?

21 CHAIRMAN RUSSELL: Sure.

22 MR. McCARTER: Mr. Chairman, members of  
23 the Board, we don't intend to go beyond what we've  
24 offered and provided to Counsel.

25 CHAIRMAN RUSSELL: Katherine, with what

1 we just heard, we don't have to exclude this at  
2 this point in time if we don't want to? We don't  
3 have to make a decision on the motion to exclude?

4 MS. ORR: Mr. Chairman, I guess I would  
5 ask Mr. McCarter one question if I could.

6 Are you intending that Mr. McCutchen's  
7 report would serve in the analysis on your motion  
8 for summary judgment? Because it is an  
9 attachment.

10 MR. McCARTER: I would defer that  
11 question to Mr. Reich.

12 MR. REICH: The parties submitted  
13 essentially all of their expert reports, or  
14 portions of them, as well as deposition testimony  
15 to the briefs. We're not saying that the Board  
16 necessarily needs to rely on any of those or all  
17 of those reports and testimony in order to make  
18 your decision. It is essentially a legal  
19 decision. We submitted a number of these reports,  
20 including Mr. McCutchen's, to illustrate -- in  
21 terms of McCutchen -- EPA interpretation of the  
22 rules in question, and the Board can regard those  
23 or not as it sees fit.

24 But we would intend, if this matter goes  
25 to hearing, to have Mr. McCutchen testify

1 essentially within the scope of his report. And  
2 as Mr. McCarter said, we'll respectfully not be  
3 asking him for solely legal opinions, and  
4 certainly the Board can decide at that point  
5 whether it's an objectionable question, and rule  
6 at that point. But we think that's better  
7 resolved at a hearing as opposed to in advance.

8 MS. ORR: Mr. Chairman, I'd say then if  
9 the Board is not going to include that report in  
10 their analysis of the summary judgment motions, it  
11 can be deferred and should be.

12 CHAIRMAN RUSSELL: So if the Board does  
13 move forward on a motion for summary judgment,  
14 that should be specifically excluded, depending  
15 on --

16 MS. ORR: One disposition of the motion  
17 for summary judgment could moot that motion, as  
18 well as the motion to strike that portion of the  
19 affidavit.

20 CHAIRMAN RUSSELL: I guess this is an  
21 opportunity for the Board to either make final  
22 clarifications on any matters, or could entertain  
23 a motion and have some further discussion. I'm  
24 certainly not here to do anything more than  
25 facilitate a process, not bludgeon its way



1 through. So I'd certainly look to anyone on the  
2 Board to start off the discussion, and make a  
3 motion.

4 The only thing I'd like to not do here  
5 is not make some -- we need to make sure that the  
6 parties know which way we want to move forward  
7 today, because this is still a fairly -- this is a  
8 schedule we've set in front of us that doesn't  
9 afford us a lot of time, so I'm sure the parties  
10 would like to know where we're going.

11 MR. ROSSBACH: I would make a  
12 preliminary motion to deny both cross motions for  
13 summary judgment on the PM2.5 BACT issue. I  
14 believe that there are facts in dispute with  
15 regard to what BACT was done or not done with  
16 regard to PM2.5, and therefore, would move to deny  
17 both motions for summary judgment, and request  
18 that this be heard.

19 CHAIRMAN RUSSELL: All motions for  
20 summary judgment?

21 MR. ROSSBACH: There's sort of cross  
22 motions for summary judgment. I'm saying that  
23 they all should be denied because there are facts  
24 in dispute with regard to what BACT -- what was  
25 done with the analysis that they did, did that

1 constitute adequate PM2.5 or not.

2 CHAIRMAN RUSSELL: For discussion  
3 purposes, is there a second?

4 MS. SHROPSHIRE: Second.

5 CHAIRMAN RUSSELL: It's been seconded by  
6 Robin. Any further discussion?

7 MR. MIRES: I'm not quite sure I  
8 understand what he said.

9 MR. ROSSBACH: There is basically two  
10 issues, the carbon dioxide issue, whether they  
11 should do a BACT on carbon dioxide, and the second  
12 is should they have done a BACT on PM2.5. And my  
13 view is after hearing the arguments, and reading  
14 the briefs, and understanding the process that  
15 went into the permit that was given, I do not  
16 believe that it can be decided purely as a legal  
17 issue, that we need to hear the facts of what was  
18 done by the Department to reach its conclusion  
19 that they did to grant the permit. In other  
20 words, I want to hear the evidence about the  
21 PM2.5.

22 MS. KAISER: Even if --

23 MR. ROSSBACH: That's my motion.

24 MS. KAISER: Would that be necessary if  
25 both sides agree that --

1 MR. ROSSBACH: Well, I don't agree.

2 MS. KAISER: You don't agree with what?

3 MR. ROSSBACH: I don't agree that the  
4 facts are not in dispute. They've been disputing  
5 the facts all day here about what was done,  
6 whether the surrogate method was adequate to be an  
7 adequate PM2.5 BACT. That's what -- I've heard  
8 that all morning.

9 CHAIRMAN RUSSELL: I have a question  
10 then. If this were 2002 -- Well, just this is an  
11 issue of technology in motion. If this was 2002,  
12 and you had a 1997 EPA guidance memo that stated  
13 -- Are you disputing the use of a surrogate PM10  
14 method at all, or are you saying there is --

15 MR. ROSSBACH: I don't know enough about  
16 it to decide. That's what I come away with.

17 CHAIRMAN RUSSELL: So it isn't a matter  
18 of -- It's just a matter of what happens after  
19 1997.

20 MR. ROSSBACH: Correct.

21 MS. SHROPSHIRE: I'll add that there is  
22 arguments, it seems, on both sides of "should  
23 have" and "could have," and it's not clear to me  
24 on both those counts, which to me involves a  
25 factual disagreement.

1 MS. KAISER: With regards to what -- I'm  
2 just asking, Robin, what the "would have," "should  
3 have"? Is it in regards to the testing  
4 methodology for PM2.5 or --

5 MS. SHROPSHIRE: That there aren't tests  
6 available?

7 MS. KAISER: Proven.

8 MS. SHROPSHIRE: Correct. It seems to  
9 me that there is not agreement on that  
10 potentially, and so I'm unclear on that as well in  
11 terms of will --

12 MR. ROSSBACH: The testimony from the  
13 Department is -- I'm calling it testimony, because  
14 effectively that's what it is -- is the testimony  
15 is about facts. Argument is about law. What I've  
16 been hearing here is a lot of what I call  
17 testimony about what the Department did, and that  
18 what they did was just as good as having done --  
19 that what they did was a PM2.5 BACT by using a --  
20 by doing it with PM10 as surrogate, and this is  
21 why that was valid as a PM2.5 BACT.

22 Then I heard the other side saying it  
23 was not valid as a PM2.5 BACT because of these  
24 other facts. So to me, there are facts in dispute  
25 as to whether the method that they used was

1       adequate to comply with -- was an adequately,  
2       properly done BACT for particulates.

3               MS. KAISER: I don't think there is any  
4       dispute that that was done within EPA's  
5       guidelines.

6               MR. ROSSBACH: Oh, there is plenty of  
7       dispute is what I heard. I heard there was plenty  
8       of dispute about that. We can disagree about  
9       that. I heard a lot of dispute.

10              MR. MIRES: But doesn't that -- What I  
11      heard, it was a time frame element, what was known  
12      at the time the applicant was applied for, and the  
13      way the procedure went at that time, was based  
14      upon known facts and information at that point in  
15      time, and things have happened since the  
16      application was made and just prior to the permit  
17      being issued. That may or may not argue with  
18      where you're going. So I guess that's --

19              MR. ROSSBACH: That may be in terms of  
20      CO2, but not in terms of PM10 or PM2.5.

21              MR. MIRES: Even with PM, from what I'm  
22      interpreting, from what I'm interpreting and what  
23      I've read in here and heard. It sounds to me like  
24      there is a time factor here.

25              MR. ROSSBACH: That may be. Then there

1 is another factual dispute. For us to decide this  
2 on a purely legal basis, we have to decide -- we  
3 have to say that there is no facts about time, or  
4 methods, or anything with regards to PM2.5.

5 MR. MIRES: But time is very relevant  
6 related to facts and the legality of facts.

7 MR. ROSSBACH: I agree. That's --

8 MR. MIRES: I just heard you say it's  
9 not.

10 MR. ROSSBACH: No. We have to decide.  
11 I don't think it's clear from, what I have heard,  
12 whether time matters or not. There has just been  
13 an awful lot of what I call testimony about that  
14 today. That's my view of it.

15 CHAIRMAN RUSSELL: Any other discussion?

16 MR. ROSSBACH: It may very well be that  
17 there isn't adequate methodology to evaluate  
18 PM2.5, but I've heard people disputing that, and I  
19 heard them disputing about what time, and when it  
20 was done, and all of that. So to me, those are  
21 factual disputes that we have to hear the  
22 witnesses, not just the lawyers. The lawyers are  
23 not --

24 The lawyers can't testify to facts. We  
25 have to hear witnesses, technical people tell us

1 about PM2.5 and PM10, and what the methods are,  
2 and how they work, and why the PM10 surrogate is  
3 good enough to evaluate PM2.5 within our  
4 technological time frame. And just because the  
5 lawyers say it doesn't mean we have to -- we can't  
6 believe what lawyers say.

7 MR. MIRES: That's factual.

8 MR. ROSSBACH: That's a fact.

9 CHAIRMAN RUSSELL: Spoken like a true  
10 lawyer. I still wonder personally and as a  
11 regulator that there has to be a basis to apply a  
12 PM2.5 analysis in and of itself. If there was, I  
13 wonder why that wouldn't be brought to us as a  
14 legally defensible way of doing it. And as I look  
15 at summary judgment, I would say, "Well, you  
16 applied this XYZ technique, when you should have  
17 applied this ABC technique, but there is no basis  
18 for ABC in the regulation. If there was a basis  
19 for it, I think it's pretty clear you should have  
20 applied this, and you didn't."

21 This is why I come -- maybe time is  
22 something we have to deliberate. I think time is  
23 extremely important. If in 1997, the EPA came out  
24 with a memo and said, "Gosh. We can't really look  
25 at PM2.5 as it exists in the plume or in the

1 emission." We've got to do something.

2 We did this with ambient sampling, too,  
3 for awhile. We set up and we correlated PM10 and  
4 PM2.5 just in ambient sampling, because that's  
5 what we did, and we wanted to make sure that we  
6 had this time tested true methodology, and we  
7 applied it to the new methodology, and then we  
8 looked at it, and we said, "Linearly these things  
9 seem to work."

10 But if you don't have anything absent of  
11 a good testing method, the EPA goes, "Well, gosh,  
12 we've got to do something. We're going to use  
13 PM10 as a surrogate because it exists in 1997,"  
14 and then ten years, eight years after that, they  
15 come back -- and I think the record states that  
16 eight years after that, they came back and said,  
17 "It's still the best thing we have using PM10 as a  
18 surrogate." What's changed in the last two years?

19 This is from a regulatory standpoint.  
20 What's changed in the last two years that I can't  
21 see? And if I can't see it, why didn't the  
22 Petitioners give it to me?

23 MR. ROSSBACH: I heard that there was  
24 another method, and that's the dispute.

25 MS. KAISER: But it's not proven.



1           MR. ROSSBACH: Well, no, they're given  
2 conditional improvements.

3           MS. KAISER: It's conditional.

4           MR. ROSSBACH: That's exactly my point.  
5 I don't know what that method is.

6           MS. KAISER: I don't either, but --

7           MR. ROSSBACH: Well, but then we  
8 can't -- That's exactly the point. If we don't  
9 know what the facts are, then we can't decide this  
10 case right now. That's my -- I don't know what  
11 the approved method is.

12           CHAIRMAN RUSSELL: But as --

13           MR. ROSSBACH: Or even a conditional  
14 method.

15           CHAIRMAN RUSSELL: As it has been  
16 relayed, it's a conditional method, only in the  
17 last few months, at least based on the record. It  
18 hasn't been very long that this new methodology  
19 has come out.

20           We also heard that this BACT analysis  
21 using surrogate PM10 was done over two years ago  
22 when the application was -- So this is why we  
23 discuss this, because we now have to act as one,  
24 at least when our decision is made, and move this.  
25 So I hope everyone is kind of getting these

1 points.

2 I understand your point. There may be  
3 some stuff out there that's a lot better than it  
4 was.

5 MR. ROSSBACH: But I don't know what --  
6 The time frames are not clear to me either.

7 CHAIRMAN RUSSELL: But we have the  
8 record.

9 MR. ROSSBACH: Right, but the record is  
10 not undisputable, is what I'm saying. From a  
11 summary judgment point of view, the facts have to  
12 be beyond dispute. And I haven't -- I have not  
13 been convinced today that the facts are beyond  
14 dispute about the availability of methodologies to  
15 evaluate what -- that's what I'm --

16 MS. KAISER: I agree with you that the  
17 methodology might be available, but if they  
18 haven't been approved, and actually --

19 MR. ROSSBACH: I don't think they have  
20 to be approved to be used.

21 CHAIRMAN RUSSELL: I believe they do.

22 MS. KAISER: I believe defensible.

23 MR. ROSSBACH: That's not the way I read  
24 it. That's not what I heard today. These are all  
25 facts in dispute. How do you go about doing a

1 BACT? There is no textbook for doing a BACT,  
2 there is no approved method for doing a BACT  
3 either. And we don't have any precedent for  
4 either side about how you do a BACT on this  
5 particular coal plant technology for PM2.5 or --  
6 There is no approved -- I don't see a precedent  
7 necessarily that says unequivocally, "This is how  
8 it has to be done."

9 MR. MARBLE: This is Don, and I'd like  
10 to say I totally concur with what Bill is saying.

11 MS. SHROPSHIRE: I heard Petitioners  
12 talking about the way the particulate matter was  
13 measured, and whether or not it was total  
14 particulate matter or PM10, and whether it was the  
15 filterable part or the condensible part. It  
16 seemed to me that there was a dispute over that,  
17 too. And maybe that was a misinterpretation of  
18 the permit, but I think that's relevant.

19 MS. KAISER: I didn't hear a dispute  
20 about that. I heard them both say that the  
21 condensible part was mostly PM2.5. I heard the  
22 Petitioners say that, and I heard the --

23 For clarification, I guess I did not  
24 hear a dispute between what the condensible part  
25 of the particulate matter was, that both

1       Petitioners and DEQ agreed that it was primarily  
2       the condensible part was primarily PM2.5.  Is  
3       there something different?  Did I hear that wrong,  
4       or were you looking for more details or more  
5       specifics?

6               MS. SHROPSHIRE:  So my understanding of  
7       the argument from the Petitioners was that PM10  
8       was used as a surrogate, but it wasn't actually  
9       PM10 that was measured, it was total PM, rather  
10      than --

11              MS. KAISER:  As I understand it, PM10  
12      and smaller; was that -- We're talking about  
13      facts.

14              CHAIRMAN RUSSELL:  I think there was a  
15      point that I think David made after Abigail made a  
16      point that was just total suspended particulate,  
17      that there is a heading in the permit that says  
18      PM, and then there is -- in the body of the  
19      document, it goes back to talking about PM10.  At  
20      least that's what I heard in the rebuttal.

21              I've been around since we did TSP's.  
22      We'd haul those around in a wheel barrow, those  
23      big old filters.

24              Further discussion?

25              MR. MIRES:  I'm still not comfortable

1 with it. I guess I don't necessarily agree with  
2 where you're at, Bill, because I'm seeing this as  
3 a: Did the Department follow the rules in issuing  
4 the permit, or did they do something differently?  
5 And I'm hearing Petitioners seeking a ruling  
6 coming out of here, and I'm hearing two things:  
7 "We want you to make a rulemaking, but at the same  
8 time, did the Department follow the rules?"

9 From what I can see and what I've heard,  
10 it appears that the Department followed the rules  
11 as they were laid out at the time that they did  
12 it. And I'm not seeing where it's going to  
13 benefit anybody for getting more facts as to  
14 whether the Department followed the rules when  
15 they issued the permit. Am I on the right track  
16 or am I off base?

17 MR. ROSSBACH: I don't agree, but that's  
18 why we have seven of us here to listen to what we  
19 heard and make our decisions. It was not clear to  
20 me. What the Department is saying is that -- I  
21 think PM2.5 is subject to regulation. They have  
22 to do a BACT. They say they did an adequate BACT,  
23 and I'm not convinced that they did. I need to  
24 hear more.

25 CHAIRMAN RUSSELL: Well, let's think of

1 -- What would be the outcome of the Department not  
2 doing an adequate BACT?

3 MR. ROSSBACH: Then there would be  
4 litigation over -- that's why we have the  
5 litigation we have today. The same thing. That's  
6 what David said. "We didn't do a specific PM2.5  
7 BACT because we didn't need to. We did -- Our  
8 PM10 served as a surrogate, so in effect we did a  
9 PM2.5." It's a substitute for it.

10 CHAIRMAN RUSSELL: Well, it's a  
11 surrogate for it. A substitute in my mind would  
12 say, "Well, there is a PM2.5 BACT analysis out  
13 there, but I don't like it, and so I'm going to do  
14 a PM10 and use it as a surrogate." There is no  
15 option here, at least that's what the Department  
16 has told us. They have one BACT analysis that  
17 they can do for particulate, for PM2.5  
18 particulate, and that's the PM10 surrogate method.

19 I never heard anyone say that there is a  
20 BACT, PM2.5 BACT method out there that is  
21 acceptable to permittees. I never heard that. I  
22 never heard one person say that there was a PM2.5  
23 BACT method acceptable to the permittees.

24 MS. SHROPSHIRE: I was hearing that the  
25 interim methods or the proposed methods would be

1 acceptable, but those weren't used.

2 CHAIRMAN RUSSELL: Why? I never heard  
3 one party say why they wouldn't be an acceptable  
4 alternative. I never heard a party state that  
5 this was an acceptable alternative, but --

6 MR. ROSSBACH: I heard MEIC say it was  
7 the alternative that should have been used because  
8 it was more appropriately focused on PM2.5, and  
9 was not used. So the question in my mind is: Was  
10 it really? I don't know enough about it. I don't  
11 know what either of these methods do.

12 CHAIRMAN RUSSELL: So let's say we jump  
13 to an evidentiary hearing. Are we going to hear  
14 it on the evidence that from a regulatory  
15 standpoint, a PM2.5 BACT is used, or are we going  
16 to come to a conclusion that there is such a thing  
17 as a PM2.5, and it should have been used? I think  
18 there is a big point still.

19 MS. SHROPSHIRE: The difference that I  
20 heard were that there are no available  
21 technologies to evaluate PM2.5, and because of  
22 that, we have to use the PM10, and --

23 CHAIRMAN RUSSELL: I didn't hear that.

24 MS. SHROPSHIRE: I have notes. "Tools  
25 aren't there."

1                   CHAIRMAN RUSSELL:  What's the date on  
2   that?

3                   MS. SHROPSHIRE:  Today.

4                   CHAIRMAN RUSSELL:  What's the date on  
5   the document?

6                   MS. SHROPSHIRE:  I don't remember whose  
7   testimony it was, but they said the tools aren't  
8   there to evaluate PM2.5.  To me that's a factual  
9   dispute, because I'm hearing that the tools are  
10  there.

11                  MR. MIRES:  But what I heard was the  
12  tools were not there at the time that the permit  
13  was issued, but there is an acceptable one that's  
14  come out, and that's been issued sometime shortly.

15                  MR. ROSSBACH:  That's what was disputed.  
16  That's exactly what I think was being disputed, is  
17  when the tools were available.  That's what I  
18  think the factual dispute is.  Are these good  
19  tools, and when were they available?

20                  CHAIRMAN RUSSELL:  Is there any further  
21  discussion?

22                  MS. KAISER:  Would you restate your  
23  motion, Bill?

24                  MR. ROSSBACH:  I would move to deny both  
25  motions for summary judgment on the PM2.5 issue on



1 the basis that there are, in my view, facts in  
2 dispute which need to be heard for us to decide  
3 the motions.

4 MR. MARBLE: I think that goes back to  
5 the rules. I agree with Bill. That's what I'm  
6 trying to say. I'm ready to vote.

7 CHAIRMAN RUSSELL: Is that how you --

8 MS. SHROPSHIRE: (Nods head)

9 CHAIRMAN RUSSELL: -- when you seconded  
10 that motion.

11 MR. SKUNKCAP: So I've got a question  
12 for SME. Was that SME that stated the tools  
13 weren't there?

14 MR. ROSSBACH: No. I think it was David  
15 Rusoff that said the rules weren't there.

16 MR. MIRES: The State said the tools  
17 were not there, from my notes.

18 MS. SHROPSHIRE: December 21st, 2007.

19 MR. MIRES: We have an EPA that has a  
20 conditionally approved method, the Petitioners  
21 have testified.

22 CHAIRMAN RUSSELL: Further discussion?

23 (No response)

24 CHAIRMAN RUSSELL: Seeing none, I'm  
25 going to go through a roll call, and I'm going to

1 go clockwise, so Don, I'm going to start with you  
2 and move around the table. Don.

3 MR. MARBLE: Yes for the motion.

4 CHAIRMAN RUSSELL: Bill.

5 MR. ROSSBACH: Yes.

6 CHAIRMAN RUSSELL: Gayle.

7 MR. SKUNKCAP: Yes.

8 CHAIRMAN RUSSELL: Robin.

9 MS. SHROPSHIRE: Yes.

10 CHAIRMAN RUSSELL: Joe, no. Heidi.

11 MS. KAISER: No.

12 CHAIRMAN RUSSELL: Larry.

13 MR. MIRES: No.

14 CHAIRMAN RUSSELL: The motion passed  
15 four to three. We will have at least an  
16 evidentiary hearing on the PM2.5 matter. Since we  
17 left the other CO2 issue hanging out, we need to  
18 resolve that, so do I have a motion so we can  
19 start some discussion on CO2?

20 MS. KAISER: I would make a motion. I'm  
21 not quite sure how to say it. I move we grant  
22 summary judgment in favor of DEQ and SME on the  
23 CO2 issue.

24 CHAIRMAN RUSSELL: Is there a second for  
25 discussion, if nothing else?

1 MR. MIRES: Second.

2 CHAIRMAN RUSSELL: It's been moved and  
3 seconded. Discussion?

4 MR. ROSSBACH: I wish I had the Deseret  
5 permits and the availability of the information  
6 that was not part of this, and the Federal  
7 Register notices. I don't feel like I'm fully  
8 informed on this. I don't feel I have enough  
9 information about which to vote.

10 CHAIRMAN RUSSELL: Any other discussions  
11 relating to this?

12 I guess we know we're coming back in  
13 January. We're going to hear an evidentiary  
14 hearing on CO2 also.

15 MR. ROSSBACH: I'm not sure there is  
16 facts in dispute on CO2, but I don't have enough  
17 law right now to feel comfortable with a decision.

18 CHAIRMAN RUSSELL: Just based on our  
19 timing with the holiday coming up, we would need  
20 to give the parties -- if there is anything that  
21 we're lacking, like the permit for Deseret --

22 MR. ROSSBACH: Federal Register  
23 references.

24 CHAIRMAN RUSSELL: It may be better,  
25 since we're going to have a hearing, we can

1 just --

2 MR. ROSSBACH: I'd move to table it.

3 Was there a second to Heidi's motion?

4 CHAIRMAN RUSSELL: If we move to table  
5 it, by default, we're going to have a hearing on  
6 it, right?

7 MR. ROSSBACH: Do we have any other way  
8 of --

9 MS. KAISER: Can we get more information  
10 and vote on it on January 11th?

11 CHAIRMAN RUSSELL: Do we have the  
12 January 11th date?

13 MR. LIVERS: We've kept that in reserve  
14 if needed.

15 MR. MIRES: We had one scheduled for the  
16 11th of January and then the 22nd.

17 MR. ROSSBACH: Is that the phone one?

18 MS. KAISER: That's the phone one.

19 MR. MIRES: The eleventh was a phone  
20 conference.

21 CHAIRMAN RUSSELL: I guess we could take  
22 action on this on the 11th, or we could just say,  
23 "Hey, we're going to go full bore," and it doesn't  
24 really matter to me.

25 MR. ROSSBACH: I think we should take

1 action on the 11th, and give the parties time to  
2 give us -- I don't feel I've got everything I need  
3 to make a decision.

4 CHAIRMAN RUSSELL: So we have our  
5 motions in front of us on this matter. We'll get  
6 the permit for Deseret. Where is this place?

7 MR. REICH: If I might just ask the  
8 Board, so that we can do this in a coordinated  
9 fashion. Is it the Deseret permit and the two  
10 Federal Register notices?

11 MR. ROSSBACH: Anything which basically  
12 deals with the question of the EPA's position on  
13 the meaning of "subject to regulation," and  
14 whether there is other citations to authority. I  
15 don't feel like I'm adequately informed on that  
16 topic.

17 CHAIRMAN RUSSELL: I guess from the  
18 parties' standpoint, if we were to wait until the  
19 11th to make a decision on that motion for summary  
20 judgment, and we turn around in basically ten  
21 days, less than two weeks, would you rather just  
22 go for the whole thing? I mean it's twelve days  
23 from now to the evidentiary hearing, versus the  
24 fact that we have a lot of time -- not a lot,  
25 but --

1           I guess I don't want to put any party at  
2 risk of not being able to present a fair  
3 evidentiary case if we wait until the 11th to make  
4 a decision on that summary judgment.

5           MS. DILLEN: Mr. Chair, if I might raise  
6 a concern that I think all of us share equally.  
7 If we don't know what facts are in dispute, we  
8 have moved on summary judgment on the premise that  
9 this can be decided upon the law. So what would  
10 be critical to us in order to prepare our case and  
11 give you more than just arguments from lawyers  
12 would be to know what facts you don't know how to  
13 resolve. So if we had some indication of that, I  
14 think we could prepare our case, but we certainly  
15 have no -- on behalf of the Petitioners, we have  
16 no objection to you taking up this summary  
17 judgment motion on the law on January 11th.

18           MR. RUSOFF: I just wanted to point out  
19 a point of procedure. I'm normally the last  
20 person in the world to stand on procedure, but I  
21 just want to remind the Board that there is a  
22 motion to grant summary judgment in favor of the  
23 Department and SME on the CO2 BACT claim, and  
24 there is a second. So you may want to decide that  
25 before you decide how you proceed further on

1 January 11th and on January 22nd.

2 CHAIRMAN RUSSELL: Right, and I think  
3 it's a good point. I thought some of my  
4 discussion was to include that, because I don't  
5 want to put anyone in the position where they  
6 can't be prepared for their case because of our  
7 schedule.

8 MR. ROSSBACH: To me --

9 MS. ORR: Can I add? I don't think the  
10 Board has all of the attachments, and I would  
11 suggest that all of those be presented to the  
12 Board hypothetically to rule on this motion by  
13 January 11th. Now, Bill might be asking for  
14 additional information, in which case, that's  
15 separate from what the record as it already has  
16 been developed, or not. I know that the Deseret  
17 permit cover sheet is in my attachments, so --

18 MR. ROSSBACH: None of us have that,  
19 though.

20 MS. ORR: So I think our starting point  
21 is to get all of the attachments in front of the  
22 Board on all of these motions, so that the record  
23 is complete for the Board.

24 CHAIRMAN RUSSELL: Well, so we have a  
25 motion and a second relating to granting summary

1 judgment in favor of SME and the Department, and  
2 it's been seconded. There has been some concern  
3 about the fact that we don't have all of the  
4 record in front of us, which has also been brought  
5 up by our attorney. Is there any further  
6 discussion, since we do have to act on this  
7 motion?

8 MS. KAISER: I have a question of Bill,  
9 what his -- what your major concern is. Is it  
10 definition of a regulated --

11 MR. ROSSBACH: No, what is "subject to  
12 regulation." Well, I think that's the crux,  
13 because the plain language to me, "subject to  
14 regulation," would include CO2. So if you want me  
15 to vote on it right now, I will vote that way, but  
16 I don't feel like I'm totally prepared to vote.

17 MS. KAISER: That's fine.

18 MR. ROSSBACH: But it isn't fine,  
19 because I don't feel like I've been fully informed  
20 on the legal aspects. I'm not asking for more  
21 facts. I'm not saying that there is -- that there  
22 are facts in dispute. What I'm saying is that I  
23 don't have all of the law that I need to make a  
24 decision.

25 MR. MIREs: So based upon that, and with



1 the advice of our attorney, can this vote be  
2 postponed until January 11th until we get all of  
3 the attachments to make sure we have the right  
4 facts to vote on and the correct procedure?

5 CHAIRMAN RUSSELL: I think our attorney  
6 has briefed us on the fact that we probably should  
7 vote this motion down, and get the additional  
8 information, and take this motion up again on the  
9 11th.

10 MR. LIVERS: Mr. Chairman, or perhaps  
11 the motion could be withdrawn, and you can  
12 reconsider it at the time --

13 CHAIRMAN RUSSELL: But I still want to  
14 make sure that we give clear direction to the  
15 parties where we're going to be on the 11th, and  
16 22nd, 23rd, and 24th.

17 MR. MIRES: If it's easier to withdraw  
18 that --

19 CHAIRMAN RUSSELL: Let's vote on it.  
20 I'll tell you which way I'm going to vote.

21 MR. LIVERS: You want to reserve the  
22 right to vote on it on the 11th; is that correct?

23 MR. ROSSBACH: I don't want to vote on  
24 -- I would prefer not to have to vote on it before  
25 the 11th.

1           CHAIRMAN RUSSELL: It's clear that you  
2 feel that you're not going to vote because you  
3 don't have enough information. That's a fine way  
4 to go. If there is concern that the Board may not  
5 go the same way that our attorney has given us  
6 legal advice to, I guess we probably should ask  
7 for it to be withdrawn.

8           MR. MIRES: I think that would probably  
9 be the quickest way to resolve it.

10          CHAIRMAN RUSSELL: You're going to  
11 withdraw your motion?

12          MR. MIRES: I would withdraw my motion.

13          CHAIRMAN RUSSELL: On the second, do you  
14 want to withdraw your motion?

15          MS. KAISER: I'll withdraw my motion.

16          CHAIRMAN RUSSELL: I guess we'll take  
17 this up on the 11th.

18          MR. REICH: Chairman, Russell, if I just  
19 might ask a question. One is procedural. I hear  
20 that some exhibits are missing. I don't know if  
21 all. Would you prefer that we just simply collate  
22 all the exhibits and email them to the Board, or  
23 are there only some exhibits that are missing?

24          CHAIRMAN RUSSELL: Everything that has  
25 any relevance to this case, go ahead and send it

1 to us.

2 MR. REICH: We could -- maybe it might  
3 be just easy to PDF everything.

4 MS. DILLEN: I think we have done --

5 MR. REICH: I thought so.

6 MS. DILLEN: We can do it again.

7 MR. ROSSBACH: We do not have the  
8 Deseret petition or any citations which were --

9 CHAIRMAN RUSSELL: Tom.

10 MR. LIVERS: Mr. Chairman, for the  
11 record, Tom Livers, Deputy Director of the DEQ.  
12 Maybe the best way to start would be for the Board  
13 attorney and the Board secretary to sit down and  
14 go through the record, and make sure whatever is  
15 missing we get out there, and I think we can  
16 probably get all the -- that way we can ensure all  
17 of the material is there, and then if there are  
18 any questions, we can go back to Counsel.

19 CHAIRMAN RUSSELL: I think there are  
20 things that were alluded to that weren't part of  
21 the record that was going to be submitted either.  
22 So I think we're asking for maybe a little record  
23 on some things that have been --

24 MR. ROSSBACH: Well, the Federal  
25 Register notices were not included. They might be

1 helpful. I could go find them, we could go find  
2 them ourselves, but it would be obviously more  
3 helpful if anything that was referred to in the  
4 Deseret case, or anything else, the North Country  
5 case, that specifically is cited there, that we  
6 don't have, that weren't attached, that you would  
7 also attach those.

8 CHAIRMAN RUSSELL: So just to recap,  
9 there are facts in dispute on PM2.5.

10 MR. ROSSBACH: Correct.

11 CHAIRMAN RUSSELL: Those facts are  
12 basically testing methodology, acceptable testing  
13 methodology --

14 MR. ROSSBACH: I'm not going to limit  
15 it.

16 MS. DILLEN: I was suggesting that Mr.  
17 Rossbach on the CO2 issue only had suggested that  
18 he didn't feel like there were issues of fact, and  
19 so I didn't want to just submit lawyers arguments  
20 again at a hearing if there wasn't facts in  
21 dispute.

22 MR. ROSSBACH: No, I don't expect to  
23 hear lawyer argument anymore. I want to see the  
24 sources, legal authority. But on PM2.5, I'm not  
25 going to limit -- My concern is, as I think the

1 motion speaks for itself, is that there are still  
2 facts in dispute about the adequacy of the BACT  
3 analysis which was done with regard to the  
4 requirements that the Department had for PM2.5.

5 CHAIRMAN RUSSELL: So I think we're  
6 clear.

7 MR. ROSSBACH: That's what -- It's their  
8 burden then to demonstrate to us with facts why  
9 there was a violation of the Clean Air Act by the  
10 Department in using the methods that they did to  
11 the BACT analysis that they did.

12 MS. SHROPSHIRE: Can I add to that?

13 MR. ROSSBACH: And it's their burden of  
14 proof. And I agree with Mr. Rusoff now, that in  
15 fact it is a burden of proof, and for which I want  
16 to have expert testimony.

17 MS. SHROPSHIRE: The question I have --

18 MR. ROSSBACH: Qualified expert  
19 testimony, not legal testimony.

20 MS. SHROPSHIRE: I don't know if it's a  
21 legal question or a factual question, and it would  
22 apply the same to the CO2 issue. But with regards  
23 to the PM2.5, if in fact there are available  
24 technologies, but they weren't available at the  
25 time, but they are available now, when is the drop

1 dead date from being required to use those? If  
2 they become available the day before the permit  
3 was issued -- and I don't know if that's a factual  
4 question or a legal question.

5 MR. ROSSBACH: Probably a legal  
6 question.

7 MS. SHROPSHIRE: It's the same with CO2,  
8 is if there is a ruling before the permit, how far  
9 before that permit is issued is reasonable?

10 MR. ROSSBACH: Reasonable is a factual  
11 issue. It may also be a legal issue.

12 MS. SHROPSHIRE: That's one of the  
13 questions I have, and I don't know if that's --

14 MR. ROSSBACH: I think I would presume  
15 that Ms. Dillen is listening, and will attempt to  
16 bring forward either legal or factual arguments to  
17 convince you at the time of the hearing.

18 CHAIRMAN RUSSELL: Which may be both,  
19 but I guess --

20 MR. ROSSBACH: It may be both. I agree.

21 CHAIRMAN RUSSELL: I see the same thing  
22 happening with CO2.

23 MS. SHROPSHIRE: I agree.

24 MR. ROSSBACH: I don't see the same  
25 thing happening with CO2.

1 MS. SHROPSHIRE: That's why I don't know  
2 if it's a factual or a legal issue, because to me,  
3 that same question applies to CO2. If it is a  
4 factual question --

5 MR. MARBLE: This is Don. I would just  
6 like just to say I think as far as PM2.5, we voted  
7 down the motion to grant summary judgment,  
8 everybody, and so we just have our hearing in the  
9 end of January on PM2.5, and go from there. And I  
10 don't think there is any limitation. It's like  
11 this never happened as far as the summary judgment  
12 is --

13 CHAIRMAN RUSSELL: You're assuming that  
14 we're going to grant summary judgment on the CO2  
15 portion on the 11th. What if we don't?

16 MR. MARBLE: Then we'll have the hearing  
17 on that one on the end of January, too.

18 CHAIRMAN RUSSELL: Twelve days after we  
19 take our action.

20 MR. MARBLE: Well, we could vote against  
21 summary judgment on CO2, that part now, if we want  
22 to go -- I know we're going to have a hearing  
23 anyway the end of January.

24 MS. KAISER: Can we make another motion?

25 CHAIRMAN RUSSELL: No. Just hear the

1 motion on summary judgment on CO2 on January 11th.

2 Anything else?

3 MS. ORR: Mr. Chairman, may I add one  
4 thing? The attachments don't include Federal  
5 Register notices, so maybe it would be good for  
6 the parties to understand that they may submit  
7 whatever Federal Register notices they believe  
8 important to their argument, or any legal  
9 supplementation on the issue of "subject to  
10 regulation."

11 MR. ROSSBACH: I think that I sort of  
12 suggested that. I think they understand that.

13 MS. ORR: I didn't know --

14 MS. DILLEN: We are clear that is  
15 appropriate for us.

16 MS. ORR: I just wanted --

17 MR. ROSSBACH: Legal argument.

18 MS. ORR: Bill doesn't have any  
19 attachments, so he doesn't know the extent or the  
20 degree to which it is inadequate or adequate. The  
21 parties do. So --

22 CHAIRMAN RUSSELL: So we want more than  
23 what you've got.

24 MS. SHROPSHIRE: Yes.

25 MR. ROSSBACH: If there is something



1 more.

2 MS. ORR: If there is something that  
3 they wanted to --

4 MR. ROSSBACH: Well, particularly cited  
5 Federal Register notices, I'd like to see those.

6 MS. ORR: There are some, but I'm not  
7 sure that all of them are here.

8 MR. RUSOFF: Can I ask a question,  
9 clarifying question, Mr. Chair? Are you asking or  
10 accepting briefs from the Department that if they  
11 can find legal authority for their arguments that  
12 have not been yet provided, or are you just asking  
13 us to submit documents?

14 MR. ROSSBACH: Authority. I think the  
15 arguments have been made. If you've got authority  
16 referred to there or otherwise, that would be  
17 helpful to us. I don't want to hear another  
18 briefs.

19 CHAIRMAN RUSSELL: I think there is  
20 sections of the code that have been cited or have  
21 been discussed even today. Wouldn't you think  
22 that those should be fair game, Katherine?

23 MS. ORR: Yes.

24 CHAIRMAN RUSSELL: Anything that's been  
25 discussed today in support of a motion for summary

1 judgment, I think can be supported by  
2 documentation.

3 MR. RUSOFF: You're just --

4 CHAIRMAN RUSSELL: But nothing outside  
5 of what was discussed.

6 MR. RUSOFF: You're just asking for  
7 documents without any brief explaining what those  
8 documents are, or where the Board should look?  
9 I'm just not clear as to whether you want briefs  
10 or just the documents.

11 CHAIRMAN RUSSELL: Well, I'm not real  
12 bright, so I'd like to have a little bit of a  
13 prelude to what you're pointing to.

14 MR. ROSSBACH: Point out what we should  
15 look for.

16 MS. DILLEN: Mr. Chairman, may I make a  
17 suggestion as to what I think may be acceptable to  
18 all parties? Under the federal rules, there is a  
19 way in which you can submit a notice of  
20 supplementary authority, and what you do is you  
21 flag what part of your argument it supports, and  
22 you can provide the page number, and you provide  
23 the actual document. Would that be acceptable to  
24 the parties and to the Board?

25 MR. REICH: Certainly.

1           CHAIRMAN RUSSELL: It would help me.

2           MR. REICH: Would that include, for  
3 instance, Montana Code provisions, as well as US  
4 Code provisions and authorities essentially?

5           CHAIRMAN RUSSELL: If in fact they were  
6 part of the argument today -- which could be  
7 Administrative Rules of Montana, because basically  
8 we have a permit in question -- I think it's  
9 acceptable, as long as it's properly cited.

10          MR. REICH: Just so I know, would that  
11 include any case law that we've cited and relied  
12 on?

13          CHAIRMAN RUSSELL: If it goes to the law  
14 and rule, why the rule exists the way it does, we  
15 can get motions to exclude that, I guess. We're  
16 not going to have time. My biggest concern right  
17 now is we're not going to have time. This is a  
18 pretty aggressive schedule. So maybe work with  
19 the other parties.

20          MR. REICH: We'll work with the parties,  
21 but I candidly have to say I don't think there is  
22 that much material in addition to what you already  
23 have. We can certainly provide it, and we can  
24 talk about what else we need to provide, but I  
25 don't -- we're not talking about four or a six

1 foot pile of material, we're talking probably five  
2 or six documents.

3 CHAIRMAN RUSSELL: The way David talked,  
4 you guys probably have dinner tonight together  
5 anyway.

6 MR. RUSOFF: I'm sorry. I missed that.

7 CHAIRMAN RUSSELL: How well you guys  
8 have gotten along, I think you're probably going  
9 to go out to dinner anyway.

10 MR. McCARTER: Abigail is buying.

11 MS. DILLEN: May I clarify one point,  
12 though? I did hear Mr. Rossbach to say, "If there  
13 is additional authority out there that you have  
14 not yet cited to me, I want that," and I hear you  
15 to be saying, Mr. Chairman, that only the  
16 materials that have already been cited are  
17 acceptable, and so I just want to make sure.

18 MR. ROSSBACH: If there is some -- I  
19 think we've -- I would presume that there is  
20 nothing else out there, but I don't have even the  
21 Federal Register citations or any of that stuff.  
22 But if there is a killer case that says exactly  
23 what "subject to regulation" means, I'd like to  
24 know that case. If there is. I presume there  
25 isn't or somebody would have found it by now.

1           CHAIRMAN RUSSELL: I understand your  
2 point. I think it helps us make a better  
3 decision, but --

4           MR. ROSSBACH: I don't think -- If  
5 there's nothing that's exactly on point, then I  
6 don't want to see a bunch of other stuff.

7           MS. SHROPSHIRE: If there is something  
8 that's useful, though, that wasn't discussed  
9 today, it shouldn't be necessarily excluded.

10          CHAIRMAN RUSSELL: Well, it wouldn't be  
11 excluded from PM2.5. It's going to be part of the  
12 evidentiary hearing. But we still have -- still  
13 have a summary judgment on the CO2. Isn't that  
14 what --

15          MR. ROSSBACH: That's all we're going to  
16 be hearing anything more on by the 11th. We don't  
17 want anything more on PM2.5 on 11th.

18          CHAIRMAN RUSSELL: No, but I'm just  
19 making a point. Anything is probably more fair  
20 game in an evidentiary hearing, as long as it's --

21          MR. ROSSBACH: But it only has to do  
22 with PM2.5.

23          CHAIRMAN RUSSELL: Yes, in the case of  
24 PM2.5. And in CO2, I think we've asked for  
25 additional supporting documents --

1           MR. ROSSBACH: Legal authority.

2           CHAIRMAN RUSSELL: -- documentation. I

3 think there still are the same issues that might

4 come up, that we have facts in dispute.

5           MR. ROSSBACH: I'm not asking for more

6 facts. I'm asking for law.

7           CHAIRMAN RUSSELL: No, I think I've

8 heard that there is some facts in dispute today.

9           MR. ROSSBACH: Then you'd better not --

10 If there is facts in dispute, then you can't grant

11 the motion. I don't think there is facts in

12 dispute about CO2.

13           CHAIRMAN RUSSELL: Well, what happens if

14 we move to summary judgment? The case is all over

15 the place.

16           So we're done. And since this is a

17 meeting of the Board of Environmental Review, if

18 there is anyone in the audience that would like to

19 speak to the Board on matters unrelated to what we

20 have done all day, this is your time to do that.

21 Anyone raise their hands. I won't adjourn the

22 meeting if someone really wants to speak to the

23 Board on other matters. If not, I'll entertain

24 motion to adjourn.

25           (No response)

1 MS. SHROPSHIRE: So moved.

2 CHAIRMAN RUSSELL: It's been moved. Is  
3 there a second?

4 MS. KAISER: Second.

5 CHAIRMAN RUSSELL: All those in favor,  
6 signify by saying aye.

7 CHAIRMAN RUSSELL: All right.

8 (The proceedings were concluded

9 at 3:25 PM)

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C E R T I F I C A T E

STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

I, LAURIE CRUTCHER, RPR, Court Reporter,  
Notary Public in and for the County of Lewis &  
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing -191- pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal  
this                      day of                      , 2008.

LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2008.