



# ENVIRONMENTAL QUALITY COUNCIL

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JOE KOLMAN, Research Analyst  
SONJA NOWAKOWSKI, Research Analyst  
HOPE STOCKWELL, Research Analyst  
CYNTHIA PETERSON, Secretary

## AGENCY OVERSIGHT SUBCOMMITTEE MINUTES

Date Approved:<sup>1</sup>

Tuesday, June 10, 2008,  
1:00 p.m. to 3:40 p.m.  
Rm 102

Capitol Building  
Helena, MT

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

### **COMMITTEE MEMBERS PRESENT**

SEN. JIM SHOCKLEY, Chair  
REP. NORMA BIXBY, Vice Chair  
REP. SUE DICKENSON  
REP. CHAS VINCENT  
REP. CRAIG WITTE

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<sup>1</sup>These minutes were completed after the interim recessed and were not approved by the subcommittee.

## STAFF PRESENT

TODD EVERTS, Lead Staff  
Cj Johnson, Secretary

## ATTACHMENTS

Agenda ([Attachment 2](#))  
Visitors' Register ([Attachment 1](#))  
Roll Call ([Attachment 3](#))

## Agenda

1. *Board of Environmental Review (BER) Explanation of the Contested Case Process and the Order* - Joe Russell, Chair of the BER
2. *Implementation of the BER Order* - DEQ Staff
3. *Public Comment*
4. *Subcommittee Questions*

## CALL TO ORDER AND ROLL CALL

00:00:02 Sen. Shockley called the committee to order at 1:00 p.m. The secretary noted the roll. Mr. Cebull and Rep. Sue Dickenson attended via the polycom phone. Rep. Norma Bixby was excused and had a proxy.

### **BER Decision to Remand Highwood Generation Station Air Quality Permit for Further Particulate Analysis**

00:01:25 Joe Russell, Chair of the BER, said he was appointed to the Board by Governor Racicot, Governor Marx, and re-appointed by Governor Schweitzer. He has been in the public health business for 21 years. He is also a regulator and inspection agent.

00:04:03 Sen. Shockley informed the audience that the committee isn't here to decide if Highwood is a go or not. He said the committee has been brought together only to oversee the procedures and if they were followed correctly. He asked Mr. Russell to go through the procedure that has brought them here to the Agency Oversight Subcommittee.

00:04:58 Mr. Russell talked about an appeal that was filed in June 28, 2007. He explained the process that the BER has followed to get to this situation. Mr. Russell talked about an opinion that was drafted May 5 to May 23, 2008, and adopted on May 23, 2008. [Exhibit 1](#)

00:11:24 Sen. Shockley asked Mr. Russell why his decision was rendered the way it was. Mr. Russell replied that he was appointed as a public health professional. He further stated that PM10 has been around as a target for regulatory approach for ten years. He stated that five years in the future things would be more clear, but things are rapidly changing in the PM2.5 regulatory arena. He said they made the

decision to send it back to the department for a Best Available Control Technology (BACT) analysis.

- 00:14:50 Richard Opper, Director of Department of Environmental Quality (DEQ), turned the hearing over to Tom Livers, Deputy Director for DEQ.
- 00:15:28 Mr. Livers said this is an evolving area, and explained the issue is over regulated air pollutant, particularly 2.5 micron (PM2.5) or smaller air particulates. They are required by BACT to control air pollutants. Regulatory bodies are also allowed to use PM10, so there is some discretion within the regulatory framework. He informed the committee that DEQ and the Board applied BACT in different ways, subsequently the controversy arose between PM10 and PM2.5.
- 00:18:03 Dave Klomp, Bureau Chief in the Air Resources Management Bureau of the Permitting and Compliance Division of the DEQ, said the department has conducted a topdown BACT analysis of PM2.5, and the board order specifically prohibits the use of the PM10. For the last few weeks they worked with the company, SME to make sure that the analysis addressed the deficiencies so that the deficiencies are not repeated.
- 00:19:33 Mr. Klomp said the analysis was taken this last Friday, June 6, 2008. Statutorily, they have 30 days to review the board order. He said they are going through the application and have 30 days, and today is day five. He said that DEQ will not presuppose the outcome, and said the process needs to work its way out. He said they would look at all the available control technologies, but said some of the procedural steps will change. He said a draft permit will be offered for 30 days so they can hold public hearings for comment. After the 30 days, there will be a 15-day appeal period, then after 15 days, a final permit will be issued.
- 00:22:35 Sen. Shockley asked the public if they have any questions.
- 00:22:52 Ann Hedges, Montana Environmental Information Center (MEIC), and one of the plaintiffs in the case, explained the Clean Air Act and the technology that controls the changes in pollutants. She stated that BACT is in both state and federal law. A new company or state that wants to build a facility that will emit pollutants must use a BACT analysis, because every BACT analysis is done on a case-by-case analysis.
- 00:25:41 Ms. Hedges talked about the U.S. Environmental Protection Agency (EPA) and how it has dealt with PM2.5. The EPA has controlled coarse particulates for years. Then the EPA began to realize that smaller particulates were penetrating lungs and causing harm. Since 1997, the EPA stated that they would set standards for 2.5 micron particulates, however, they did not. Finally, by 2005, the EPA stated that you can rely on PM10 for making all of your BACT decisions. PM2.5 is fundamentally different than PM10. She said the EPA still hasn't come up with a solution. She read some of the BACT statute language "a new stationary source shall apply to BACT for each pollutant subject to regulation under the federal Clean Air Act." She stated that PM2.5 is certainly subject to the federal Clean Air Act, but instead of applying BACT specifically to PM2.5, the

department used PM10, and said that it was good enough. The time to say that PM10 is not good enough is now. The EPA has not come up with guidance on what states are supposed to do, but EPA has been very clear on what the states feel is necessary. She said that states can use PM2.5, and not rely on PM10. The board has been persuaded that the EPA and this administration have been dragging their feet on the Clean Air Act rules. She said that the EPA is living a fairy tale, and they need to deal with the public health issues. She said the Board had two days of hearings with experts, discovery and deposition from experts on both sides. She said that the issues are complex and weighty. The Board listened to experts from the MEIC who talked about control technologies for PM2.5. The expert from the MEIC stated that there are technologies that can control PM2.5. The Board was persuaded by the fact that it is possible to consider technologies to control PM2.5. She urged the committee members to look at the EPA's web page and look at PM2.5, and to realize that PM2.5 is a dangerous pollutant. She believes that the DEQ and the company knew that PM2.5 would be an issue. She said the consultant advised MEIC against raising the issue of PM2.5. She stated that the company consultants e-mailed back and forth for quite some time regarding PM2.5.

00:33:29 Ms. Hedges talked about procedural issues that were raised. She explained the language on injunctions for air permits. She said in the legislative process they are called stays. Prior to 2003, when an air permit was appealed, the time clock on the appeal was automatically stayed, so the 18-months the company was given would have been stayed. HB 700 changed that language so that the clock is not stayed, but rather continues to run as soon as a permit is issued. It is very difficult to get a stay on a permit, even more difficult than getting an injunction. Ms. Hedges said that HB 700 was done against MEIC's objection, and contained language that the MEIC is not happy with. However, there are companies across the state that asked the legislature for language change.

00:34:54 Ms. Hedges discussed the ability to make Montana rules more stringent than the federal guidelines. She said that right now Montana doesn't have a law more stringent than federal law. A law passed in 1995 stated that if Montana wanted to have a rule more stringent than federal law, it had to be necessary, technologically feasible and balanced economically. She said that the 75-2-207, MCA, only applies to rules and is not applicable in this case. The EPA and Montana's provisions are pretty much the same. The federal Clean Air Act allows only so much air pollution to occur in certain areas, so only a certain amount is allowed in Great Falls. She stated that the legislature currently does not require companies like this to control PM2.5, so later there will not be enough allowable pollution available for the next company that comes into Great Falls. She stated this is how the Clean Air Act works, it pushes companies to keep the air clean so that more industries can come into an area.

00:37:49 Ms. Hedges said that the BER order will not be the demise of the Highwood Generating Station, but rather financial conditions or a zoning lawsuit will probably be the reason. In fact, over 60 coal plants in the last 6 months have been defeated. The escalating costs of construction and operation for coal plants will be a much larger issue to overcome than this. She stated that this decision

from the BER is a good one for public health, but she believes that the plant has much higher hurdles to overcome.

00:39:27 Aart Dolman, Great Falls, member of Citizens for Concerned Energy, asked the committee to come to Great Falls for a public hearing.

00:44:11 Sen. Keith Bales, SD 20, said he came to testify on what he thinks is a broken system. He distributed a letter from Greg Petesch, Legal Services Office, who had responded to a request from Sen. Bales. **Exhibit 2** Sen. Bales talked about Ms. Hedge's comments and said that financing is really not the entire reason, but rather the questions that have been brought forth by the actions of the BER pertaining to the air quality permit. He said that BACT makes it impossible for SME to get a bid for the cost of a new boiler and for the filtration items to clean up the particulate matter.

00:46:57 Sen. Bales said it has been a full year since the permit was issued. He wanted to know what happens next. He stated that SME has submitted a new BACT analysis, which the DEQ is going to take another 30 days to look at, then there is a 30-day comment period, then there is an appeal period, and if there is another appeal that is another six months, so then the permit will expire. So the permit remains in limbo until it expires. During that time a company cannot get financing and cannot move forward. He felt that it was wrong to keep them waiting. He said there is a lot of stuff in the order that states that the DEQ didn't do the BACT analysis correctly. He said the BACT analysis was supposed to be on PM10, not the PM2.5. He stated that the EPA believed that PM10 should be used as a surrogate for PM2.5. In other words, PM10 is what the state should use for PM2.5. He said that Montana state law directs entities to use the EPA rules. He also stated that Montana does not have any rules in place pertaining to PM2.5. He said there is no other state in the nation that has required a BACT analysis for stand alone PM 2.5. He is worried that the regulatory legal process will deter other companies, and he wants the plant to be built. He stated "what is the message of this process to other companies that want to come into Montana—it tells them to stay out . . . don't come to Montana, we don't want your business, don't waste your time and effort." He said the plant is put together by several local cooperatives for Montanans, using Montana coal, and has strong support of the unions. He urged the committee to consider how the process has affected not only coal generation, but any other business that would require a permit from the DEQ that has to go through the BER. He thought the committee should look at what needs to be done for Montana to remain competitive in this market for the future.

00:53:13 Sen. Shockley asked Sen. Bales for clarification as to whether Sen. Bales was asking for union support for this project. Sen. Bales replied that the project already had strong union support.

00:53:30 Olaf Stimac, President of the Central Montana Labor Council, and representing the North Central Montana Building and Trades Department, said the trades are 5,000 members strong. He said they wholeheartedly support the Highwood Generating Station.

- 00:54:50 Tim Gregori, GM/CEO of Southern Montana Electric Generation (SME) and Transmission Cooperative (Southern Montana Electric G & T), stated that his company provides wholesale electric energy and related supply services to five rural electric distribution cooperatives in south central Montana. He said the energy needs of 66,000 Montanans are met through this cooperative. Sen. Shockley reminded him that the committee had already heard his report before. Sen. Shockley asked Mr. Gregori to submit the report as evidence to the committee. [Exhibit 3](#)
- 00:57:34 Mr. Gregori said that despite its many accomplishments, SMEG&T has reached a point that the delays before the BER are taking a serious toll on their ability to demonstrate project viability and to secure financing. He said it has been 13 months since the DEQ issued their permit. Since that time, the permit has remained before the review process. As a result, the financial entities view the delay as a stigma on Highwood to secure long-term financing. He stated that the process is broken. The combination of the unreasonable delays before the BER where the rules seem to change with the wind, and the fact that the process has now consumed 13 of the 18 months they have to begin construction on the project. This will mean that they have less than two months to raise funding for the project. He said that the price escalation has taken its toll.
- 01:03:42 Mr. Gregori talked about Sen. Bales comments. He said that NorthWestern customers are paying 6.1 cents per kW hour and his customers with SME pay only 4 cents per kW hour. There are no boiler makers in the United States to serve Highwood's need. In addition, the steam generator needed is only sold in Japan. When these entities submit a bid they look at the length of the process. For the company to provide a bid for the boiler it costs them around \$650,000, so they need to ensure that the process is completed in a timely fashion. He said that SME has been provided four estimates. So each time there is a delay the costs stack up. He said that SME can't give them any indication of when construction will begin and any indication of the cost validity or even what the total cost will be because it remains a perpetual process. Mr. Gregori urged committee members to put into place a system that has more predictability. He stated that the northwest reserves will run out in approximately two years. It takes five years to build a coal fired facility. A gas facility would probably take just three years to build, however the price of natural gas is much higher. Mr. Gregori asked the committee to consider the patience and dedication SMEG&T has had and remarked that the process needs to be concluded in a timely manner.
- 01:06:11 Candace Payne, Southern Montana Electric (SME), gave an overview of the Montana Constitution, Article 2, section 3. She stated that Article 2, section 3 provides for certain rights. They include among other things, the right to a clean and healthful environment and the right to pursue life's necessities. These rights were added to the constitution in the 1972 revision—both are considered fundamental rights. She said that the Montana Supreme Court has determined that a right is a fundamental right if it is set forth in the constitution's declaration of rights. The cooperative members who have worked so hard to build Highwood Generating Station are pursuing life's basic necessities by attempting to provide themselves, their families and others with an affordable source of electricity. She

talked about the BER changing the rules in the middle of the process. She stated that this has circumvented the basic constitutional right of cooperative members to pursue life's basic necessities. Article 9 of the Montana Constitution is titled "Environment and Natural Resources". Section 1 provides that the state and each person shall maintain and improve a healthful environment. Section 2 provides that the legislature shall provide for the administration and enforcement of this duty. Section 3 provides that the legislature shall provide adequate remedies for the protection of the environmental support system from the degradation and provide adequate remedies to prevent unreasonable depletion of natural resources. The constitution does not give the executive branch of government or any of its appointed boards the authority to convert the permitting requirements into a constantly changing will of the wisp concept that the BER seems to think appropriate. The Montana Constitution gives the legislature the ultimate authority to fix this problem. She asked the committee to please take whatever action is necessary to protect our other constitutional right, to pursue life's basic necessity.

01:08:43 Joe Dirkson, Director of Fergus Electric and a director at SME, stated that he wanted to explain the air quality permit and how it was issued. The SME air quality permit has had two appeals that should have been answered in a more timely manner. The CO<sub>2</sub> issue should have gone away as there are no rules and regulations that govern CO<sub>2</sub>. It should not have taken two months to get an answer from the BER. The PM<sub>2.5</sub> using PM<sub>10</sub> analysis was a way to analyze PM<sub>2.5</sub>, so the DEQ did nothing wrong at the time they issued SME's permit. This issue should have been answered within 30 to 60 days, rather than a year and two months. He stated that the problem is that the BER is making rules and decisions which they are not qualified to make. There are experts hired by the DEQ that handle all aspects of the Montana permitting process. The BER has no one qualified to look over their shoulders to recommend changes to what the DEQ has mandated. "My opinion is that the BER has been yanking our chain."

01:10:47 Todd O'Hair, with Rio Tinto Energy America, explained that Rio Tinto is a global company that mines everything from talc to diamonds across the world and is the second largest coal producer in the United States. They operate coal mines in Montana, Wyoming and Colorado. The Montana mine, Spring Creek, is the single largest producing coal mine in Montana. Last year, Rio Tinto's taxes to the State of Montana exceeded \$34 million dollars, including coal severance taxes, business equipment taxes and other related taxes. Rio Tinto Energy spent around \$52 million dollars in Montana goods and services. It is important that SME intends to purchase Montana coal and Rio Tinto Energy America intends to compete for their business. They have over 200 employees and have some of the best paying jobs in Montana. The SME project is probably the largest coal project Montana has seen since Colstrip. The length of the process and the fact that the BER had mandated a PM<sub>2.5</sub> study—from their position this is the only stand alone PM<sub>2.5</sub> study in the United States. The precedent this sets is startling. Despite rumors to the contrary of the demise of the coal industry, according to the National Energy Laboratory, which tracks the construction and permitting of coal fire generating facilities around the United States, there are twenty-eight coal firing plants in the United States. Further, six are near

construction, 13 have been permitted, and 67 are under feasibility studies. SME is not behind the times in trying to provide a reliable and cheap energy supply.

- 01:13:36 Don Allen, Western Montana Environment Trade Association (WETA), said he has attended a lot of BER meetings, and addressed several points:
- The fallout on other businesses that may come to Montana, and looking at the way DEQ is doing things, it will cost extra time, money, etc., as word of this problem spreads.
  - The board should have adopted a rule process first for the PM2.5 standard.
  - This ruling puts DEQ in a tough spot because they have to follow the law. In addition, they also have to obey the BER order. Mr. Allen asked if an order from BER could be challenged.
- 01:17:41 Harold Robbins, President of Bison Engineering, Inc., the consulting firm that did the air quality analysis on behalf of SME, said they are now doing an analysis on a PM2.5. He said it is very difficult as there are no prior standards to use. The BACT analysis involved extensive calculations and methodologies that are used to determine what would be the ambient air quality impacts from the facility on PM2.5, PM10 and all the other air pollutants. He believed that by using a conservative air quality control method, the facility will not cause or contribute to any air quality standards. He took issue with the comment that the facility would use up all the available ambient air quality in Great Falls. He stated that the statement was untrue and an exaggeration. The BER should follow federal government guidelines and the DEQ did follow federal guidelines.
- 01:22:19 Mr. Robbins stated that it is a mischaracterization that the 1997 EPA standard didn't do anything. Actually, the EPA was sued within 15 minutes of the standard and a lot of things have happened since then. The EPA has not been idle since then and has in fact revised the standard since that time, and has provided guidelines to the state. There are programs in place to resolve PM2.5 problems, but Great Falls is not one of them, as they do not have this problem.
- 01:23:17 Mr. Robbins said it is interesting to hear that apparently the plant is doomed, and indeed, if that is the case, no one will want to look at the BACT analysis anyway.
- 01:23:46 Allen See, General Manager of Tongue River Electric Cooperative in Ashland Montana, said that DEQ is a very well run organization with a staff of environmentally friendly people. He finds it reprehensible that the experts and professionals at DEQ are discounted by BER in favor of any fringe, and extreme environmentalist that MEIC can bring in front of the state. He said that "the State of Montana is closed for business until the legislature starts mandating that the processes in place are adhered to and that there is assurity for industry that if they follow the rules they can succeed."

**Questions from Committee:**

- 01:24:53 Rep. Vincent asked Ms. Hedges in her testimony if she stated that the first two attempts to stop the plant were not successful, but that the other means probably would be. Ms. Hedges responded that she did not say that. The chair asked if



she had a response. She said she did not as she did not understand the question. She stated that they had certainly sued this company, and cited lawsuits involving zoning issues. In addition, her organization appealed two issues with SME over the CO<sub>2</sub> issue and the PM2.5. She stated that the CO<sub>2</sub> issue will be taken to court.

- 01:28:53 Rep. Vincent asked Ms. Hedges if they will be appealing the process again after the current BACT analysis is finished. She stated that she will review the BACT analysis and determine if it is complete. If it is, then they will not appeal it.
- 01:30:39 Rep. Witte asked Hal Robbins about the project being on a 3-year timeline. He asked how much the PM2.5 has contributed to the delay. Hal Robbins replied that PM2.5 was the reason for the delay.
- 01:33:13 Rep. Witte asked Tom Livers why this project was given 18 months rather than the 3-year timeline. Tom Livers responded that the time is typically from one to three years for the permitting process. He stated that the company chose 18 months. Rep. Witte asked for clarification about SME requesting 18 months. Mr. Livers responded that the company requested 18 months. However, DEQ had initially offered three years to the company. Rep. Witte then asked if anyone could answer why SME chose to have an 18 month timeline instead of three years.
- 01:34:45 Kevin Mathews, an employee of Bison Engineering, explained the 3 years vs. the 18 months. He explained that a company has three years from the start of the process to begin construction. However, if the company is a major source for PSD, which this company is, then it has 18 months to start construction. If it is not a major source and is just being permitted under state rules, then it has three years. Rep. Witte asked if the plant can be built in 3 years. Mr. Mathews said if you are a minor source then you are not subject to federal PSD rules, then you have three years. However, if you are a major source you have 18 months. Rep. Witte stated that he thought the time could be extended. Mr. Mathews stated that the Director of the DEQ could extend the time.
- 01:37:13 Sen. Shockley asked Dave Klemp to clarify the issue of the timeline for the company. Dave Klemp stated that for the SME facility there is discretion on the time limitations. Prior to the submittal of the application, the department had incorporated the federal PSD program into its states' rules. The federal PSD program, at 40 CFR 52.21, is where it identifies 18 months that a project has once they receive their construction approvals to commence construction. If that was still in the rules, the DEQ would not have any discretion for a facility, such as SME, that was removed from the rules several years ago. So now the state rules are used. In subchapter 7, if the agency determines that it is appropriate to put a time frame in, which the DEQ does as a matter of practice for all permits. It can be no less than one, but no more than three years. The DEQ had started off with 36 months to commence construction, however, there was a misunderstanding with SME of the applicability of the commencement of construction rules. Bison Engineering and SME thought 40 CFR 52.21 did apply but it does not. Thus, to clear up any uncertainty, SME sent a letter asking them to change the time frame

to 18 months. There are two ways in which a company can commence construction. First, they can begin actual permanent construction on the site, for example, pouring concrete. Or they could enter into substantial contractual agreements in which the company could incur loss. There is discretion of one year to three years. Rep. Witte asked if dirt excavation constituted permanent construction on the site. Mr. Klemp stated that digging a hole is not a permanent measure, nor would they need an air quality permit to dig a hole or move dirt.

- 01:41:24 Rep. Witte asked Mr. Russell about the seven members on the BER. He stated that on the EQC, a member is allowed only three two year terms. He then asked Mr. Russell how long he has served on the BER. Mr. Russell stated that it is his third term and he did not think term limits had been set. Rep. Witte wanted to know about the other members and how long their terms had been. Mr. Russell stated that everyone else on the board was appointed by Governor Schweitzer. Rep. Witte asked if the Governor was for this project or against this project. Mr. Russell said there has been no conversation with the governor's office and that he is somewhat isolated from the governor. He defended his decisions. He remarked he has had only three conversations with previous governors since he has been on the board.
- 01:44:35 Rep. Witte again asked Mr. Russell if he knew what the Governor's position is on this. Mr. Russell stated that he has not discussed it with him and he doesn't know his decision. Therefore, he cannot make a comment.
- 01:45:28 Brian Cebull asked Mr. Livers about a reference to the statute 75-2-27, MCA, and whether or not the BER circumvented the rulemaking process by not going through PM2.5 prior to their most recent order. Mr. Livers replied he does not believe that they circumvented the process and that there are several ways that this could have been approached. One would be they could have started with PM2.5 rulemaking or they could have had a specific case in which the issue was relevant.
- 01:47:18 Mr. Cebull stated that he understands 75-2-207, MCA, to mean that the state could not set any rules that were more restrictive than the federal guidelines without a rule making process. He further stated that exceptions within the law could do it under rule making. The intent of this is to keep the state from doing exactly what it appears the BER is doing.
- 01:48:07 Mr. Cebull asked Mr. Russell what is the intent and purpose of rulemaking that was set out in statute and state rules versus federal rules. He further asked him for his opinion on how the BER acted upon this. Mr. Russell said they have rulemaking authority and that the BER hears contested cases for matters that involve the DEQ. He stated that when using the NSR manual for PSD you must use BACT. He stated again that BACT is performed on a case by case basis and it changes with the changes in technologies. The BER utilized the record that was provided by the contested case process. There may be a higher level of control strategies that could be employed on the boiler and the general emission control strategies that were put forward by SME on the Highwood generating stations.

- 01:51:48 Mr. Cebull asked Mr. Russell about the 28 coal fired plants starting in the United States. He directly asked Mr. Russell if this is the only plant in the entire United States that requires this PM2.5 analysis and why is Montana the only state requiring it. He asked, is Montana that progressive? Mr. Russell stated that he did believe that Montana is progressive. He further stated that PM2.5 is a pollutant and it is a regulated air pollutant. It has an ambient air quality standard that has been established in Montana based on the federal regulation. It is already established and it is 35 micrograms per cubic meter. If Montana is the first to do a BACT analysis then we will be moving into uncharted territory, but he stated that things change. He agrees that the ability to monitor PM2.5 may be difficult, but there are control strategies available.
- 01:54:09 Mr. Cebull had one follow up question for Mr. Russell about why all the 28 projects in the other states are not requiring the PM2.5 BACT analysis. Mr. Russell said he couldn't answer the question and that he didn't know. Mr. Cebull asked if anyone in the audience could answer the question. Ann Hedges explained that the process is complicated. There are two parts to PM2.5. One is called condensible and the other is called filterable. People in other states are doing the condensible part of the analysis. She stated that it is not uncharted territory, even though no one has done a PM2.5 analysis in total.
- 01:56:07 Rep. Vincent asked Tim Gregori about the cooperative and what is the fallout if this permit isn't done. Rep. Vincent noted that restrictions begin in July. He asked what the cost for consumers would be. Mr. Gregori said the cost will rise considerably. Power purchase agreements that are in place will carry through the third quarter of 2011, and possibly SME will obtain new contracts until 2013. However, the price of power will mirror the market, which is between \$55 a MWh -\$65 a MWh. Rep. Vincent asked for a ball park percentage increase. Mr. Gregori stated that it would increase about 60%.
- 01:57:41 Rep. Vincent asked Mr. Gregori if the BACT analysis is given within 15 days and there are not any delays, would SME be able to get financing? Mr. Gregori said he has a timeline problem. He reiterated what Mr. Klemp explained about the timeline. He stated that the soonest SME could begin construction would be September. In addition, contracts need to be in place equal to 10% of the overall cost.
- 01:59:56 Rep. Vincent asked Mr. Russell about the scheduling for meetings in July 2007 and then again in December 2007. He asked if this schedule was changed by the length of time to conduct depositions. Rep. Vincent asked why the board doesn't meet more often. Mr. Russell explained that the board meets every other month to stay within a statutory framework for adopting regulatory rules.
- 02:01:57 Rep. Vincent asked if the permit is appealed again could the board meet in an interim manner. Mr. Russell thinks the framework is in place to move forward on this, however the BER can elect not to take up a contested case because the affidavit doesn't follow the petition. Rep. Vincent asked Mr. Russell about the wording of the order and quoted "to demonstrate that in fact the most protective

and innovative" saying wouldn't this open the door for any argument. Mr. Russell did not agree with that.

02:04:35 Tom Livers interjected and clarified that the board does call contested meetings - the board can call a meeting when it is needed and does not have to wait for two months.

02:05:36 Sen. Shockley asked Mr. Russell if he agreed with the statement that the legislature passes statutes to give boards the power to write rules. Mr. Russell stated that the legislature provides the authority for boards to write rules and he believes that the statutory framework provides for that ability. Sen. Shockley asked if the board could go outside of statutes and make up rules. Mr. Russell stated that he did not believe that. Sen. Shockley then asked Mr. Russell to explain the basis of the BER's decision for the PM2.5 standing alone. Mr. Russell explained that it was a contested case based on a petition of a regulated air pollutant. (PM2.5 is a regulated air pollutant in Montana.) Sen. Shockley asked if the EPA said in their memo in 2005, ". . . states should use PM10, non-attainment measure NSR program as a surrogate to address the requirements of non-attainment major NSR for the PM2.5 NAAQS. . .by applying the PPM non-attainment measure NSR program interim period, states will effectively mitigate increases in PM2.5 emissions because PM2.5 is a subset of PM10." The EPA said in 1997 and 2005 that they don't know how to measure stand alone particles, so the BER measures 10 micron particles and extrapolates from that measurement how many 2.5 particles there are. Sen. Shockley asked what authority does the BER have to require SME to measure something the EPA says is not measurable? What is the BER authority? Mr. Russell stated that the memo is from 2005. Mr. Russell said that the EPA is aggressively working on the ability to measure PM2.5. There is a 202 revised method in place. He said since 2005 things have changed, and the people working at EPA are working on measuring standards all the time. Testing methods are out there, but are not in the federal codes. Sen. Shockley asked Mr. Russell if it is the BER position that without a rule, the board can require the entity to measure stand alone PM2.5 particles. Mr. Russell said yes that is the position.

02:13:21 Sen. Shockley read a portion of the order as follows, "do it if you can, then come back and tell us if you can't measure PM2.5". He asked Mr. Russell to clarify. Mr. Russell stated that the BER did not allow the surrogate method to be conducted. Mr. Russell stated that he has never seen the BACT analysis.

02:19:00 Sen. Shockley stated that he believed three issues are of a concern: 1) BACT analysis, 2) PM2.5, and 3) expedition. He said these are three separate issues and he asked Mr. Russell to only answer the questions pertaining to the PM2.5 issue. Mr. Russell stated that he could not separate BACT from PM2.5. He further explained why he could not separate the two issues. Sen. Shockley moved on to topdown BACT. The goal is to reduce particulates as much as possible and the department uses the Administrative Rules of Montana (ARM) to provide guidelines. The policy is to use topdown and apply it to the BACT standard. Sen. Shockley stated that he understood "topdown" to mean that entities look at all the best control technologies and then apply the one that will

get rid of the most when is it economically feasible, etc. If that doesn't work, then use a different one, then the next one, etc. The goal is to get it as clean as possible, but you never exceed the limit. Sen. Shockley asked if that in fact was a definition of "topdown". Mr. Russell agreed. The record indicates that SME did a topdown BACT analysis. The boiler that SME chose is not in question. But some on the board may state that a complete topdown BACT was not done. He stated that a membrane filter bag house on the boiler could capture a higher level. That was in fact the reason for the decision. He stated that there are other emissions control measures that may, within a BACT approach, capture fine particulate. If it gets to the point where SME can not do anything more than they did before, they may not use a surrogate method. The SME has already submitted a BACT. Sen. Shockley asked for clarification of the order. He quoted, "if you can't adequately do a BACT topdown analysis on PM2.5 than you should do a proper topdown BACT analysis on PM10." Sen. Shockley asked if BER is assuming that they may not be able to do it with PM2.5. Mr. Russell replied that the information is not in the order. Sen. Shockley proceeded to read the entire order. Mr. Russell interrupted Sen. Shockley to state that the order he was reading was a draft order. Sen. Shockley asked if the department had the final order. Sen. Shockley read the final order, "the permit number 3423-00 is remanded for a thorough topdown BACT analysis of PM2.5 of the CFB boiler. A surrogate analysis of PM2.5 is not acceptable. A topdown BACT analysis conforming to the NSR manual will be deemed sufficiently thorough." Sen. Shockley apologized for having the wrong order.

02:20:12 Sen. Shockley stated to Mr. Russell that after reading the correct order, ARM does not require a "topdown" BACT analysis, rather simply a BACT. However, since the DEQ stated that they would use "topdown" BACT application, then they failed in that endeavor. Mr. Russell stated that using a BACT approach rather than a "topdown" BACT approach does not makes any difference in the decision. However, the BACT approach may provide a little more latitude than a "topdown" approach would. Sen. Shockley asked about the timeline of SME. He thought 18 months would be a tight schedule for normal civil litigation. He didn't think the meetings scheduled in December and January were untimely, but then other hearings in February and April may be viewed by some people as slow. Mr. Russell believes that the BER can regulate PM2.5 and still open the plant. He stated that this was a weighty decision, and some scheduling problems did arise. However, the scheduling was difficult.

02:25:26 Sen. Shockley asked Dave Klemp if he agreed with the BER statement that they can impose the stand alone PM2.5 measurement standard without having a rule in place. Mr. Klemp responded that BACT is required for PM2.5. It is a regulated pollutant. The DEQ chose to use their discretion because of some of the issues that Sen. Shockley addressed. However, there is nothing in the BACT definition that requires it to be measured. He said they were confronted with a different type of BACT analysis than what they are used to doing. There are ways and the BACT definition provides for this like work practices, as BACT as opposed to specific emission limitations. The agency has never taken the position that you can not do a BACT solely because you can't measure it. The DEQ took the position that it was appropriate to use the surrogate approach for many of the

reasons that the committee has brought forward. Sen. Shockley said that the EPA specifically stated that you measure for PM2.5 using the surrogate of 10 microns. There is no rule anywhere, federal or state, that says the entity has to measure PM2.5 standing alone. Sen. Shockley asked Mr. Klemp if he believed that there needed to be a rule before there was a requirement that you can not use a surrogate. Mr. Klemp stated that there is a requirement to perform a BACT analysis on PM2.5. Sen. Shockley redirected by asking if that was using a surrogate. Mr. Klemp responded that the surrogate is provided in guidance, but it is not mandated to use a surrogate. It is mandated that the DEQ not issue a permit until the entity demonstrate compliance with their BACT requirements for PM2.5. That may be done using a surrogate or a direct PM2.5 analysis. That was the discretion the DEQ chose to make. Sen. Shockley said that he understands that PM2.5 is a regulated pollutant subject to BACT, but he reiterated his questions regarding where does it say that you can not use the surrogate. In fact, in the EPA memo it says that you should, so does the DEQ believe that the BER can require you to measure it stand alone, not using the surrogate, when no one was aware of it that you could do it or had to do it that way. The surrogate policy memo does not obligate the states to use the surrogate approach, and in fact the states are free to not use the surrogate approach if they think it is appropriate to do so. Do they have to put that in writing before they have to apply it. Mr. Klemp stated that he did not think it was in the law and that the DEQ tries to help applicants to succeed in front of the board.

02:31:10 Sen. Shockley asked Mr. Klemp if the timeline could be extended. Mr. Klemp said yes. He said that the timeline is only to keep equipment from stagnating. If the company runs the risk of losing money, then the timeline could be extended. Sen. Shockley asked if SME needs to start constructing by November and if they want to extend it past November then they need to go through the BACT process. Mr. Klemp confirmed that they have to go through the BACT process. Sen. Shockley asked how long it would take to give SME a new permit. Mr. Klemp stated that it is somewhat speculative, however, PM2.5 would be more difficult. Generally speaking he would guess that they would have anywhere from 45 to 60 days for a final permitting decision.

02:35:19 Sen. Shockley asked Ann Hedges to clarify the fact that the PM2.5 measuring technology was available, so surrogate technology to measure PM2.5 is unnecessary. He specifically asked where the PM2.5 measuring technology exists. Ms. Hedges stated that measuring and technology controls are not the same issue. The EPA has "conditional test methods" which means you can use them, however the EPA doesn't have the confidence in them like they do in test methods that are put in regulations.

02:36:54 Sen. Shockley tried to sum up that the EPA is more comfortable using a surrogate of PM10 for PM2.5 particulates and that the entity that Ms. Hedges represents, MEIC, is more comfortable using some conditional technology. Ms. Hedges believes that there are technologies available to use, like using a better bag house filter, the type of filters that are used can change the amount of particulates that are allowed through. MEIC does believe that EPA has stalled on this and that other technologies are out there to use. Ms. Hedges said In 1997

the EPA lowered the standard for PM2.5 particulates so EPA has the ability to change standards.

02:39:29 Sen. Shockley asked if there were more questions. There were none.

02:39:44 Sen. Shockley adjourned the committee at 3:40 p.m.

**Exhibit 4** A letter from Sen. Wanzenried addressing his concerns.