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## THREE AIR POLLUTION CONTROLS FOR MONTANA

### I. INTRODUCTION

Air pollution is not a new problem for mankind. Katz's article in *The Pollution Reader* states:

Atmospheric pollution as a social problem dates probably from the beginning of the 14th century, with the introduction of coal as a source of heat. Air pollution became intensified during the industrial revolution of the 19th century and the resultant growth of metallurgical, chemical, and many other manufacturing processes based on the application of technical and scientific knowledge. Since then, the continued development of new industrial techniques and products, the increasing use of motor vehicles coupled with the population explosion and the growth of large urban communities have introduced into the atmosphere a great number of complex pollutants.<sup>1</sup>

Until recently, with the possible exception of Silver Bow and Deer Lodge Counties, Montana has been relatively free from the problem of air pollution; however, with the influx of new industry into the state, air pollution has become a problem with which Montana must immediately deal. The new industries of the state have found that the atmosphere is both a convenient and an inexpensive "garbage pail" for gaseous wastes. Fortunately, Montana has three powerful new weapons with which to fight the polluters of the atmosphere. These weapons are the Garrison decisions i.e. *Dutton v. Rocky Mountain Phosphates*;<sup>2</sup> The 1967 Clean Air Act of Montana;<sup>3</sup> and the federal Air Quality Act of 1967.<sup>4</sup> The purpose of this Note is to explain the substance and future value of each of these controls in the fight against air pollution in Montana.

### II. THE GARRISON DECISIONS<sup>5</sup>

Rocky Mountain Phosphate, which was incorporated in 1959 under the laws of Montana, manufactures defluorinated phosphate for use as a mineral supplement in livestock feeds. According to the facts of this case:

The manufacturing of defluorinated phosphate consists basically of treating finely ground phosphate rock by either of several methods to release most of the fluorine in the rock so that the finished product will have not more than 18/100 of one percent of fluorine content. The original rock at the beginning of the process herein involved had fluorine content ranging from 3.3 percent to 4.17 per-

<sup>1</sup>Katz, *Nature and Sources of Air Pollution*, in *THE POLLUTION READER* 163 (Anthony DeVos, Norman Pearson, P.L. Silveston, and W.R. Drynan eds. 1968).

<sup>2</sup>*Dutton v. Rocky Mountain Phosphates*, 151 Mont. 54, 438 P.2d 674 (1968); Injunction was appealed in *Dutton v. Rocky Mountain Phosphates*, 152 Mont. 352, 450 P.2d 672 (1969).

<sup>3</sup>Revised Codes of Montana, § 69-3904 (1947) [hereinafter cited as R.C.M.1947].

<sup>4</sup>Federal Air Quality Act of 1967, 42 U.S.C.A. § 1857 (1967).

<sup>5</sup>*Dutton*, *supra* note 2.

cent depending on the source. Unless captured, the fluorine compounds called "fluorides" are emitted into the atmosphere.

Fluorine is a very active chemical agent which never exists free and independent in nature. It is in all vegetation and in all tissue. Fluorine, when ingested by animals in excessive amounts, can cause varying degrees of injury. Also, fluorine can cause damage to coniferous trees. This damage is called fluorosis.

Fluorine toxicosis is similar in all species of cattle. In (sic) involves the teeth, bones and the well-being of the animals.<sup>6</sup>

Rocky Mountain Phosphate Corporation opened a phosphate plant near Butte, Montana, in April of 1960, and in 1962 the corporation purchased land near Garrison, Montana, and began construction of a new factory. Garrison, which is located approximately 50 miles northwest of Butte, is primarily an agricultural community. Cattle raising and hay production are the principal industries of this locality.

In 1963 a nuisance action was instituted against the Butte plant, and this suit resulted in an injunction. Rocky Mountain Phosphate shifted their production to the Garrison plant, and on August 2, 1963 the Garrison factory resumed the manufacturing of defluorinated phosphate. Scrubbers, which capture the excess fluorides before they are released into the atmosphere, were not installed in the Garrison plant until October 5, 1963. The court found: In August 1963, with no scrubbers operating, the plant emitted 12,600 pounds of fluorides.<sup>7</sup> On October 10, 1963 a group of local ranchers instituted a nuisance suit against Rocky Mountain Phosphate for the pollution caused by the Garrison factory. On June 11, 1964 the plant was restrained by court order from operating until new scrubbing equipment was installed and other improvements were made to control the emission of fluorides.

The phosphate factory made improvements in its scrubbing process and increased the height of the plant's smokestack. Consequently, the plant was allowed to resume operations under the supervision of the Montana Board of Health. Complaints from area ranchers and the Montana Board of Health forced the plant to periodically suspend operations over the next two years. Finally, on March 21, 1966, a group of local ranchers instituted a suit against Rocky Mountain Phosphate Corporation. The plaintiffs demanded recompense for damage to their cattle herds and to their grazing land as well as injunctive relief to prohibit the Garrison plant from manufacturing fluorides.

The plaintiff ranchers based their demand for recovery on the theory of strict liability, and the court agreed with this theory. The court cited *Prosser, Hornbook on the Law of Torts*, § 59 at 239 (2d ed. 1955):

The principle has been recognized fully in England, and to a considerable extent in the United States, that one who maintains a condition, or engages in an activity, which involves a high degree

<sup>6</sup>Dutton (1968), *supra* note 2 at 58.

<sup>7</sup>Dutton (1968), *supra* note 2 at 60.

of risk of harm to others and is abnormal in the community and inappropriate to its surroundings, is strictly liable for the harm which it causes.<sup>8</sup>

The court found further support in R.C.M. 1947, S 49-106 which states: "One must so use his own rights as not to infringe upon the rights of others." For case support, the court cited *Rylands v. Fletcher*:

We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in (at his peril), and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape.<sup>9</sup>

The court also took notice of the A.L.R. annotation entitled:

Landowner's or Occupant's Liability in Damages for Escape, Without Negligence, of Harmful Gases or Fumes From Premises.<sup>10</sup>

The plaintiffs contended that the sole purpose of the defendant's plant was the production of fluorides, and these fluorides were produced at a rate of 2,640 to 3,360 pounds per day. These fluorides were either captured in the plant or were emitted into the atmosphere. Rocky Mountain Phosphate knew of the inherent danger of these fluorides to both cattle and pasture land, and in the face of this danger the plant commenced and continued production in such a manner as to allow a large amount of these fluorides to escape into the atmosphere, causing an epidemic of fluorosis among the cattle herds of the plaintiffs. The testimony of local veterinarians supported the contention that no fluorosis epidemic existed among the plaintiffs' cattle before August of 1963, and the present fluorosis epidemic decreased as new improvements for the control of fluoride emissions were incorporated into the Garrison plant. Rocky Mountain Phosphate admitted responsibility for the injury suffered; however, the amount demanded by the plaintiffs was contested as being not commensurate with the damage suffered. The jury awarded \$72,708.80 in compensatory damages to the plaintiffs as well as \$10,000 punitive damages. On appeal the Supreme Court of Montana sustained these damage awards.<sup>11</sup>

The second demand of the plaintiffs was a permanent injunction to prohibit the production of fluorides at the Garrison factory. The trial court denied the permanent injunction and the Supreme Court of Montana sustained that holding. The Supreme Court stated:

Equity demands that the trial court should reopen the injunctive feature of the case and require the defendant to establish that its operation is now within reasonable limits and that its operation will not result in the emission of quantities of fluorides into the atmosphere that will damage hay or grass and it will not, therefore, result in damage to livestock.

To determine the question of the reasonableness of the defendant's operation, the trial court may appoint the State Board of Health or

<sup>8</sup>Dutton (1968), *supra* note 2 at 66.

<sup>9</sup>*Rylands v. Fletcher*, L.R. 3 H.L. 330 (Eng., 1866).

<sup>10</sup>Annot., 54 A.L.R.2d 764 (1957).

<sup>11</sup>Dutton (1968), *supra* note 2.

any other inspection agency it desires. The cost of said inspection and report to the court shall be at the expense of the defendant, the Rocky Mountain Phosphate, Inc.<sup>12</sup>

The court concluded by stating that the injunction would only be denied if the operation of the plant were found to be within the safe limits as stated by the inspection agency.

Following the Supreme Court's directive, the trial court organized an independent testing agency which was supervised by the Montana State Board of Health. On April 11, 1968 Rocky Mountain Phosphate was ordered to show that the emissions of fluoride from the Garrison plant were within the safe limits so as not to damage either the cattle herds or the grasslands of the plaintiffs. The court found that the operation of the plant was not within the prescribed safe limits, and on June 19, 1968, District Court Judge W. W. Lessley, entered the following judgment:

That the defendant, Rocky Mountain Phosphates, Inc., its directors, officers, agents and employees, be and they are hereby permanently enjoined from operating the Rocky Mountain Phosphate plant at Garrison, Powell County, Montana, and that the plaintiffs have judgment for their costs.<sup>13</sup>

The defendants moved to amend the judgment to conform to the findings of fact and conclusion of law. This motion was granted, and an amended judgment was entered by the district court which states:

That the continued emission from the defendant's defluorination phosphate plant at Garrison, Montana, of fluorides in excessive quantities and beyond safe limits constitutes a nuisance, and the same is hereby permanently enjoined.<sup>14</sup>

The lower court did not permanently enjoin the Garrison factory from operation; however, the factory was permanently enjoined from emitting excessive and unsafe amounts of fluorides into the atmosphere. The plaintiffs, who were demanding a permanent injunction that would completely prohibit any operation of the Garrison facility, appealed to the Supreme Court of Montana.<sup>15</sup>

The Supreme Court of Montana affirmed the amended judgment,<sup>16</sup> i.e., the plant could continue operation; however, Rocky Mountain Phosphate was permanently enjoined from emitting unsafe amounts of fluorides into the atmosphere. This decision was supported by several factors. First, the Garrison plant had recently installed a new scrubber that was alleged to be 99.9% effective; therefore, the fluoride emissions would be negligible. Second, the Montana Board of Health had entered into a contract with Rocky Mountain Phosphate, Inc. The contract permitted the Garrison plant to operate; however, in exchange, the

<sup>12</sup>Dutton (1968), *supra* note 2 at 74.

<sup>13</sup>Dutton (1969), *supra* note 2 at 357-358.

<sup>14</sup>Dutton (1969), *supra* note 2 at 358.

<sup>15</sup>Dutton (1969), *supra* note 2.

<sup>16</sup>Dutton (1969), *supra* note 2.

Garrison plant agreed to cease operation upon any finding by the Board of Health that the plant was not operating within safe limits. The case was returned to the jurisdiction of the lower court,<sup>17</sup> and until the present time, the Garrison plant has operated under the supervision of the Montana Board of Health.

The Garrison decisions, which supercede several earlier air pollution cases,<sup>18</sup> have provided a strong and valuable precedent for Montana. These cases stand for two basic propositions. The first proposition is that a nuisance action may be brought by damaged parties against a polluter, and if damages can be proven, the injured plaintiff will be able to collect. The second proposition for which these cases stand is that not only an injunction can and will be issued against a polluter to prohibit that polluter from emitting harmful and noxious gases into the atmosphere, but also the State of Montana, as a representative of the injured parties, will take upon itself the task of policing this polluter.

### III. MONTANA CLEAN AIR ACT

The next area of air pollution control with which this Note is concerned is the Clean Air Act of Montana.<sup>19</sup> This law, passed by the Montana legislature on March 3, 1967, is one of the stronger state acts that have been enacted to control air pollution. The State Board of Health, which administers the provisions of this new law, is aided by an eleven member advisory council.<sup>20</sup> One member of this council is the executive officer of the State Board of Health. The other ten members are appointed by the governor in the following manner:

a representative of the manufacturing industry; a representative of the fuel industry; a practicing physician licensed in Montana; a practicing veterinarian licensed in Montana; a practicing registered professional chemical or environmental engineer; a meteorologist; a conservationist; and an urban planning consultant. The chairman shall be elected by the advisory council from among this number.<sup>21</sup>

The Board of Health is granted a wide variety of powers in order to combat air pollution.<sup>22</sup> This board has the power to conduct hearings, to call witnesses, and to demand the production of evidence.<sup>23</sup>

If local programs are financed with public funds, the board may contract with the local government to share the cost of the program. However, the state share may not exceed thirty percent (30%) of the total cost.<sup>24</sup>

<sup>17</sup>Dutton (1969), *supra* note 2.

<sup>18</sup>See, Annot. 54 A.L.R.2d 764 (1957).

<sup>19</sup>R.C.M.1947, § 69-3904.

<sup>20</sup>R.C.M.1947, § 69-3903.

<sup>21</sup>R.C.M.1947, § 69-3904.

<sup>22</sup>R.C.M.1947, § 69-3909.

<sup>23</sup>R.C.M.1947, § 69-3909 (2).

<sup>24</sup>R.C.M.1947, § 69-3909 (8).

The board has the power to establish ambient air quality standards for the State of Montana.<sup>25</sup> At present, the board has established eighteen air pollution standards scheduled to be effective in 1972-1973.<sup>26</sup>

The board may classify air contaminant sources which in its judgment may cause or contribute to air pollution according to levels and types of emissions and other characteristics which relate to air pollution. . . . Such classifications shall be made with special reference to effects on health, economic and social factors, and physical effects on property, and may be applied to the state as a whole or to any designated area.<sup>27</sup>

The board also has the power to prohibit the installation of any equipment which may contribute to air pollution; however, the board has the power to issue permits for such equipment.<sup>28</sup> The board members may enter and inspect any property, excluding a private residence, on which an air contaminant source is located.<sup>29</sup> The enforcement proceedings of this Act consist of a notice to the potential polluter, and a hearing to inquire into the possible violation of this Act.<sup>30</sup>

If an emergency exists which endangers either human health or safety, the director of the board may order this pollution to be either reduced or discontinued immediately. However, a hearing must follow within 24 hours, and 24 hours after the commencement of this hearing the board must make a decision on the order that was issued by the director.<sup>31</sup> The act does not define an "emergency requiring immediate action to protect human health or safety." At present, the issue has not been presented to the Montana Courts for definition of the term. Thus its impact on polluters cannot be estimated.

This Act also makes ample provisions for variances from the regulations governing air pollution; however, these variances must be renewed each year.

A variance will be granted if the emission occurring or proposed does not constitute a danger to public health or safety; and if compliance with the rules would produce hardship without equal or greater benefits to the public.<sup>32</sup> Before a variance is granted, the board must hold a public hearing, on due notice, and must consider the relative interests of the applicant, other owners of property likely to be affected by the emissions, and the general public.<sup>34</sup>

<sup>25</sup>R.C.M.1947, § 69-3909 (12).

<sup>26</sup>These standards are concerned with the control of open burning, storage of oil, internal combustion engines, garbage disposal, air pollution controls for the wood industry, sulphur emission control, etc.

<sup>27</sup>R.C.M.1947, § 69-3910 (1).

<sup>28</sup>R.C.M.1947, § 69-3911 (1), (2).

<sup>29</sup>R.C.M.1947, § 69-3912 (1).

<sup>30</sup>R.C.M.1947, § 69-3914 (1).

<sup>31</sup>R.C.M.1947, § 69-3915 (1).

<sup>32</sup>R.C.M.1947, § 69-3916 (3).

<sup>33</sup>R.C.M.1947, § 69-3916(1).

<sup>34</sup>R.C.M.1947, § 69-3916 (2).

As of December 22, 1970, according to Mr. Don Holtz of the Montana Air Pollution Control, several variances have been granted. The Farmers Union Central Exchange Refinery in Laurel was granted a variance for the installation of flares. This was granted in October of 1970 and will expire on December 31, 1970. Both the United Sierra Division of Cyprus Mines of Three Forks and Pfizer Company of Dillon were granted variances for the installation of bag houses for tale mill recovery operations. These variances will expire in April of 1971. Dupuis Lumber of Polson was granted a variance for the installation of a hog fuel boiler, and the expiration date for this variance is April 1, 1971. Thompson Falls Lumber of Thompson Falls was granted a similar variance. Anaconda Wire and Cable of Columbia Falls was granted a variance until June 1, 1971 for the installation of a fluxing operation to recover Aluminum Chlorine emissions. Humble Oil and Refining of Billings was granted a variance which expires on July 1, 1971. This variance was for the installation of a coker to burn waste material. Stauffer Chemical of Butte was granted a variance for the installation of phosphorous control equipment.

The board has also granted variances that will possibly extend for more than one year; however, these variance must be renewed annually. Ideal Cement of Three Forks is constructing a new plant, which will be completed in March of 1973; however, this variance must be renewed on July 1, 1971. Hoerner Waldorf Corporation of Missoula has been granted a variance for their Phase I recovery boiler and Phase II recovery boiler. These variances expire on June 1, 1971. W. R. Grace Zonolite of Libby has been granted a variance until June 1, 1971 for the building of a new plant. This plant will be completed in April of 1973.

These variances and the granting standards are a public record and the Montana Air Pollution Control in Helena will provide this information to any interested citizen.

The board's decisions, including variance,<sup>35</sup> are subject to judicial review. If the potential polluter believes that the ruling of the board was not supported by the evidence, that new evidence has come into existence since the original hearing, that the order was procured by fraud, or that competent evidence was excluded, then he may apply for a rehearing. If this rehearing is denied, the party may appeal to the district court of the judicial district where the property affected by the order is located.<sup>36</sup> Any sales records, production techniques, or other such information that the board may obtain will not be made

<sup>35</sup>R.C.M.1947, § 69-3916 (4).

<sup>36</sup>R.C.M.1947, § 69-3917 (1)-(5).



public without the expressed consent of the business. However, this does not prohibit the board from making public its analyses or summary of the case.<sup>37</sup>

For violations of this law, fines will be levied against the polluter in an amount not to exceed \$1,000 a day.<sup>38</sup> This Act does not apply to air contamination existing solely within commercial plants, nor does this Act apply to relations between employers and employees with respect to air pollution.<sup>39</sup> Sanitation, industrial health, or safety laws are not superceded or limited by this Act.<sup>40</sup>

From these facts, one is able to conclude that this Act is quite comprehensive and should be able to provide adequate air pollution control for the State of Montana. The Board of Health possesses a wide range of powers, and if these powers are exercised, air pollution in Montana should decrease.

#### IV. THE FEDERAL CLEAN AIR ACT

The final air pollution control which this Note will discuss is the Air Quality Act of 1967.<sup>41</sup> The federal law was passed:

- (1) to protect the Nation's air resources so as to promote the public health, and welfare and the productive capacity of its population;
- (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
- (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
- (4) to encourage and assist the development and operation of regional air pollution control programs.<sup>42</sup>

The Federal Act, administered by the Secretary of Health, Education and Welfare, is an attempt to supplement state air pollution laws. The Federal Government will not establish ambient air quality control standards unless the states fail to enact local air pollution laws.<sup>43</sup> The Act is also designed to encourage cooperative activities among Federal, State, and Local governments.<sup>44</sup> The Act provides for research programs, local and state grants, interstate conferences on air pollution, and public hearings on the various problems that are connected with air pollution.<sup>45</sup> Provisions are also made in the Act for the testing of automobile emissions and the registration of fuel additives.<sup>46</sup>

<sup>37</sup>R.C.M.1947, § 69-3918 (1), (2).

<sup>38</sup>R.C.M.1947, § 69-3921 (1).

<sup>39</sup>R.C.M.1947, § 69-3922 (1), (2).

<sup>40</sup>R.C.M.1947, § 69-3922 (3).

<sup>41</sup>Air Quality Act of 1967 *supra* note 4.

<sup>42</sup>Air Quality Act of 1967, *supra* note 4.

<sup>43</sup>Air Quality Act of 1967, *supra* note 4 at § 1857d (2).

<sup>44</sup>Air Quality Act of 1967, *supra* note 4 at § 1857a (a).

<sup>45</sup>Air Quality Act of 1967, *supra* note 4 at § 1857b (a)-(c).

<sup>46</sup>Air Quality Act of 1967, *supra* note 4 at § 1857e (a), (b).

The Federal Act is deliberately broad in scope. This enables individual states to enact specific state laws in order to control individual state and local air pollution problems. The main emphasis of the Federal Act is to control air pollution on an interstate and regional basis. There have been no test cases under the Federal Act, so that its actual effect cannot be determined. At best the value of the act to Montana will be indirect. Since Montana has its own air pollution control system, it will govern over the Federal Act. Thus any benefit from the Federal Act will derive to Montana through the results of research programs, information developed at the Interstate Conferences and public hearings. Another possible source of benefit is in the grants which are available under the Federal Act.

### V. CONCLUSION

These three "Air Pollution Controls" provide Montana with a formidable defense against air polluters. The Federal Act is intended to control the national problem, and both the Montana Clean Air Act and the *Garrison Decisions* provide excellent supplementation on the state and local level. As Robert and Leona Rienow state in their book *Moment in the Sun*:

Properly, the attack on our ignorance must be spearheaded by the national government. Not only would it be sheer waste for each community or state to duplicate each other's efforts; the call now is for such highly specialized atmospheric scientists, medics, chemists, engineers, meteorologists, etc., that smaller agencies of government could not readily recruit the talent called for in our emergency.

Once the facts are known and the solutions made available, the problem of applying those understandings is primarily local. As noted, one community may contend with a copper smelter, another with a chemical plant. One may suffer from atmospheric inversion demanding inflexible traffic limitations; another may have a soft coal problem. No distant official would be likely to work out the ingenious economical and effective program for trash burning. . . .

There is an important role for the states, however. Enabling laws must be passed, rigid standards laid down, specialists provided for the smaller communities, and both intercommunity and interstate or regional problems attacked. . . . And unless extensive education is carried on by all levels of government, there will not be the necessary public support to implement the arge but needed outlays of money by either government or industry.<sup>47</sup>

As *Moment in the Sun* explains, air pollution demands action by all government levels, and Montana is fortunate to have a strong combination of pollution controls. The *Garrison Decisions* provide Montana with initial precedent to deter and to control polluters of the atmosphere. The Clean Air Act of Montana, when fully in force, will provide a base on which this precedent can be developed and enlarged.<sup>48</sup>

<sup>47</sup>RIENOW and L. RIENOW, *MOMENT IN THE SUN* 153 (1969).

<sup>48</sup>The board has held public hearings on sulphur emission in East Helena, Montana. Both Anaconda Copper Company and American Smelting and Refining Company have objected that the proposed standards for the control of sulphur emissions are too stringent for compliance.

However, any pollution control is only as effective as those charged with its enforcement. It therefore behooves the people of this state to maintain a close watch on the actions of the board to insure proper enforcement. If this is done, the potentially effective tools for pollution control *will be* effective, and Montana will be assured of a decent atmosphere for its citizens.

JOHN B. DUDIS, JR.