



Montana Department of
ENVIRONMENTAL QUALITY

MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901

DATE: January 16, 2009

SUBJECT: Board of Environmental Review, Case No. BER 2009-01 AQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE APPEAL BY THE USDA FOREST
SERVICE NORTHERN REGION OF THE AIR
QUALITY MAJOR OPEN BURNING PERMIT
FEE FOR CALENDAR YEAR 2009

Case No. BER 2009-01 AQ

BER has received the attached request for hearing. Also attached is DEQ's administrative document relating to this request.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

David Rusoff
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments



United States
Department of
Agriculture

Forest
Service

Region One

Northern Region
200 East Broadway
Missoula, MT 59802

157-2009-01 A

File Code: 2580

Date: January 14, 2009

Board of Environmental Review
Department of Environmental Policy
Metcalf Building
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

FILED this 16th day of
January AD 2009
at _____ o'Clock _____ M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: 

Dear Sir/Madam:

The United States of America, acting by and through the USDA Forest Service ("Forest Service"), is hereby filing an Administrative Appeal under the provisions of Rule 17.8.511 of the Administrative Rules of Montana. This Appeal concerns the decision by the Montana Department of Environmental Quality ("DEQ") that the Forest Service open burning permit application for calendar year 2009 is considered deficient. This appeal must be filed by January 15, 2009; hence this is a timely appeal. By voluntarily filing this appeal, the Forest Service does not waive any right of judicial review, or any rights, privileges, or defenses in a court of competent jurisdiction. Further, filing this appeal shall not be construed as an acknowledgment or admission on the part of the Forest Service that Montana's smoke management program fully complies with the statutory requirements to waive federal sovereignty set forth in Clean Air Act section 118, codified at 42 U.S.C. § 7418.

In a letter received by the Forest Service on December 26, 2008, DEQ determined that the Forest Service Open Burning permit application is deficient. The Forest Service hereby contests the following issues whereby the permit application was found deficient:

Lack of permit application fee: Open burning permit fees are based on "the actual, or estimated actual, amount of air pollutants emitted by the applicant in the last calendar year during which the applicant conducted open burning." (ARM 17.8.514 (4)). This information is provided through a database managed by the Montana/Idaho (MT/ID) Airshed Group, which is accessible by The Montana Department of Environmental Quality. Based on this information, the Montana Department of Environmental Quality annually develops a fee structure whereby the total emissions of particulate matter, oxides of nitrogen, and volatile organic compounds are assessed a per tonnage fee and summed to establish a total permit fee (ARM 17.8.514 (5)).

Information about the actual, or estimated actual, amount of air pollutants emitted by an applicant has traditionally been submitted to DEQ directly by the Montana/Idaho Airshed Group. This practice was acceptable to DEQ and the information used to determine the open burning permit fees. Because of staff turnover, this information was not submitted by the MT/ID Airshed Group to DEQ for calendar year 2007. Instead of contacting the Montana/Idaho Airshed Group or the major burners directly, DEQ decided to determine the emissions in a different manner.

DEQ contacted the University of Montana Center for Landscape Fire Analysis, which manages the open burning database for the Montana/Idaho Airshed Group, and was provided with a value of 464,765 tons of emissions from prescribed burning activities for calendar year 2007. Based on this information, DEQ determined that the Forest Service owed an open burning permit fee of



\$28,582.48, after taking into account the in kind services the Forest Service provides to the Montana smoke management program.

However, DEQ based their fee schedule on the pre-burn estimated fuel loadings, and not the actual, or estimated actual, emissions resulting from prescribed burning activities as prescribed by ARM 17.8.514 (4). Based on information obtained from the same MT/ID Airshed Group database where DEQ obtained its information, the actual, or estimated actual, Forest Service 2007 emissions from prescribed burning is 229,022 tons. Based on the open burning permit fee structure, the Forest Service's obligation prior to taking into account any in kind services is \$27,695.61. These fees are more than offset by the \$28,040 of in kind services provided by the Forest Service to the smoke management program. Thus, the Forest Service has determined that it does not owe a fee for the 2009 open burning permit.

While the Forest Service believes that its 2009 open burning permit fees are more than offset by the in kind services it provides to the smoke management program, the Forest Service is in the process of paying the \$28,582.48 that DEQ believes it is owed for an open burning permit fee. This is to ensure that the Forest Service will have a valid Montana open burning permit during this appeal process. As part of this appeal, the Forest Service is asking that this payment be refunded in whole by DEQ.

Lack of Affidavit of Publication of Public Notice: Since the December 26, 2008, receipt of DEQ's deficiency letter, DEQ has determined that the affidavits were successfully submitted on time, and the Forest Service open burning permit application is no longer deficient on this issue. This was verified by an e-mail sent by Julie Merkel, DEQ permitting specialist, to Thomas Dzomba, Forest Service Regional Air Program manager, on January 12, 2009.

The Forest Service is committed to conducting prescribed burning activities on our lands in Montana under the guidelines set forth in our open burning permit, including the payment of an appropriate permit fee that is properly determined.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia L. Koppin".

PATRICIA L. KOPPENOL
Director of Fire, Aviation & Air