

The Chairman of the Board of Environmental Review (BER) and representatives of the Department of Environmental Quality (DEQ) testified at the Oversight Subcommittee's hearing on the issue of the Highwood Power Plant on June 10, 2008. Both entities provided information at the hearing and both agreed that there was currently no prohibition in the Federal or the Montana Clean Air Act, the Code of Federal Regulations, or the Administrative Rules of Montana, on using PM-10 as a surrogate in a PM2.5 best available control technology analysis. In addition, both the BER chairman and DEQ staff provided information that they know of no other states or permitting authorities that have disallowed the use of PM10 as a surrogate. Other testimony indicated that there currently is no federally adopted reference test method to measure PM2.5 emissions.

The law is clear that an agency rule must be based on authority provided by a statute and that the rules to implement the intent of the statute are in place before the substance of the rule is imposed on the public. The BER's decision to not allow DEQ to use its discretion to use PM10 as a surrogate for PM2.5, which was imposed on the Highwood Power Plant's air quality permit application, was not reduced to a rule at the time of the application, and has not been done so to date. However, it seems that the statutes do provide the BER the authority to promulgate such a rule, if so desired by the BER.

The Environmental Quality Council, in its advisory role, suggests that both the BER and the DEQ obey the law and reduce any changes to the method for measuring 2.5 micron particles to a rule. This letter makes takes no position on the Highwood Plant, nor the need for the rule. However, if the technology is available, and the new rule is needed, the DEQ has the responsibility to enact the appropriate rule.