



ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704
HELENA, MONTANA 59620-1704
(406) 444-3742

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AGENCY OVERSIGHT SUBCOMMITTEE MINUTES

Approved July 14, 2008

Date: May 12, 2008

Room 102
Montana State Capitol Building

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.

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COMMITTEE MEMBERS PRESENT

SEN. JIM SHOCKLEY (Chairman)
REP. NORMA BIXBY
REP. SUE DICKENSON
REP. CHAS VINCENT
REP. CRAIG WITTE
MR. BRIAN CEBULL

STAFF PRESENT

TODD EVERTS, Lead Staff
CYNTHIA PETERSON, Committee Secretary

Visitors

Visitors' list ([Attachment 1](#))
Agenda ([Attachment 2](#))

COMMITTEE ACTION

- The Subcommittee adopted the minutes from the March 10, 2008, meeting.

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Jim Shockley, Chairman of the Agency Oversight Subcommittee (Subcommittee), called the meeting to order at 8:30 a.m. The secretary noted the roll ([Attachment 3](#)).

AGENDA

00:00:21 Rep. Vincent moved to adopt the minutes of March 10, 2008. The motion carried unanimously by voice vote.

BOARD OF ENVIRONMENTAL REVIEW DECISION TO REMAND HIGHWOOD GENERATION STATION AIR QUALITY PERMIT FOR FURTHER PARTICULATE ANALYSIS

BER Explanation

00:00:58 Katherine Orr, Montana Attorney General's Office and Counsel to the Board of Environmental Review (BER), addressed the contested case hearing on the Highwood Generation Station air-quality permit. Ms. Orr reported the BER will issue its decision on the air-quality permit on May 30, 2008. Ms. Orr stated the BER held a two-day hearing in January, and that there has been subsequent hearings since that time. On April 21, 2008, the BER heard arguments and voted on a motion to remand the permit for further Best Available Control Technology (BACT) analysis of a small particulate. Ms. Orr is in the process of writing the decision for the BER. Ms. Orr reiterated the BER will vote on the decision on May 30, 2008. Chairman Shockley hoped the BER Chairman would be present at the next Subcommittee meeting.

Department of Environmental Quality Perspective

00:04:03 Tom Livers, Deputy Director, Department of Environmental Quality (DEQ), acts as a liaison between the BER and the DEQ. Mr. Livers stated the Chairman would make every effort to attend the next Subcommittee meeting. Mr. Livers depicted the contested case hearing as complex and multi-faceted. The DEQ maintains the BACT analysis was done in accordance with the requirements of the law, with EPA policy and guidance, and issued within the bounds of the DEQ's discretion. Mr. Livers was uncertain until he reviews the final order, but believed the BACT analysis was used, but may not have been documented adequately. Mr. Livers maintained the DEQ made an appropriate decision. Mr.

Livers did not believe the process would have to start all over, and that the DEQ thought it would be faster to comply with the BER's decision.

Public Comment

- 00:08:03 Tim Gregori, Southern Montana Electric Generation and Transmission Cooperative (SME) submitted written testimony regarding the Highwood Generation Facility ([EXHIBIT 1](#)).
- 00:21:49 Jeff Chaffee, Bison Engineering, was previously responsible for permitting for SME and worked on the air-quality permit for the Highwood Generation Facility. Mr. Chaffee submitted and reviewed a time line for the Highwood Generation Station ([EXHIBIT 2](#)). Mr. Chaffee stated there is no urgency on the part of the BER to move the process forward, which leaves the applicant hanging.
- 00:27:45 Sen. Keith Bales, SD 20, is on the board for the Tongue River Electric Cooperative. Sen. Bales believed SME has gone through a long process to determine what pathway it should take into the future. Sen. Bales submitted a chart depicting Year When Resources Drop Below Target Capacity Margins (Committed Resources Only) ([EXHIBIT 3](#)). Sen. Bales testified that the demand for electricity in the West in 2009 will exceed the generation capacity. Sen. Bales believed what happened to SME's air-quality permit was a disgrace, and that the actions of the BER were also disgraceful. Sen. Bales agreed the DEQ followed the rules and did everything right and believed the situation could have been addressed in 90 days, but recalled the first hearing was not held for 180 days. Sen. Bales urged the Subcommittee to write a letter to the BER asking the BER to reverse their vote regarding the order to remand since the BER is acting outside of Montana law. The letter should also request the BER to extend the time back to 18 months for the plant to begin construction. Sen. Bales reiterated SME has done everything by the book. Second, Sen. Bales stated if the BER goes forward, the Subcommittee should consider a special session to address the serious breach of law and trust by the BER, and the Subcommittee should look at legislation to address tightening up time lines on appeals and consider requiring an appeal of the rule not go to the BER, but rather to district court. Sen. Bales believed the decision of whether a permit is right or wrong is a matter that should be decided by the court.
- 00:38:22 Candace Payne, Governmental Relations Specialist for SME, was passionate about the continuing change of permit requirements and stated it has been a problem for other projects such as the plants at Thompson Falls and Roundup, and an issue for anyone wanting to do business in Montana. Ms. Payne believed the constant shifting and uncertainty will have a direct impact on the Northern Cheyenne Reservation.
- 00:41:28 Don Allen, Western Environmental Trade Association (WETA), stressed the implications of waving a red flag to other businesses that may want to conduct business in Montana. Mr. Allen believed there would be far-reaching implications that would result from changing the rules in the middle of a stream. Mr. Allen urged the legislators to exert their influence.

- 00:44:49 Gary Weins, Assistant General Manager, Montana Electric Cooperatives' Association, addressed energy shortages in the western grid and stated that immediate action is need to have enough electricity in ten years. Mr. Weins believed several cooperatives will be in critical need of additional electric supply, and that the BER is creating an uncompetitive environment in Montana.
- 00:47:05 Bud Clinch, Executive Director, Montana Coal Council, thought the issue was indicative of a larger issue. Mr. Clinch explained that several potential coal project developers have moved on because of Montana's permitting process.
- 00:48:48 Keith Allen, International Brotherhood of Electrical Workers Local 233, agreed and reminded the Subcommittee that this is Montana, and Montanans do not treat their family, friends, and neighbors the way SME has been treated. Mr. Allen stated the Highwood Generation Facility needs to be built, and that SME voluntarily did everything it was supposed to do and more.
- 00:50:05 Olaf Stimak, Business Agent for Plumbers and Pipefitters 401 and President of the Central Labor Council in Central Montana, has a workforce spread out over the nation and stated those individuals would like to return to Montana to work. Mr. Stimak stated the goalpost is continually being moved.

Subcommittee Questions

- 00:51:06 Mr. Cebull addressed Mr. Livers and a comment that was made stating that the DEQ was responsible for keeping the construction deadline fixed. Mr. Cebull wanted to know the DEQ's perspective on the time line and the ramifications of moving that time line. Mr. Livers explained it was his understanding the 18 month deadline came at the request of SME. Mr. Livers did not know of any reason the DEQ would have shortened the time line, unless it was because of the critical need for power. Mr. Livers stated that to simply and unilaterally extend the permit would have been a risky and indefensible move. Mr. Livers suggested there may be financing concerns for SME until the permit is issued.
- 00:54:32 Mr. Cebull next addressed Mr. Gregori and asked what SME's options were if they received their air-quality permit within the next 30 days. Mr. Gregori addressed the three-year and 18-month issue and stated Montana does allow for a three-year permit, which is inconsistent with the Environmental Protection Agency (EPA) rules. Mr. Gregori believed that when a permit is before the BER, the deadline should toll. Mr. Gregori identified the most significant attribute of the project as the boiler, and stated financing of the boiler would not occur until a permit is issued. Mr. Gregori reminded the Subcommittee that the region is running out of energy. Mr. Gregori stated the DEQ has been very forthcoming, and that the issue is with the BER.
- 00:58:35 Mr. Cebull addressed Richard Opper, Director, DEQ, and asked what it would take for the DEQ to write a letter which would allow construction to begin while still addressing the issues. Mr. Opper was cautious and stated the DEQ has to make sure that in practice and appearance there is no predetermined outcome. Director Opper was sympathetic to SME's need to address financing.

01:00:30 Rep. Dickenson addressed Mr. Gregori and asked that given that one co-op has left SME, what percentage of the output of the Highwood Generation Facility would go to SME and what percent would be going as merchant power out of state. Mr. Gregori clarified the Yellowstone Valley Co-op had not left SME and will remain a purchasing member of SME until 2030 and has just asked to not be associated with the finances in developing the Highwood Generation Facility. Mr. Gregori responded all of the power will be used by the SME members who are willing to step forward and pay for the facility. Rep. Dickenson recalled the DEQ offered to reopen and extend the permit deadline and asked why that would not be acceptable. Mr. Gregori responded there is no assurance that if SME starts over that SME will not end up in the same position. Mr. Gregori stated his complaint is with the process. Mr. Gregori explained there is no indication there is a change in the BACT analysis and did not see any reason to review that process again. SME has spent \$18 million in the permitting stage, and Mr. Gregori believed it is time to move forward with construction since costs are escalating. Mr. Gregori was convinced the economics of the Highwood Generation Facility are even more feasible today considering the cost of energy on the market.

01:03:51 Rep. Dickenson next addressed Mr. Livers, and asked him to explain the difference between BACT and Maximum Achievable Control Technology (MACT). Mr. Livers explained BACT and MACT are two different regulatory extremes.

David Klemp, Bureau Chief, Air Resources Management Bureau Chief and past Bureau Chief for the Air Permitting Program, DEQ, stated there are significant differences in the processes and applications. BACT is made at the time of a preconstruction permit and balances the economics, technical achievability, environmental impacts, energy impacts of all control options and determines the appropriate controls or limitations for a facility. MACT applies to the operating permit and facilities as a result of the EPA listing the facility in a certain category. Mr. Kemp explained the EPA is supposed to set MACTs for all source categories. However, if EPA does not set the MACT, it is left to the state to set the MACT on a case-by-case basis. Mr. Kemp identified hazardous air pollutants as causing the need for a MACT.

01:08:04 Rep. Dickenson followed up and asked whether PM 2.5 is a hazardous substance that would require a MACT. Mr. Klemp explained PM 2.5 is not a hazardous air pollutant, but some of the constituents that make up PM 2.5 can be hazardous air pollutants. Rep. Dickenson addressed Ms. Orr and asked if the BER could require action where human health is concerned that is stricter than the federal requirement since in the Montana Constitution there is a requirement to provide citizens with a clean and helpful environment. Ms. Orr responded human health and the constitutional requirement are factors that are considered in policy making by both the DEQ and the BER. Ms. Orr stated the Montana Supreme Court has also addressed the issue. When the BER addresses public health, it can be through the rule making process or the BER can act as an impartial decision maker. When the BER is issuing a decision it must consider and incorporate applicable federal and state laws and cases. Rep. Dickenson

asked whether the BER believes there is a greater degree of responsibility because of Montana's constitutional mandate. Ms. Orr responded the BER may not make that determination because the BER may not arbitrate issues of constitutionality.

- 01:14:00 Rep. Witte addressed Mr. Chaffee and noted because Montana's constitution requires a clean and healthful environment, Montana should have a higher standard for air-quality permits than the federal government. Rep. Witte was troubled by exceeding the federal standards and asked whether there are any other states that exceed the federal standards. Mr. Chaffee responded he was not aware of any other states. Rep. Witte asked where the PM 2.5 standard came from. Mr. Chaffee responded PM 2.5 is a size cutoff based on impact of fine particles on human health. Mr. Chaffee explained the DEQ followed the federal policy and compared it to the PM 2.5 standard and still showed compliance. Rep. Witte commented that he was feeling embarrassed by the state government because of its delay in issuing the permit.
- 01:17:10 Chairman Shockley addressed Mr. Livers and asked whether there were any laws, rules, or case law that would allow a tolling of the 18-month time line. Mr. Livers responded there used to be a provision for a stay in state law, but the provision was removed in 2003. Chairman Shockley asked whether extending the time line would result in having to revisit the BACT. Mr. Livers agreed that would be the case.
- 01:18:28 Chairman Shockley addressed Ms. Orr and acknowledged the Subcommittee acted expeditiously in only allowing the BER ten days to two weeks to make its presentation, and that the Subcommittee did not give the BER Chairman an opportunity to be present. Chairman Shockley suggested the Subcommittee would like to see the final order and revisit the issue. Chairman Shockley was curious why PM 2.5 and not PM 10 was used as a surrogate. Chairman Shockley also wondered whether PM 2.5 could be measured independent of the surrogate and whether equipment is available to handle PM 2.5. Chairman Shockley also desired to discuss with the BER the fact that one year of the 18-month time line has now passed. Ms. Orr commented the Chairman of the BER would provide a more detailed response and in contested cases, it is the parties that determine the course of events, and the parties conducted discovery, retained experts, and submitted cross-motions for summary judgment. Chairman Shockley noted the BER had two months to write the order. Ms. Orr agreed and stated the matters are complicated, and that BER orders are not routinely challenged, and the order has to be supported by the record and the law, which takes time. Additionally, all of the decision makers of the BER who were present at the contested case hearing must be present to approve the language in the final order and one of those members is currently unavailable. Chairman Shockley emphasized the BER members would have to make an effort to meet. Chairman Shockley cited § 75-2-203(4) which allows the BER to set more stringent standards and asked whether the BER or the DEQ has a rule that addresses that particular statute. Chairman Shockley suggested there may need to be a special meeting of the Subcommittee to address the BER issues.

- 01:25:13 Mr. Livers addressed the issue of the BER rules being more stringent than the federal standards, and stated when the BER makes decisions, it conducts an analysis of how the rule stacks up against federal requirements. Mr. Livers also recalled the BER is looking at the use of the surrogate and the BACT. Mr. Livers believed that the technology is now mature enough to allow for a PM 2.5 analysis, which would then become the BACT.
- 01:28:05 Sen. Shockley commented that particles of 2.5 have to be limited to a certain level, but the question is how to analyze. Mr. Livers agreed.

CONTROLLED GROUND WATER FEE DISCUSSION

DNRC Staff Presentation on the Fee Structure

- 01:30:14 John Tubbs, Water Resources Division, Department of Natural Resources and Conservation, distributed the rule regarding Controlled Groundwater Area Fees (**EXHIBIT 4**). Mr. Tubbs explained the relatively small component of the fee in comparison to the land value. Mr. Tubbs depicted § 85-2-506, MCA, as an old law that is not used frequently. DNRC has denied several petitioned areas in the past few years because the information provided by petitioners was insufficient. Mr. Tubbs explained that the DNRC's HB 203 (2007) was intended to develop a rulemaking procedure to simplify the process, but the bill died. The DNRC will be proposing new legislation in 2009, and Mr. Tubbs commented that out-of-date statutes cannot be fixed through rules.

Affected Persons' Concerns

- 01:37:37 Vivian Drake directed the Subcommittee to comments from Shana Floyd (**EXHIBIT 5**). Ms. Drake respectfully disagreed with Mr. Tubbs that the legislation was outdated. Ms. Drake explained how the North Hills Groundwater Area Petitioners attempted to get the DNRC's attention and their efforts to protect their ground water. Ms. Drake explained the North Hills petitioners have currently expended over \$100,000 to protect their ground water. Ms. Drake was expressly concerned with Section V, which requires Petitioners to bear the costs. Ms. Drake explained that petitioners must pay for the costs of the hearing, conducting investigations/studies, and making records. Ms. Drake suggested the Subcommittee was the only group that could provide oversight to the DNRC and object to the rule and the fee increase. Ms. Drake stated she listened to the past hearing on the rule, and that the rule was not adequately explained to the Subcommittee. Ms. Drake believed the rule would add another burden on Montana citizens. Ms. Drake urged the Subcommittee to make the DNRC responsive to citizens.

Subcommittee Questions

- 01:44:21 Sen. Shockley believed if a group became a controlled ground water area, it would cost a substantial amount of state money to do the investigation. Ms. Drake agreed, but that the law charges the DNRC, not citizens, with the responsibility.

- 01:45:16 Mary Clark stated she did not understand the reason for the fee increase for controlled water protection. Ms. Clark thought the fee increase would be a hardship on Montana citizens. Ms. Clark also thought the whole basin and the cumulative effects should be considered.
- 01:47:37 Rep. Vincent asked Mr. Tubbs how many petitions the DNRC receives a year. Mr. Tubbs stated there have been 22 petitions over the course of the statute and an average of one or two a year. Rep. Vincent asked whether the majority of petitions were for closed basins. Mr. Tubbs responded the petitions are for both closed and open basins. Rep. Vincent asked whether the developer had to provide the DNRC with a hydrological assessment. Mr. Tubbs responded only if the developer intends on being served by a public water supply system, and that water rights for individual wells are not reviewed by the DNRC. Rep. Vincent was curious about how the studies required by HB 831 regarding the drilling of exempt wells. Mr. Tubbs responded the case studies are in progress and are very focused on specific developments. The Montana Bureau of Mines and Geology (MBMG) tracks well logs. Additionally, the Water Policy Interim Committee (WPIC) is very focused on the issue of exempt wells. Rep. Vincent recalled a reference to changing surface water rights to ground water rights and asked whether that option was being used. Mr. Tubbs responded of the 14 applications, every one proposes using mitigation to offset depletion to surface water.
- 01:53:08 Rep. Dickenson recalled hearing heart-wrenching testimony from citizens who were trying to protect their ground water and that it was very costly, and that it would cost less to the DNRC if it were to assume the responsibility. Rep. Dickenson asked if it were DNRC's responsibility, whether the cost would be less. Mr. Tubbs responded it would depend on the petition and the area. Mr. Tubbs suggested keeping an eye out for the WPIC's proposed legislation which would let MBMG conduct more studies and suggested the legislation could be tied to controlled ground water legislation. Mr. Tubbs clarified the \$1.7 million revenue was a result of DNRC increasing several fees and offered to provide a breakdown.

ASBESTOS FEES DISCUSSION

DEQ Staff Presentation on the Fee Structure

- 01:58:13 John Podolinsky discussed the ten percent project fee increase and submitted written testimony ([EXHIBIT 6](#)).

Asbestos Contractors Concerns

- 02:01:37 Dean Hochhalter, Helena, commented as both a contractor/small business owner and a taxpayer. Mr. Hochhalter believed the fee is burdensome on small businesses and everyone in the state.
- 02:04:35 Milan Plachy, Stevensville, agreed there has to be a fee, but took exception to a 10 percent fee from the gross of a project, which results from a private contract

between himself and another party. Mr. Plachy reminded the Subcommittee that the 10 percent is in addition to other taxes, and that expenses get passed on to customers and hinder projects. Mr. Plachy suggested the fee increase could ultimately increase exposure because general contractors may not dispose of asbestos adequately if it is too expensive. Mr. Plachy complimented the DEQ and its asbestos control program.

02:08:10 Doug Tisdell, representing the Asbestos Consultant Contractors' Association of Montana, discussed a potential conflict of interest in § 75-2-503 (h) - (k), MCA. Mr. Tisdell stated 10 percent across the board is not commensurate with the cost of the permitting process. Mr. Tisdell has been involved in permitting with many other states, and pointed out that other states have a flat fee based upon the square footage rather than a flat percent. Mr. Tisdell believed the increased costs are discouraging contractors from doing work properly and the more inconvenient and expensive the process, the more asbestos will be dumped in landfills or disposed of inappropriately.

Subcommittee Questions

02:13:29 Rep. Witte asked Mr. Podolinsky how the percentage fee impacted his budget. Mr. Podolinsky could not say how much of an impact the 10 percent fee would have on his budget since other fees also cause an impact. Rep. Witte thought it would be important to know how much of an impact the 10 percent would have.

02:15:58 Rep. Vincent wanted to know where the 10 percent number came from. Mr. Podolinsky explained other fee increases apply to annual permits and other fees were also increased; however, audit fees were decreased. Mr. Podolinsky explained the 10 percent increase was needed to balance the budget. Rep. Vincent cited the goal as ensuring the safe disbursement of asbestos material; however, contractors are saying it is having the opposite effect. Mr. Podolinsky stated he would look at the issue.

02:18:04 Mr. Cebull addressed the earlier comment expressing concern about making private contracts public and whether the information would become public. Mr. Podolinsky agreed the information would become public.

02:18:35 Chairman Shockley recalled costs were up 13 percent from 2004, but that revenue is up more than 13 percent. Judy Hanson, Administrator of the Permitting and Compliance Division, DEQ, explained the program is attempting to raise the revenue to cover the appropriation and is not raising the appropriation or the budget. Ms. Hanson addressed Chairman Shockley's question and stated that the federal funds from the Environmental Protection Agency are declining, so the DEQ has to look at increasing fees to offset costs. Chairman Shockley noted information contained in the Notice of Public Hearing on Proposed Amendment (Asbestos) which states if the DEQ did not get the fee increase, the deficit in 2008 would be \$35,000 and would be \$346,000 in 2011. Chairman Shockley wondered why. Ms. Hanson explained the \$346,000 deficit would not be an annual deficit but would be cumulative. Ms. Hanson added there are two people in permitting that are dedicated at 100 percent, as well as

administrative staff, and that the DEQ also pays for enforcement staff and legal staff. Chairman Shockley wondered why the square footage method was not used.

02:23:14 Mr. Podolinsky explained they have always used a number based on the contract amount. Chairman Shockley did not like the fact that someone could look at a private contract. Mr. Podolinsky explained the DEQ has looked at a number of states and how revenue is collected. Mr. Podolinsky was unaware of whether there were any other states that used the same method of calculation as Montana.

02:24:42 Ed Thamke, Waste and Underground Tank Management, DEQ, added the DEQ supports the new asbestos trade association and that the 10 percent increase was chosen because that is what was needed to fund the program and, at the same time, other costs were lowered. Mr. Thamke assured the Subcommittee that the DEQ would do what is fair and equitable, and that the advisory committee would be addressing the issue.

PUBLIC COMMENT

There was no public comment offered.

ADJOURN

02:26:39 Chairman Shockley adjourned the meeting at 10:58 a.m.