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July 18, 2008

Mr. Joseph W. Russell, Chairman
Board of Environmental Review
1520 East Sixth Avenue
PO Box 200901
Helena, Montana 59620-0901

Dear Chairman Russell and the Board of Environmental Review:

The Chairman of the Board of Environmental Review (BER) and representatives of the Department of Environmental Quality (DEQ) testified at the Environmental Quality Council Agency Oversight Subcommittee's hearing on the issue of the proposed 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 (BACT) 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 prohibit DEQ from using PM10 as a surrogate for PM 2.5 should be followed up with clarifying administrative rules. It seems that the statutes provide the BER the authority to promologate these administrative rules.

In its advisory oversight role, the Environmental Quality Council recommends that, because the BER acted to preclude the use of the PM10 surrogate for the PM 2.5 BACT analysis, the BER, with the assistance of the DEQ, develop administrative rules. This letter takes no position on the proposed Highwood Power Plant.

The Council appreciates the BER's attention regarding this matter.

Sincerely,

by JWR


Senator Dave Wanzenried
Chairman, Environmental Quality Council

cc: Mr. Richard Opper, Director of the Department of Environmental Quality