LARK MONTANA ENVIRONMENTAL INFORMATION CENTER and ENVIRONMENTAL DEFENSE, Plaintiffs, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and BULL MOUNTAIN DEVELOPMENT COMPANY NO. 1, LLC, Defendants, and THE MONTANA AFL-CIO, MONTANA STATE BUILDING AND CONSTRUCTION TRADE COUNCIL, SOUTH EAST MONTANA BUILDING TRADES AND AFFILIATES, ASBESTOS WORKERS LU 82, THE BOILERMAKERS LU 599, THE BRICK- LAYERS LU 10, THE CARPENTERS LU 1172, THE CEMENT MASON, THE ELECTRICAL WORKERS LU 532, THE IRONWORKERS LU 841, THE LABORERS LU 98, THE OPER ENGINEERS LU 400, THE PAINTERS LU 1922, THE PLUMBERS LU 30, THE SHEETMETAL WORKERS LU 103, and WESTERN ENVIRONMENTAL TRADE ASSOCIATION, Proposed Defendants/Intervenor.

Cause No. CDV-2003-138

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

2003 ML 3164*; *2003 Mont. Dist. LEXIS 3345

September 29, 2003, Decided

JUDGES: [**1] Thomas C. Honzel, District Court Judge.

OPINION BY: Thomas C. Honzel

OPINION

MEMORANDUM AND ORDER ON MOTION TO CHANGE VENUE

[*1] Before the Court is the motion of Defendant Bull Mountain Development Company, No. 1, LLC (Bull Mountain), to change the place of trial. The motion was heard September 16, 2003, and is ready for decision. Bull Mountain also had filed a motion to dismiss. However, at the hearing, it withdrew that motion.

[*2] Bull Mountain is a foreign corporation which proposes to construct a coal-fired generating plant in Musselshell County, Montana, known as the Roundup Power Project. Bull Mountain's registered agent is the law firm of Browning, Kaleczyc, Berry and Hoven in Helena, Lewis and Clark County, Montana. In connection with the project, Bull Mountain applied to Defendant Montana Department of Environmental Quality (DEQ) for an air quality permit. DEQ issued a final environmental impact statement (EIS) on January 10, 2003. Following a contested case hearing, the Board of Environmental Review issued an air quality permit to Bull Mountain on July 21, 2003.

[*3] In this action, Plaintiffs Montana Environmental Information Center and Environmental Defense challenge [**2] the issuance of the air quality permit on various grounds. In Count I, they allege that the final EIS was inadequate and is in violation of the Montana Environmental Policy Act, *Sections 75-1-201, et seq., MCA* (MEPA). Count II alleges that the issuance of the air quality permit violates the provisions of the Clean Air Act of Montana, *Sections 75-2-101, et seq., MCA*,

and the federal Clean Air Act. Count II also alleges that the issuance of the permit violates Article II, Section 3, and *Article IX, Section 1, of the Montana Constitution*. Count III alleges that independent of any statutory or regulatory requirement, construction, an operation of the Roundup Power Project violates Article II, Section 3, and *Article IX, Section 1, of the Montana Constitution*. Count IV alleges that to the extent the Clean Air Act permits the issuance of the air quality permit or construction of the Roundup Power Project, the statute conflicts with the Constitution and therefore is unconstitutional facially and as applied. Count V alleges that the Defendants failed to comply with the requirements of the Montana Major Facilities Siting Act, *Sections 75-20-101, et seq., MCA* (MFSA). Count V further alleges that [**3] amendments to the MFSA in 2001 which exempted the Roundup Power Project from review under the MFSA violate Article II, Section 3, and *Article IX, Section 1 of the Montana Constitution*.

[*4] Bull Mountain contends that the place of trial must be changed to Musselshell County based on specific venue statutes enacted by the 2003 Montana legislature. Ch. 361, Laws 2003.

[*5] The general venue statutes are contained in Title 25, Chapter 2, MCA. The proper place for trial of a civil action is the county in which the defendants or any of them reside at the commencement of the action. *Section 25-2-118 (1), MCA*. In an action with multiple defendants, the proper place of trial for one defendant is the proper place of trial for all the defendants. *Section 25-2-117, MCA*. In a tort action where the defendant is a foreign corporation, the proper place of trial is:

> (a) [T]he county in which the tort was committed;
>
> (b) the county in which the plaintiff resides; or
>
> (c) the county in which the corporation's resident agent is located, as required by law.

[*6] *Section 25-2-122 (2), MCA*. When [**4] the state is a defendant, the proper place of trial is the county in which the claim arose or Lewis and Clark County. *Section 25-2-126 (1), MCA*.

[*7] Chapter 361, Laws 2003 is an act generally revising the laws governing the environment. Among other things, it specifically provides that certain actions involving MEPA, the Clean Air Act and the MFSA must be brought in the county where the activity being challenged is proposed to occur or will occur. *Section 75-1-108, MCA* (enacted as Ch. 361, Laws 2003, § 37), provides: "A proceeding to challenge an action taken pursuant to [MEPA] must be brought in the county in which the activity that is the subject of the action is proposed to occur or will occur."

[*8] *Section 75-2-104 (3), MCA* (enacted as Ch. 361, Laws 2003, § 8), provides: "An action to challenge a permit decision pursuant to [the Clean Air Act] must be brought in the county in which the permitted activity will occur."

[*9] *Section 75-20-401 (4), MCA* (enacted as Ch. 361, Laws 2003, § 23), provides: "An action to challenge the issuance of a certificate [**5] pursuant to [the MFSA] must be brought in the county in which the activity authorized by the certificate will occur."

[*10] In addition, Chapter 361, Laws 2003, § 1, amended Section 2-4-702 (2), MCA, of the Montana Administrative Procedure Act to provide: "If a petition for [judicial] review is filed challenging a licensing or permitting decision made pursuant to Title 75 . . ., the petition for review must be filed in the county where the facility is located or proposed to be located or where the action is proposed to occur." It is the Court's understanding that the Plaintiffs have now filed a petition for judicial review in Musselshell County.

[*11] These statutes are all specific venue statutes. The Montana Supreme Court has held that "'when a general statute and a specific statute are inconsistent, the specific statute governs, so that a specific legislative directive will control over an inconsistent general provision.'" *Whalen v. Montana Right to Life Ass'n, 2002 MT 328, P9, 313 Mont. 204, P9, 60 P.3d 972, P9*, (quoting *Gibson v. State Comp. Mut. Ins. Fund, 255 Mont. 393, 396, 842 P.2d 338, 340 (1992)*.

[*12] [**6] The Plaintiffs argue that their claims against Bull Mountain are not a challenge to a permit decision but that they are direct actions under a constitutional tort theory and, therefore, Lewis and Clark County is the proper place for trial because Bull Mountain's registered agent is located in Lewis and Clark

County.

[*13] Although in *Dorwart v. Caraway, 2002 MT 240, 312 Mont. 1, 58 P.3d 128*, the Montana Supreme Court recognized that a constitutional tort claim could lie against a governmental agency, it has not held that a constitutional tort is actionable against a private entity. Even if the supreme court were to recognize that a constitutional tort could be maintained against a private entity for violation of Article II, Section 3, and *Article IX, Section 1, of the Montana Constitution*, the Court concludes that under the allegations of this case, the place of trial should be transferred to Musselshell County. All of Plaintiffs' claims, including Count III, are inextricably intertwined with the issuance of the permit. Without the permit, Bull Mountain could not proceed with the project.

[*14] Plaintiffs certainly can challenge the issuance of the permit on constitutional [**7] grounds and if successful, the permit will be set aside and Bull Mountain will not be able to proceed with the project. But under the venue statutes, the case must be tried in Musselshell County.

[*15] For the foregoing reasons,

[*16] IT IS ORDERED that Bull Mountain's motion for change of place of trial IS GRANTED and this matter is transferred to the Montana Fourteenth Judicial District, Musselshell County.

[*17] IT IS FURTHER ORDERED that because Bull Mountain has withdrawn its motion to dismiss, it shall file its answer to Plaintiff's complaint within 20 days of the date of this Order.

DATED this 29th day of September, 2003.

Thomas C. Honzel

District Court Judge

MONTANA ENVIRONMENTAL INFORMATION CENTER and ENVIRONMENTAL DEFENSE, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and BULL MOUNTAIN DEVELOPMENT COMPANY NO. 1, LLC, Respondents.

Cause No. DV 03-50

FOURTEENTH JUDICIAL DISTRICT COURT OF MONTANA, MUSSELSHELL COUNTY

2004 ML 682; 2004 Mont. Dist. LEXIS 3151

March 30, 2004, Decided

JUDGES: [**1] Richard A. Simonton DISTRICT COURT JUDGE

OPINION BY: Richard A. Simonton

OPINION

ORDER

[*1] This action is an appeal pursuant to *Section 2-4-702, et seq., MCA*, of the Findings of Fact, Conclusions of Law, and Order dated June 24, 2003 of the Board of Environmental Review affirming, with some modifications, a decision by the Department of Environmental Quality to issue Air Quality Permit No. 3182-00 authorizing the construction and operation of a coal-fired power plant known as the Roundup Power Project proposed by Respondent Bull Mountain Development Company.

[*2] The parties submitted briefs regarding this Court's review of the Board's decision. Arguments were heard March 15, 2004 in the Musselshell County Courthouse at Roundup, Montana. Petitioners were represented by George E. Hays and Jennifer S. Hendricks. The Department of Environmental Quality was represented by David Rusoff. Bull Mountain Development Company was represented by J. Daniel Hoven and Sara B. Stanton.

[*3] The Court having reviewed the record in its entirety and having considered the briefs and arguments of the parties and the applicable law,

[*4] IT IS HEREBY ORDERED that this Court affirms the [**2] Findings of Facts, Conclusions of Law, and Order of the Board of Environmental Review for the reasons hereafter stated.

PROCEDURAL BACKGROUND

[*5] January 14, 2002 Bull Mountain Development Company (Bull Mountain) submitted an application to the Department of Environmental Quality (DEQ) for an air quality permit for a 780 megawatt pulverized coal-fired (PC) electrical power generation plant to be located in Musselshell County, Montana approximately 12 miles southeast of Roundup and approximately 35 miles north of Billings. The application was submitted pursuant to the State's Prevention of Significant Deterioration of Air Quality (PSD) Rules which apply to air quality permits for major stationary sources which would be located in an area that meets ambient air quality standards. The State's PSD program is substantially the

same as the PSD program specified in the Federal Clean Air Act and U.S. Environmental Protection Agency regulations. Because some of the lands affected were federal lands, DEQ forwarded the application to EPA and to the Federal Land Managers (FLMs) who are responsible for protecting air quality on federal lands. Those FLMs are with the USDA Forest Service, [**3] National Park Service, and U.S. Fish and Wildlife Service. Their comments were requested, and DEQ worked with those federal agencies.

[*6] As part of the application process, Bull Mountain published notice of the application in the Billings Gazette, the Roundup Record/Tribune, and the Winnett Times. Notice was also published in the Billings Gazette that public comments would be accepted until April 19, 2002 on the Environmental Impact Statement (EIS) for the project. A public meeting was held in Roundup to accept comments. At the request of DEQ and because of comments by the FLMs, Bull Mountain provided additional information to the Department on several occasions, and the Department deemed the permit application complete as of July 22, 2002.

[*7] August 12, 2002 DEQ issued its Preliminary Determination (PD), or Draft Permit, subject to public comment. It issued a Draft Environmental Impact Statement on November 18, 2002. December 5, 2002 the DEQ conducted a public hearing in Roundup to receive comments concerning the Draft Environmental Impact Statement. Comments on the draft permit and the Draft Environmental Impact Statement were accepted until December 18, 2002.

[*8] [**4] January 31, 2003 the Department issued a Record of Decision and Department Decision granting the permit with conditions. The Petitioners requested a Contested Case Hearing on February 18, 2003. The Board of Environmental Review conducted a hearing June 4, 5, 6, 2003 and issued its decision on July 8, 2003. It is that decision that Petitioners claim is wrong and request that the matter be remanded to the Board with instructions to DEQ to reopen the permitting procedure and to comply with the law.

STANDARD OF JUDICIAL REVIEW

[*9] Both sides agree that the standard for judicial review of the Board's decision is found in *Section 2-4-704, MCA*. To summarize, the Court's review is conducted without a jury and is confined to the record. The Court may not substitute its judgment for that of the agency (Board) as to the weight of the evidence on questions of fact. Questions of law will be upheld if an agency's interpretation of the law is correct. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

> "(a) [**5] the administrative findings, inferences, conclusions or decisions are (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abusive discretion, or clearly unwarranted exercise of discretion . . . "

[*10] See *Farmers Union Central Exchange, Incorporated v. Department of Revenue of the State of Montana, 901 P.2d 561 (Mont. 1995)*; *Steer, Inc. v. Department of Revenue, 803 P.2d 601 (Mont 1990)*.

ALLEGATIONS OF ERROR

[*11] The Petition for Judicial Review alleges that the Board erred as follows:

> 1. After the close of the public comment period, the Department of Environmental Quality received additional information that Federal Land Managers changed their position regarding whether there would be an adverse impact on visibility in nearby Class I areas, and the public, therefore, never had an opportunity to review that new data. Thus, the public did not have an opportunity to participate in the permitting process.

[*12] The public comment period for commenting on the Preliminary Determination closed December 18, 2002. Comments were submitted [**6] by Petitioners on that date. Also on that date an FLM letter determined the project would adversely impact visibility at Yellowstone National Park and UL Bend Wilderness Area. Bull Mountain responded to that adverse determination on December 30, 2002. January 10, 2003 Craig Manson of the U. S. Department of the Interior sent a second letter

withdrawing the Department's determination of adverse impact.

[*13] Bull Mountain's response to the adverse determination was a breakdown of each of the days that visibility would allegedly be affected and a showing that adverse weather conditions on those days were required to be considered. The Federal Land Managers Air Quality Related Values Work Group (FLAG) December 2000 report required such considerations on a case-by-case basis. Also see *17.8.1101 (2), ARM*. Under both state and federal clean air acts, the FLMs are primarily responsible for evaluating visibility data. Although the public may not have had an opportunity to respond to the Department of the Interior January letter, Petitioners did have that opportunity and, in fact, did respond before the Board.

> 2. The Board found that DEQ failed to follow the Top-Down Five-Step process [**7] in determining BACT, but failed to remand the matter to DEQ for further proceedings utilizing that process.

[*14] A BACT analysis is required for all PSD permits. In determining BACT, the Department utilizes the New Source Review Workshop Manual as a guide. While the manual describes a Top-Down Five-Step Process, Montana law and rules do not specify that a Top-Down Five-Step Process is required.

[*15] Step One of the five-step analysis requires identification of all control technologies. Neither Bull Mountain nor the Department referred to IGCC or CFB technologies specifically. They were not considered, according to testimony, because they would "redefine the source", or require a redesign of the whole project. The Department did, however, consider the IGCC and CFB and possibly could have eliminated them in Step Two or Step Three of the Five-Step Process. Instead it eliminated them as being alternative combustion processes and not control technologies applicable to pulverized coal-fired boiler electric generating plants. The New Source Review Workshop Manual even acknowledges that EPA does not consider BACT as requiring redefining the design of the source. Additionally, [**8] there was considerable time and testimony spent on the costs, reliability, and relatively few examples of IGCC and CFB.

[*16] Because the Top-Down Five-Step Analysis is not required at this time, the Board suggested that rules be adopted to require this process in the future. Without a current requirement to use this process, however, there is no reason for the Board to remand the matter to the Department.

[*17] Kenneth Snell, the primary author of the BACT analysis for the project, used the Top-Down method from the New Source Review Workshop Manual. He testified that he used the most stringent emission standards for NOx, Carbon, VOs, and PM10. He did not choose the most effective controls of sulfur because of economic and environmental impacts. He stated that DEQ required more stringent emission limits than what Bull Mountain submitted.

> 3. DEQ did not require Bull Mountain to provide sufficient data from which the cost effectiveness of Integrated Gasification Combined Cycle (IGCC) or Circulating Fluidized Bed (CFB) could be calculated, and thus it could not determine what was BACT. The Board's failure to remand to DEQ and accept its conclusion was an error of law.

[*18] [**9] Because IGCC and CFB were considered alternative combustion processes and not compatible with pulverized coal-fired boiler electric generating plants, it was not necessary to determine the cost effectiveness of those production methods, although testimony indicated a 50 percent increase in cost to use them.

[*19] Walter Koucky, an expert hired by Petitioners, was critical of the BACT analysis done by the State. He believes the State did not consider coal washing as an available technology and he could not tell if IGCC and CFB were considered. He admits that he did not do a BACT analysis himself because he felt there was insufficient information. He believed that the presence of NOx emissions was one of the biggest concerns and that efficiency could be increased beyond 80 percent. He was also critical of the 90 percent limit on sulfur when 94 percent was available. He does, however, acknowledge that the applicant did a Top-Down analysis, but that it was incomplete. He further admitted that most of the project, including its design, would have to be changed if IGCC were considered and accepted, and that Wyoming found the IGCC process would redefine the source. He

acknowledges that [**10] the wet scrubber was not pursued because of the water shortages around the project. He also agrees that there is nothing in Montana law that requires BACT to include a Top-Down Five-Step Analysis. On page 181 of his testimony he acknowledges that the Department did comment on why it rejected IGCC and CFB.

[*20] Dan Walsh testified that IGCC and CFB were considered, but rejected because they were alternative generating techniques and outside the scope of this project.

[*21] John Thompson recognized that IGCC and pulverized control technologies are mutually exclusive and that any use of IGCC would involve redesigning the plant and submitting a new application. He recognized that the permit limits for sulfur, NOx and PM10 compared favorably with other plants, and in some cases were stricter. He also stated that one cannot apply an IGCC to a pulverized coal boiler.

[*22] Jules Dickey is the project manager for Bull Mountain. He is very familiar with IGCC and CFB and chose pulverized coal because of its low maintenance. CFB is generally not utilized in projects this large, and IGCC is basically a chemical plant that secondarily generates electricity. The IGCC plant that [**11] he worked with was closed after its demonstration period because it was no longer economical.

4. In finding that the DEQ BACT determination was appropriate, the Board's decision was an error of law.

[*23] The Board did not err as a matter of law in determining the Department's BACT analysis was appropriate for the reasons stated above. Without specifically identifying the five steps in its analysis, the DEQ appears to have worked through each of them, where required, in making its determination to issue the permit.

5. Although the Board found that the DEQ's failure to include an emission limit for sulfuric acid was in error, the Board ordered DEQ to include an emission limit, rather than offering an opportunity for public comment.

[*24] Petitioners are correct that DEQ did not initially include a specific emission limit for sulfuric acid. They did, however, conduct a BACT analysis on sulfur, a component of sulfuric acid, and the Department was satisfied that by controlling sulfur, the sulfuric acid would likewise be controlled. Because the emission limits were not specified for sulfuric acid mist, the Board required that it establish a BACT emission limit for it.

[*25] [**12] Dan Walsh testified that the Department considered fuel switching, fuel blending, and wet scrubbing. In choosing an option, water consumption was a big factor because it is not readily available in the Roundup area.

[*26] Emission limits were not placed on sulfuric acid because sulfur was used as a surrogate emission limit, and monitoring of sulfur would determine the level of sulfuric acid. The Department set sulfuric acid limits and compliance testing provisions by a Department letter dated June 20, 2003.

6. The Board erred by not requiring DEQ to include an opacity standard in the permit.

[*27] The Department did require an opacity limit of 20 percent. Admittedly, it did not do a BACT determination in setting that limit. The Department did conduct a BACT analysis, however, for PM10 and there is a correlation between opacity and PM10 emissions. Since opacity is not a pollutant, it is not required to be the subject of a BACT analysis. Petitioners acknowledge on page 10 of their Opening Brief that State *Rule 17.8.304 ARM* required a 20 percent opacity limit which the Department followed. Although Petitioners refer to five and fifteen percent opacity limits, the five percent [**13] limit applied to a paper mill and the 15 percent limit applied to an Arizona facility. The 20 percent limit was the same as that set in Wyoming. Petitioners have not shown that the 20 percent opacity limit is clearly erroneous, arbitrary, or capricious, or an abuse of discretion.

[*28] David Klemp confirmed that DEQ does a BACT analysis on all applications and that Montana does not require a Top-Down process. He testified that the Federal Land Managers decide opacity and whether there is an adverse impact. The Department did not set an opacity limit because there was a readily measurable mass emission limit in the form of PM10 limitation.

7. The Board erred as a matter of law by not requiring DEQ to insist on recent air monitoring, but allowed it to use ten year old data.

[*29] *ARM 17.8.822 (6)* requires continuous air monitoring for at least one year prior to receipt of the application unless the Department determines that a proper analysis can be made with data over at least a four month period. There was considerable testimony that although not recent, there was data for the years 1989 to 1992, and for a 51 to 59 day period preceding the application. There was also considerable [**14] testimony that there had been few changes in the Roundup area that would affect air quality since 1992. Based on the evidence before the Board, this Court cannot say that its failure to require strict compliance with *ARM 17.8.822 (6)* was clearly erroneous, arbitrary, capricious, or an error of law that would justify a remand.

[*30] Nitrogen oxides (NOx) emission are analyzed by the Department and Board and the project proposes to use the control system that achieves greatest emission reduction. This determination is not clearly erroneous, arbitrary and capricious or an abuse of discretion.

[*31] Monitoring for PM10 has been referred to above. PM10 are particles emitted from the source. Data for the years 1989 to 1992 were available and considered as well as the 51 to 59 day period prior to the application. There was no evidence that the dated data would be different from a lengthier current study. Since the data was a result of continuous air monitoring, the Board did not abuse its discretion or act arbitrarily or capriciously in accepting it and determining it would not have an adverse effect.

[*32] Dr. Jana Milford reviewed the modeling and monitoring data analysis [**15] that was used in the permit application. She does not disagree with the use of the 1987 to 1991 data. She was critical of using only one year's data rather than five for the sulfur modeling, but she does admit that there are only three years of data that were available She acknowledged that one of the duties of DEQ is to evaluate whether data is representative of the existing conditions and provided no evidence that the data relied upon by DEQ was not representative.

[*33] John Coefield is familiar with the Roundup area and testified that in the last ten years, there was nothing to change air quality around Roundup which is why the Department accepted the ten year old data.

8. The Board erred in not remanding this to the Department to collect multiple years of meteorological data for modeling purposes.

[*34] Petitioners allege that the Department's reliance upon one year of meteorological data was in error; it should have required at least three to five years of data. The data relied upon by the Department was for 1990. The Board considered that five years of data did not exist, but recognized that the proposed site is in a remote area where data is not available, and [**16] the Board made its decision on information available to it. The Board took a practical approach, and rather than delay a project for five years, determined the Department did not act erroneously, arbitrarily, capriciously, or abuse its discretion. In so finding, this Court agrees that the Board did not act erroneously, arbitrarily, or capriciously, nor did it abuse its discretion. Continuous air monitoring is required to determine any adverse impact.

[*35] Angelica Haller confirmed that the most recent air quality statistics available from the EPA were for the years 1987 through 1991 and that the modeling submitted by Bull Mountain showed there was compliance with all air quality standards.

9. The Board did not properly consider the sulfur impact on the Northern Cheyenne Indian Reservation; and

[*36] The Board allowed the Department to establish a control efficiency of 90 percent for controlling sulfur even though technology is available at 94 percent efficiency.

[*37] There was sufficient testimony and information from EPA that Roundup emissions would not significantly contribute to a sulfur impact on the Northern Cheyenne Indian Reservation and that any such adverse [**17] conditions were contributed to by Colstrip. Related to this is the Department's establishing a control efficiency of 90 percent for sulfur even. though Bull Mountain proposed 94 percent efficiency. The Department and the Board discussed relaxing this limitation, and noted that the average expected control efficiency was 94 percent. That means that some of the time the 94 percent efficiency would be exceeded and

some of the time it would not be met; so the project was not placed in danger of immediately violating the average control efficiency, the Board agreed with the Department that 90 percent efficiency was reasonable. When factors such as coal quality and control technology are considered, BACT does not require the lowest achievable emission rate. The Board's conclusion was not erroneous or arbitrary or an abuse of discretion.

10. The adverse impact on visibility at Yellowstone National Park, the UL Bend Wilderness Area, Northern Absaroka Wilderness Area, and the Northern Cheyenne Indian Reservation precluded the issuance of a permit.

[*38] Considerable time was spent on visibility impact at Yellowstone National Park, UL Bend Wilderness Area, the Northern Absaroka Wilderness [**18] Area, and Northern Cheyenne Indian Reservation. The Department and the Board concluded that visibility impact on the Northern Cheyenne Indian Reservation was not a factor because the reservation is not a mandatory federal Class I area. Petitioners argue that visibility requirements are applicable to the reservation because it is a Class I area. They don't argue that it is a mandatory Class I area. This Court believes that the Department and Bull Mountain did not err in determining that the visibility requirements do not apply to the Northern Cheyenne Indian Reservation. See *ARM 17.8.825*, 43 USC Section 749(a)(1), and 169A of the Federal Clean Air Act.

[*39] Federal Land Managers determined the impact on visibility at Yellowstone National Park, UL Bend Wilderness Area, and Northern Absaroka Wilderness Area, or the closest areas where dates are available. They are the experts upon which DEQ relies and they are the ones responsible for determining impacts on federal lands. With the exception of the initial report on Yellowstone National Park, the FLMs did not find adverse air quality impacts that would preclude the project. After review of the data on Yellowstone [**19] National Park, the initial adverse report was amended. The Board spent considerable time receiving testimony and other evidence, appeared to carefully review it, and its conclusions are not arbitrary, capricious, or an abuse of discretion.

11. The Board's reliance on *ARM 17.8.705* to allow de minimis changes was an error because the regulation was never approved by EPA.

[*40] By rule, *ARM 17.8.745* (17.8.705 as referred to by Petitioners) allows de minimis changes. A ten-day notice may be required prior to start up or use of any proposed de minimis change. The Board's interpretation of the rule is correct.

12. The decision to not allow EPA to complete a Section 164(e) process with the Northern Cheyenne Tribe was an error of law.

[*41] December 19, 2002 the Department received a comment from the Northern Cheyenne Tribe on the Draft Environmental Impact Statement. The Tribe indicated that it would need additional time to make more specific comments. January 29, 2003 EPA notified the Department that the Tribe requested a dispute resolution under Section 164(e) of the Federal Clean Air Act, and requested a delay in issuing a final PSD. The Department considered the requested [**20] delay, but also considered Montana deadlines and determined that it could not delay the issuance of the final permit without violating Montana law. The Department followed the law in not delaying the issuance of the permit. It had no regulatory or statutory authority to delay. *ARM 17.8.759* (previously 17.8.720). The Board's decision complies with Montana law.

BOARD'S STANDARD OF REVIEW AND PARTIES' BURDEN OF PROOF

[*42] From time to time one or the other of the parties appears to use "standard of review" and "burden of proof" interchangeably. Perhaps at this stage of the proceedings, the distinction is not significant. The Board takes the position that it, in effect, is reviewing a decision of DEQ to issue a permit to Bull Mountain and that decision should be "reviewed" to determine if the Department acted arbitrarily or capriciously or abused its discretion or whether its decision was clearly erroneous in view of the reliable probative and substantial evidence on the whole record. The Board, in effect, claims its review of the DEQ decision follows the same standard as judicial review of a Board decision, with the exception

that the Board hears testimony, receives exhibits, [**21] and can affirm, reject, or modify the permit. Petitioners argue that the Contested Case Hearing before the Board is the first opportunity to present evidence regarding the propriety of issuing the permit, and therefore the Board should be responsible for deciding if the preponderance of evidence justifies issuance of the permit based on the facts and applicable law.

[*43] The functions of the DEQ and Board of Environmental Review, of course, differ. Under *Section 75-2-112, MCA*, in regards to air quality, DEQ administers the Clean Air Act of Montana and in doing so, it enforces orders issued by the Board of Environmental Review; obtains scientific and technical, administrative and operational services; conducts studies, investigations, and research related to air pollution; and consults with persons proposing to construct, install, or acquire an air contaminant source or device or system. The Department also approves or denies an application for a permit (*Section 75-2-211 (10), MCA)* according to rules established by the Board. The Department's decision on a permit application is final unless a request for hearing is filed.

[*44] The Board of [**22] Environmental Review consists of seven members with various backgrounds appointed by the governor and is a quasi-judicial board pursuant to *Section 2-15-124, MCA.*

[*45] The technical expertise in determining, at least at the outset, whether a permit should be granted, is with the Department of Environmental Quality. There is no requirement that any member of the Board of Environmental Review have expertise in air quality standards. In addition to rule-making authority, it would seem that the Board's role in determining whether a permit should be issued would not be de novo, but would be to review a decision of the experts (DEQ) to determine if there is substantial evidence to support its decision. This Court thus agrees with the Board that the burden of proof is on the Petitioners to show that the decision of DEQ was clearly erroneous, arbitrary, capricious, or an abuse of discretion. Such a position seems to be consistent with federal practices as demonstrated in In Re Steel Dynamics, Inc., PSD Appeal No. 01-03, Attachment 4 to the Legal Appendix to Petitioner's Pre-Hearing Memorandum, and In Re Knauf Fiberglass, GMBH, PSD Appeal Nos. 98-3 through [**23] 98-20 and marked as Attachment 5 to the Legal Appendix to Petitioner's Pre-Hearing Memorandum. The burden on Petitioners is a "substantial one" *Northern Plains Resource Council v. Board of Natural Resources, 594 P.2d 297 (Mont. 1979)*. The Petitioner has to overcome a rebuttable presumption that the DEQ decision was correct. *Hoven et al. v. Montana Commissioner of Labor, 774 P.2d 995 (Mont. 1989)*. This also appears consistent with *Section 75-2-211 (11), MCA* that any stay of the DEQ decision to issue a permit is not summarily granted, but must be the result of a finding that the person requesting the stay is entitled to the relief demanded, or a continuation of the permit during an appeal would produce great or irreparable injury to the person requesting the stay, and if a stay is granted, the Board can require a written undertaking.

[*46] The Court is thus of the opinion that the standard of review as set forth by DEQ in Exhibit 49 rather than that set forth by Petitioners in Exhibit 50 is the appropriate standard for review of a DEQ decision by the Board. However, this Court is also convinced that if Petitioners were correct [**24] that DEQ must satisfy the Board, that a preponderance of the evidence justified the issuance of a permit, the Court would still affirm the Findings of Fact, Conclusions of Law and Order of the Board.

SUMMARY

[*47] January 14, 2002 Bull Mountain Development Company submitted an application for a pulverized coal electric generation plant approximately 12 miles from Roundup, Montana. Among other things, the application had to meet the requirements of the Clean Air Act of Montana, *Section 75-2-101 et seq., MCA.* It was determined on July 22, 2002 that the application met the requirements. Under Montana law and rules, the Department of Environmental Quality then had 180 days to complete an environmental review. The Final Environmental Impact Statement was adopted by the Department November 18, 2002. There followed a 30-day comment period and an opportunity to request a Contested Case Hearing which was done by the Plaintiffs in this case. That hearing was held June 4, 5, 6, 2003 before the Board of Environmental Review. July 8, 2003 the Board issued its Findings of Fact, Conclusions of Law and Order, and approved the issuance of the permit with some modifications. August 6, 2003 Petitioners [**25] filed their Petition for Review with this Court.

[*48] The Court has considered the record, all

exhibits, briefs, arguments of the parties, and the applicable law and concludes that the Petitioners failed to establish by a preponderance of the evidence that the Board's findings are clearly erroneous, arbitrary, capricious, or an abuse of discretion. The Court further concludes that Petitioners failed to establish that the Board's decision was unlawful, or that it misinterpreted or misapplied the law.

[*49] This project is planned to pulverize coal to boil water and utilize the steam to generate electricity. The plant would be built adjacent to an existing coal mine. It is estimated that construction will take approximately four years and employ 800 workers. Following construction, approximately 150 full-time jobs would be created.

[*50] Because of the nature of the project and the potential environmental impact, Montana's Prevention of Significant Deterioration of Air Quality Rules were applicable. The PSD Program is based upon the Federal Clean Air Act and EPA regulations.

[*51] The application was reviewed by the EPA and Federal Land Managers because they [**26] are responsible for monitoring and protecting air quality on federal lands such as Yellowstone National Park, UL Bend Wilderness Area, and Northern Absaroka Wilderness Area. Another potentially affected area is the Northern Cheyenne Indian Reservation.

[*52] The public was invited to participate at public meetings and through written comments. DEQ considered 80 letters, 500 postcards and more than 1200 e-mails responding to the Draft Environmental Impact Statement.

[*53] In deciding whether to grant the application and issue the permit, DEQ was required to follow a Best Available Control Technology (BACT) analysis. The FLAG guidance document was used to analyze reductions in visibility. CALPUFF modeling was used after the Draft Environmental Impact Statement to conduct a case-by-case impact analysis. In reaching its conclusions, the Department utilized the EPA New Source Review Workshop Manual.

[*54] In determining BACT, current Montana law does not require the Top-Down Five-Step Analysis, but the Board suggested that rules be established to require it. Nonetheless, it appears the Board found the Department used that approach while not always describing its application.

[**27] [*55] The Top-Down Five-Step Process consists of the following:

> 1. Identifying all available control options;
>
> 2. Eliminating technically infeasible options;
>
> 3. Ranking remaining control technologies in order of control effectiveness;
>
> 4. Considering energy, environmental, and economic impacts; and
>
> 5. Selecting the most effective control alternative not previously eliminated.

[*56] The major concern of the Petitioners is that IGCC and CFB were not considered in step one. In fact, the evidence indicates that they were considered and were eliminated because they did not meet the scope of the project. To utilize them, the entire project would have to be redesigned and, in effect, "redefined". There was testimony that those technologies were in the developmental stages and only two such plants in the United States utilize them, and they were both demonstration plants. There was also testimony that using that technology would increase the cost of the project by at least 50 percent.

[*57] The impact on visibility was a concern. The evidence indicated that such limits are applicable only to mandatory federal class I areas. The Northern Cheyenne Indian Reservation is not [**28] a mandatory Class I area. An adverse impact statement was initially made regarding Yellowstone National Park, but after a case-by-case and daily analysis of the days in question, the Department of Interior revised its position finding no significant adverse impact.

[*58] The criticism that current long-term meteorological data from the Roundup area wasn't utilized was answered by the Department explaining that it was not available. The period 1987 to 1991 for data collected in Billings was reviewed with current 51 to 59

day data from the site. The New Source Review Workshop Manual allows this. There was also testimony that there has been so little development in the Roundup area in the past ten years that air quality would not have changed.

[*59] It is not the function of the Court to substitute its judgment for that of the Board of Environmental Review. Its function is limited to determining if the Board acted unlawfully, clearly erroneously in view of the reliable probative and substantial evidence, or arbitrarily, capriciously, or if it abused its discretion. Petitioners have failed to establish that the Board's findings are clearly erroneous or its conclusions are incorrect. [**29] While the Court believes the Board was correct in applying a similar review to the issuance of the permit by the Department of Environmental Quality, there was sufficient evidence to support the findings of the Board that the Department was justified in issuing the permit for this project.

[*60] The decision by the Board is not clearly erroneous in light of substantial evidence. There is substantial credible evidence to support the Board's findings. Its interpretation of the law is correct.

[*61] The Board's Order of June 24, 2003 is affirmed.

[*62] The Clerk of Court is directed to file this Order and provide copies to counsel of record.

DATED in Chambers at Glendive, Montana this 30th day of March, 2004.

Richard A. Simonton

DISTRICT COURT JUDGE

1 of 1 DOCUMENT

MONTANA ENVIRONMENTAL INFORMATION CENTER and ENVIRONMENTAL DEFENSE, Petitioners and Appellants, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and BULL MOUNTAIN DEVELOPMENT CO. NO. 1 LLC, Respondents and Respondents.

No. 04-247

SUPREME COURT OF MONTANA

2005 MT 96*; *326 Mont. 502*; *112 P.3d 964*; *2005 Mont. LEXIS 166

December 22, 2004, Submitted on Briefs
April 19, 2005, Decided

SUBSEQUENT HISTORY: Released for Publication: May 31, 2005.
Rehearing denied by *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 2005 Mont. LEXIS 229 (Mont., May 31, 2005)*

PRIOR HISTORY: APPEAL FROM: District Court of the Fourteenth Judicial District, In and For the County of Musselshell, Cause No. DV-03-50, Honorable Richard A. Simonton, Presiding Judge.

DISPOSITION: Affirmed in part, reversed in part and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent Montana Department of Environmental Quality's issued an air quality permit to respondent developer. The Montana Board of Environmental Review entered an order approving the decision, and the Fourteenth Judicial District Court, Musselshell County, Montana, affirmed the Board's findings of fact and conclusions of law. Appellant environmental center challenged the judgment.

OVERVIEW: The developer proposed to build a coal-fired power plant in a Class I area. The issues the supreme court considered on appeal were: (1) whether the district court erred in determining the Board correctly concluded that the center had the burden of proof; (2) whether the district court erred in determining the Board applied the correct standards; and (3) whether the district court erred in determining the Board correctly concluded that federal land managers (FLMs) had responsibility to protect visibility in Class I areas and whether deference to the conclusions of the FLMs was appropriate. The center had the burden of presenting the evidence necessary to establish the essential facts, pursuant to *Mont. Code Ann. § 26-1-401* and *Mont. Code Ann. § 26-1-402*. Nevertheless, the Board applied a standard of review not legally available to it under the Montana Administrative Procedure Act. Finally, although FLMs were charged with the responsibility for management of Class I areas, the Department was precluded from issuing a permit unless there was an affirmative showing that the project would not cause an adverse impact on visibility. Deference to the FLMs was inappropriate.

OUTCOME: The supreme court affirmed the judgment, in part, and it reversed the judgment, in part. The supreme court remanded the matter for further proceedings.

COUNSEL: For Appellants: Jennifer S. Hendricks; Meloy Trieweiler, Helena, Montana. George E. Hays, Attorney at Law, San Francisco, California.

For Respondents: J. Daniel Hoven, Sara B. Stanton; Browning, Kaleczyc, Berry & Hoven, Helena, Montana, (for Bull Mountain Development Co. No. 1 LLC). David M. Rusoff, Special Assistant Attorney General, Department of Environmental Quality, Helena, Montana, (for Department of Environmental Quality).

JUDGES: KARLA M. GRAY. We concur: JAMES C. NELSON, PATRICIA O. COTTER, W. WILLIAM LEAPHART, JOHN WARNER. Chief Justice Karla M. Gray delivered the Opinion of the Court.

OPINION BY: Karla M. Gray

OPINION

[**503] [***965] Chief Justice Karla M. Gray delivered the Opinion of the Court.

[*P1] The Montana Environmental Information Center and Environmental Defense (collectively, MEIC) appeal from the judgment entered by the Fourteenth Judicial District Court, Musselshell County, on its order affirming findings of fact, conclusions of law and an order entered by the Montana Board of Environmental Review (the Board). In its order, the Board approved the decision of the Montana Department of Environmental Quality (the Department) to issue an air quality permit to Bull Mountain Development Co. No. 1 LLC (Bull Mountain). We affirm in part, reverse in part and remand for further [**504] proceedings consistent with this opinion.

[*P2] Although MEIC raises seven issues in its appeal of the District Court's order, we need address only the following:

[*P3] 1. Did the District Court err in determining the Board correctly concluded that MEIC had the burden of proof in the contested case proceeding?

[*P4] 2. Did the District Court err in determining the Board applied the correct standards in the contested case proceeding?

[*P5] 3. Did the District Court err in determining the Board correctly concluded that federal land managers have responsibility to protect visibility in Class I areas and, therefore, the Department appropriately deferred to the federal land managers' conclusions regarding visibility impacts in those areas?

FACTUAL AND PROCEDURAL BACKGROUND

[*P6] This case stems from a proposal by Bull Mountain to build a 780 megawatt pulverized coal-fired power plant in Musselshell County, approximately 12 miles southeast of Roundup, Montana. The plant would use coal from the Bull Mountain Mine, located adjacent to the site for the proposed plant, as fuel for two boilers to produce steam which would power turbine generators and produce electricity.

[*P7] In January of 2002, Bull Mountain submitted an air quality permit application for the proposed power plant to the Department as required by *§ 75-2-211, MCA*, and the administrative rules promulgated thereunder. Bull Mountain also published notice of its application in various local newspapers. After Bull Mountain provided supplementary information, the Department deemed the application complete in July of 2002. The Department issued a draft permit in August of 2002 and a draft environmental impact statement (EIS) the following November. The Department provided for public comment periods on the application, the draft permit and the draft EIS. In early January of 2003, the Department issued its final EIS and, later that month, issued its decision proposing that the air quality permit be granted with conditions.

[*P8] MEIC timely requested a hearing before the Board pursuant to *§ 75-2-211(10), MCA*, challenging the Department's decision to grant Bull Mountain an air quality permit for the proposed power plant. MEIC asserted that both Bull Mountain's application and the Department's decision to grant the permit suffered from various procedural and substantive deficiencies. The Board held a contested case hearing pursuant to the *Montana Administrative Procedure Act* [**505] (MAPA) and issued findings of fact, conclusions of law and an order approving the Department's decision to grant the permit. MEIC then petitioned for judicial review of the Board's order. The District Court affirmed the Board's findings of fact, conclusions of law and order. MEIC appeals.

[***966] STANDARD OF REVIEW

[*P9] A district court reviews a decision in a MAPA contested case proceeding pursuant to *§ 2-4-704, MCA*, which provides as follows:

> (1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;
>
> (ii) in excess of the statutory authority of the agency;
>
> (iii) made upon unlawful procedure;
>
> (iv) affected by other error of law;
>
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (b) findings of fact, upon issues essential to the decision, were not made although requested.

We employ this same standard when reviewing a district court's order affirming or reversing an administrative decision. *Juro's United Drug v. Public Health, 2004 MT 117, P9, 321 Mont. 167, P9, 90 P.3d 388, P9.*

DISCUSSION

[*P10] 1. Did the District Court err in determining the Board correctly concluded that MEIC had the burden of proof in the contested case [**506] proceeding?

[*P11] During the contested case proceeding before the Board, the question arose regarding which party had the burden of proving that the air quality permit should or should not be issued to Bull Mountain. The Board determined that, as the party challenging issuance of the permit, MEIC had the burden of proof. MEIC challenged this determination in its petition for judicial review. The District Court concluded that the Board correctly determined that MEIC had the burden of proof. MEIC asserts error.

[*P12] MEIC asserts that, when Bull Mountain applied for the air quality permit, Bull Mountain had the burden of proving to the Department that all statutory and regulatory criteria for issuance of the permit were satisfied. From that premise, MEIC contends that Bull Mountain's initial burden of proof in this regard extended to the contested case hearing before the Board and required Bull Mountain--as well as the Department--to establish that the application met the permit criteria. Bull Mountain and the Department respond that MEIC, as the party contesting the decision to issue the permit, had the burden of proving to the Board that the application did not meet the permit criteria.

[*P13] As stated above, MEIC challenged the Department's decision to issue the air quality permit by requesting a hearing before the Board pursuant to *§ 75-2-211(10), MCA*. *Section 75-2-211(10), MCA*, provides that "a person who is jointly or severally adversely affected by the department's decision may request a hearing before the board," and that the contested case provisions of the MAPA apply to hearings before the Board. Under the contested case provisions of the MAPA, all parties to such a proceeding must be afforded the opportunity to respond and present evidence and argument on the issues raised. *Section 2-4-612(1), MCA*. Furthermore, contested case hearings are bound by the common law and statutory rules of evidence unless otherwise provided by a specific statute. *Section 2-4-612(2), MCA*. The parties do not contend that any

statute relating directly to the Department or the Board provides for alternative evidentiary rules in a hearing before the Board. Consequently, Montana's general common law and statutory [***967] rules of evidence apply to a contested case hearing before the Board under *§ 75-2-211(10), MCA.*

[*P14] The statutory evidentiary provisions pertinent to this issue state that " the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side[;]" in addition, "a party has the burden of persuasion as to [**507] each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." *Sections 26-1-401* and *-402, MCA.* Thus, the party asserting a claim for relief bears the burden of producing evidence in support of that claim. *Wright Oil & Tire Co. v. Goodrich (1997), 284 Mont. 6, 11, 942 P.2d 128, 131*.

[*P15] Here, MEIC challenged the Department's decision to issue an air quality permit to Bull Mountain by requesting a contested case hearing before the Board. MEIC filed a petition and affidavit with the Board alleging that the Department approved the permit in violation of Montana statutes and administrative regulations, and requesting the following relief: 1) that the Board order a contested case hearing to determine the validity of the permit; 2) that the Board stay the Department's decision to grant the permit pending the hearing and final decision; 3) that the Board vacate and remand the decision to issue the permit pending compliance with all applicable laws and regulations; and 3) that the Board provide any and all other relief it may deem appropriate.

[*P16] The claim MEIC asserted before the Board was that the Department's decision to issue the air quality permit violated Montana law. If no challenge had been made or, as in this case, no evidence were presented at the contested case hearing establishing that issuance of the permit violated the law, the Board would have no basis on which to determine the Department's decision was legally invalid. Thus, as the party asserting the claim at issue, MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law. *See §§ 26-1-401* and *-402, MCA.* We hold, therefore, that the District Court did not err in determining the Board correctly concluded that MEIC had the burden of proof in the contested case proceeding.

[*P17] 2. Did the District Court err in determining the Board applied the correct standards in the contested case proceeding?

[*P18] In its petition and affidavit filed with the Board challenging the Department's decision to issue the air quality permit, MEIC alleged numerous procedural and substantive errors regarding the issuance of the permit. MEIC's petition set forth each allegation of error in separate subsections and asserted with regard to each error that the Department's act or omission was clearly erroneous, arbitrary and capricious, and an abuse of discretion. Prior to the contested case hearing, the question arose as to the Board's proper role in addressing the Department's decision and MEIC's asserted claims of error. MEIC contended that, notwithstanding the clearly erroneous/arbitrary and [**508] capricious/abuse of discretion language used in its petition, the Board was to act as a finder of fact and make legal determinations based on the preponderance of the evidence presented. The Department and Bull Mountain asserted that the Board should review the Department's decision with deference to the Department's expertise in the subject matter.

[*P19] At the beginning of the hearing, the attorney advising the Board as to procedural and evidentiary matters presented a memorandum regarding the standards the Board should use in the proceeding. The opening paragraph of the memorandum stated as follows:

Under the *Montana Administrative Procedure Act* , the standards for court review of agency decisions are in *MCA § 2-4-704(2)*. The Board should apply the same standards when hearing a challenge to a decision made by [the Department], to the extent that the standards are applicable to the Board.

The memorandum then generally referred to the standards set forth in *subsections (1) through (4) of § 2-4-704(2)(a), MCA.* With regard to the standards provided in *§ 2-4-704(2)(a)(5)* and *(6)*, MCA, the memorandum [***968] provided specific definitions of the terms "clearly erroneous," ";arbitrary," "capricious" and "abuse of discretion." Additionally, at the beginning of the Board's deliberations after the hearing, the Board's attorney again mentioned his earlier memorandum and advised the Board that

these are the standards used by a court review of agency decisions. So if the decisions made by this Board were to be reviewed by a court, the court would apply those standards to the Board's decisions. When the Board looks, then, at what [the Department] did, at a minimum, [the Department's] actions have to fit those standards to be sustained.

The attorney also advised the Board that it had the power to enter findings of fact based on a preponderance of the evidence and that, as to MEIC's allegations that the Department's actions were clearly erroneous, arbitrary and capricious or an abuse of discretion, "the question is, did the petitioners, by a preponderance of the evidence, establish that the decision was arbitrary and capricious?"

[*P20] The Board subsequently issued its findings of fact, conclusions of law and order which generally affirmed, with modifications, the Department's determination to issue the air quality permit. The Board's decision addressed each allegation contained in MEIC's petition separately. As to each allegation, the Board made findings of fact based on a preponderance of the evidence presented to it at the [**509] contested case hearing, a conclusion of law based on those findings and an ultimate decision--based on the findings and conclusion--regarding the allegation at issue. However, as stated above, certain of the allegations in MEIC's petition to the Board asserted that the Department's actions were "clearly erroneous, arbitrary and capricious, and an abuse of discretion." Regarding those allegations, the Board entered findings of fact stating that "the Board finds, by the preponderance of the evidence, that the conduct of the Department . . . was not clearly erroneous, arbitrary and capricious, and an abuse of discretion."

[*P21] In petitioning the District Court for judicial review, MEIC contended the Board erred by utilizing incorrect standards when it determined whether the Department's decision was clearly erroneous, arbitrary or capricious, or an abuse of discretion. The District Court concluded that "it would seem that the Board's role in determining whether a permit should be issued would not be de novo, but would be to review a decision of the experts [the Department] to determine if there is substantial evidence to support its decision." The court further concluded that the standards stated by the Board's attorney were the appropriate standards for the Board to apply in reviewing a Department decision. MEIC asserts the District Court's conclusions are erroneous.

[*P22] As stated above, a party adversely affected by a Department decision approving or denying an air quality permit may request a hearing before the Board to be conducted pursuant to the contested case provisions of the MAPA. *Section 75-2-211(10), MCA*. The contested case provisions of the MAPA are contained in Title 2, chapter 4, part 6 of the Montana Code Annotated (MCA). Under those provisions, all parties shall be given opportunity to appear and present evidence and argument regarding all the issues raised in the proceeding. *Section 2-4-612(1), MCA*. Additionally, *§ 2-4-623, MCA*, provides, in pertinent part, as follows:

> (1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.
>
> (2) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.
>
> (3) Each conclusion of law shall be supported by authority or [**510] by a reasoned opinion.

Furthermore, findings of fact in a civil matter must be based on a preponderance of the evidence. *Section 26-1-403(1), MCA*. Thus, the Board' s role in the contested case proceeding was to receive evidence from the parties, enter findings of fact based on the [***969] preponderance of the evidence presented and then enter conclusions of law based on those findings.

[*P23] In contrast, Title 2, chapter 4, part 7 of the MCA provides for judicial review by a district court of an agency decision in a contested case proceeding under the MAPA. As set forth above, a district court reviews a final agency decision in a contested case proceeding pursuant to *§ 2-4-704, MCA*. Pursuant to this statute, a district court may determine whether an agency decision is clearly erroneous, arbitrary and capricious, or an abuse of discretion. *See § 2-4-704(2)(a)(5)* and *(6)*, MCA. These standards of review are expressly limited to a district court's review of an agency decision under part 7 of the

MAPA. The standards of clearly erroneous, arbitrary and capricious, and abuse of discretion are not available to an agency acting as a factfinder under the contested case provisions contained in part 6 of the MAPA.

[*P24] Situations exist in which an administrative body acts in an appellate capacity when reviewing decisions, acting outside the purview of the MAPA contested case provisions and using a deferential standard of review. For example, administrative regulations governing school controversies provide that a decision of a local school board of trustees may be appealed to the county superintendent. *See Rule 10.6.103, ARM*. The county superintendent conducts an evidentiary hearing and enters a written final order containing findings of fact and conclusions of law. *Rules 10.6.116* and *10.6.119, ARM*. A party aggrieved by the county superintendent's final order then may appeal to the state superintendent of public instruction. *Rule 10.6.121(3), ARM*. The state superintendent reviews the county superintendent's decision in an appellate capacity, confined to the record established at the hearing before the county superintendent and applying a standard of review substantially similar to that applied by a district court in judicial review of a contested case under *§ 2-4-704(2), MCA*, of the MAPA. *Rules 10.6.121* and *10.6.125, ARM*.

[*P25] In the present case, however, *§ 75-2-211(10), MCA*, expressly states that the hearing before the Board must be conducted pursuant to the contested case provisions of part 6 of the MAPA. To that end, the Board entered findings of fact based on the evidence presented and conclusions of law based on those findings. However, as to certain of [**511] MEIC's allegations, the Board determined that the Department's actions were not clearly erroneous, arbitrary or capricious, or an abuse of discretion. In making these latter findings, the Board responded to the language utilized in MEIC's petition, and also relied on the imprecise advice of the Board's attorney regarding its role vis-a-vis the Department's decision. It is clear, however, that the Board applied a standard of review not legally available to it as the finder of fact in a contested case proceeding pursuant to the MAPA.

[*P26] We conclude, therefore, that the District Court erred in determining the Board applied the correct standards in the contested case proceeding. We further conclude that this case must be remanded to the District Court with instructions to remand to the Board for entry of new findings of fact and conclusions of law in conformity with part 6 of the MAPA. In entering new findings of fact and conclusions of law, the Board may, in its discretion, rely entirely on the record before it or receive additional evidence on such matters as it may deem appropriate.

[*P27] 3. Did the District Court err in determining the Board correctly concluded that federal land managers have responsibility to protect visibility in Class I areas and, therefore, the Department appropriately deferred to the federal land managers' conclusions regarding visibility impacts in those areas?

[*P28] Department regulations require an applicant for an air quality permit to include in the application information regarding the types of pollutants the proposed project is predicted to emit, the predicted rates of such emissions and proposed methods of controlling the emissions. The regulations also require a permit applicant to provide a visibility analysis demonstrating that the predicted emissions will not cause or contribute to an adverse impact on visibility in any area designated as a Class I area. *See Rule 17.8.1106, ARM*. The effect of emissions on [***970] visibility in Class I areas must be estimated using an approved computer air quality dispersion modeling program. *Rule 17.8.1107, ARM*. The Department may not issue an air quality permit unless the applicant demonstrates that there will be no resulting adverse impact on visibility in Class I areas. *Rules 17.8.1106(1)* and *17.8.1109(2), ARM*.

[*P29] If, upon initial review of the application, the Department determines that a proposed project will or may impact on visibility in a Class I area, the Department must provide notice of the anticipated visibility impact to the environmental protection agency (EPA) and to the federal land manager (FLM) charged with direct responsibility for [**512] the management of the Class I area involved. *Rule 17.8.1108, ARM*.

> The [FLM] and the federal official charged with direct responsibility for management of Class I lands have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands and to consider . . . whether a proposed source or modification would have an adverse impact on such values.
>
> Rule 17.8.825(2), ARM.

[*P30] Upon receiving the Department's notice, the FLM may present the Department with a demonstration that emissions from the proposed project will adversely impact the visibility of the Class I area at issue. *Rules 17.8.825(3)* and *17.8.1109(1), ARM*. If the FLM determines that such an adverse impact on visibility will result, then

> the [applicant] may demonstrate to the [FLM] that the emissions from such source would have no adverse impact on the air quality-related values of such lands (including visibility) . . . . If the [FLM] concurs with such demonstration and so certifies to the department, the department may, provided that applicable requirements are otherwise met, issue the permit . . . .

Rule 17.8.825(4), *ARM*. *Rule 17.8.1109*, ARM, further provides that

> (2) The department will consider the comments of the [FLM] in its determination of whether adverse impact on visibility may result. Should the department determine that such impairment may result, a permit for the proposed source will not be granted.
>
> (3) Where the department finds [the FLM's] analysis does not demonstrate to the satisfaction of the department that an adverse impact on visibility will result, the department will provide written notification to the affected [FLM] within five days of the department's final decision on the permit. The notification will include an explanation of the department's decision or give notice as to where the explanation can be obtained.

[*P31] In its application, Bull Mountain identified four Class I areas within which visibility potentially could be impacted by emissions from the proposed plant: Yellowstone National Park (Yellowstone), the UL Bend Wilderness area (UL Bend), the North Absaroka Wilderness area (North Absaroka) and the Northern Cheyenne Indian Reservation (NCIR). In conducting its visibility analysis, Bull Mountain used a computer modeling program called CALPUFF to estimate whether, and to what extent, visibility impacts would occur in those areas. The CALPUFF modeling revealed that visibility impacts would occur in varying degrees in each of the four areas. Consequently, the [**513] Department notified the EPA; the United States Department of Agriculture Forest Service (Forest Service), the FLM for North Absaroka; the United States Department of Interior for Fish, Wildlife and Parks (FWP), the FLM for Yellowstone and UL Bend; and the NCIR of the potential visibility impacts resulting from emissions from the proposed project.

[*P32] The Forest Service did not respond to the notification on behalf of North Absaroka. The NCIR submitted comments concerning visibility impairment on the reservation resulting from the proposed project, but did not provide data or analysis demonstrating that emissions would or would not cause or contribute to an adverse impact on visibility as contemplated by *Rules 17.8.825(3)* and *17.8.1109(1), ARM*. The FWP responded with a letter to the Department stating that the FWP had conducted its own computer modeling analysis and concluded that emissions [***971] from the proposed project would have an adverse impact on visibility in Yellowstone and UL Bend on a significant number of days in a year. The FWP appended documentation of its computer modeling analysis to the letter. The FWP also observed that, although it was not the FLM for North Absaroka or the NCIR, its computer modeling analysis included those areas for completeness and determined there would be adverse visibility impacts in those areas as well.

[*P33] In response the FWP letter, Bull Mountain conducted an additional visibility analysis using weather

data specific to the Yellowstone area. This analysis determined that, on the majority of the days on which the FWP asserted the proposed project would adversely impact visibility in Yellowstone, there were weather conditions such as rain, snow or fog which would cause visibility impairment naturally. As a result, according to Bull Mountain, any adverse visibility impact from the proposed project would be obscured by the natural weather conditions and be imperceptible to Yellowstone visitors. In other words, Bull Mountain asserted that, on the majority of those days, the proposed project would not cause or contribute to an adverse impact on visibility in Yellowstone. Bull Mountain also observed that it could not conduct a similar analysis for the UL Bend area because there was no historical weather data available, but indicated it was "likely" that such natural visibility impairment also would occur in that area. Bull Mountain provided documentation of its additional visibility analysis in Yellowstone to the Department and the FWP.

[*P34] After receiving Bull Mountain's additional visibility analysis, the FWP withdrew its initial adverse visibility impact determination for Yellowstone and UL Bend. In its subsequent decision to issue Bull [**514] Mountain an air quality permit, the Department observed that the FLMs initially indicated the proposed project's emissions would lead to an adverse impact on visibility in nearby Class I areas, but that "the FLMs withdrew their determination that an adverse impact would result from" the proposed project. Thus, although not expressly stated in its decision, the Department implicitly determined that emissions from Bull Mountain's proposed project would not "cause or contribute to adverse impact on visibility" in nearby Class I areas. *See Rules 17.8.1106(1)* and *17.8.1109(2), ARM*.

[*P35] At the hearing before the Board, MEIC asserted that the Department improperly deferred to the FWP's opinion regarding visibility impacts rather than reaching its own independent assessment of whether the proposed project's emissions would result in visibility impacts. The Board determined that, by law, FLMs have responsibility to protect visibility in Class I areas and the Department properly relied on the FWP's opinion that the proposed project would not adversely impact visibility in those areas. MEIC challenged this determination in its petition for judicial review by the District Court. The District Court concluded as follows:

> [FLMs] determined the impact on visibility at Yellowstone National Park, UL Bend Wilderness Area, and Northern Absaroka Wilderness Area, or the closest areas where data are available. They are the experts upon which [the Department] relies and they are the ones responsible for determining impacts on federal lands. With the exception of the initial report on Yellowstone National Park, the FLMs did not find adverse air quality impacts that would preclude the project. After review of the data on Yellowstone National Park, the initial adverse report was amended. The Board spent considerable time receiving testimony and other evidence, appeared to carefully review it, and its conclusions are not arbitrary, capricious, or an abuse of discretion.
>
> MEIC asserts the court's conclusion that the Department properly relied on, and deferred to, the FLM opinion is erroneous. We agree.

[*P36] Bull Mountain and the Department correctly observe that FLMs are charged with the responsibility for management of Class I areas and have an affirmative responsibility to protect the air quality-related values of those areas by, in part, considering whether a proposed project would have an adverse impact on visibility. *See Rule 17.8.825(2), ARM*. However, the Department is precluded from issuing an air quality permit unless the applicant affirmatively demonstrates [**515] to it that the proposed project will not cause or contribute to an [***972] adverse impact on visibility in Class I areas. *See Rules 17.8.1106(1)* and *17.8.1109(2), ARM*. Moreover, as set forth above, *Rule 17.8.1109, ARM*, provides that

> (2) The department will *consider* the comments of the [FLM] in *its determination* of whether adverse impact on visibility may result. Should the department determine that such impairment may result, a permit for the proposed source will not be granted.
>
> (3) Where the department finds [the FLM's] analysis does not demonstrate to

> the satisfaction of the department than an adverse impact on visibility will result, the department will provide written notification to the affected [FLM] within five days of the department's final decision on the permit. The notification will include an explanation of the department's decision or give notice as to where the explanation can be obtained. [Emphasis added.]

[*P37] Thus, while FLMs' opinions and analyses regarding adverse visibility impacts on Class I areas carries weight in the overall determination of whether an applicant has established that a proposed project's emissions will not cause such adverse impacts, the Department's own regulations require it to make its own independent determination on the issue by considering all the information presented to it. The Department may not simply defer to the opinion of the relevant FLMs.

[*P38] We hold, therefore, that although the Board correctly concluded that FLMs have responsibility to protect visibility in Class I areas, the District Court erred in determining the Department appropriately deferred to the FLMs' conclusions regarding visibility impacts in those Class I areas potentially impacted by emissions from the proposed project. Thus, on remand the Board shall enter findings of fact and conclusions of law determining whether, based on all the evidence presented, Bull Mountain established that emissions from its proposed project will not cause or contribute to adverse impact on visibility in the Class I areas at issue.

[*P39] Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/S/ KARLA M. GRAY

We concur:

/S/ JAMES C. NELSON

/S/ PATRICIA O. COTTER

/S/ W. WILLIAM LEAPHART

/S/ JOHN WARNER