



ENVIRONMENTAL QUALITY COUNCIL

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

AGENCY OVERSIGHT SUBCOMMITTEE MINUTES

Date Approved:¹

July 14, 2008

Room 102
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.

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

¹These minutes were completed after the interim recessed and were not approved by the committee.

COMMITTEE MEMBERS ABSENT/EXCUSED

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 voted to submit Sen. Shockley's proposed letter concerning the BER's decision regarding the Highwood Generation Facility to the EQC for review.
- The Subcommittee adopted the minutes, as amended, from the May 12, 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 9:03 a.m. The secretary noted the roll ([Attachment 3](#)).

AGENDA

00:00:31 Mr. Everts provided background information on the purpose of the Subcommittee, and its duties regarding environmental compliance and enforcement.

SUBCOMMITTEE DISCUSSION OF THE BOARD OF ENVIRONMENTAL REVIEW (BER) DECISION TO REMAND HIGHWOOD GENERATION STATION AIR QUALITY PERMIT FOR FURTHER PARTICULATE ANALYSIS

Subcommittee Discussion

00:02:16 Rep. Dickenson requested reactions from other Subcommittee members regarding the BER decision and stated she did not want the Subcommittee's action to be obstructive, so construction of the plant can move forward.

00:03:51 Rep. Witte expressed his shock over the hearing regarding the particulate matter and the 2.5 standard, which is not being used by any other states. Rep. Witte wanted to know what standard is being used for other plants being constructed, and recalled the standard was higher. Rep. Witte was also surprised at the power the BER has and how a committee of seven people appointed by the Governor could shut down a project such as the Highwood Generation Station.

00:06:09 Chairman Shockley reminded the Subcommittee that the issue is with the procedure for granting permits and not about the Highwood Generation Station in particular.

00:06:20 Rep. Vincent stated he hoped to expedite the process, and that he would like to see a procedure in Montana that lures, rather than prohibits, development.

00:07:23 Mr. Everts offered to obtain information for Rep. Witte regarding whether other states had pursued a Best Available Control Technology (BACT) top-down approach regarding the 2.5 particulate matter standard.

00:07:59 Rep. Witte recalled no other state in the nation is considering the 2.5 limit and sought to know how many similar facilities were being pursued in other states. Rep. Witte requested to know the location of the other facilities.

00:08:52 Sen. Shockley recalled that other facilities use the surrogate method.

00:09:41 Rep. Vincent requested a brief update from the BER.

00:10:36 Tom Livers, Deputy Director, Department of Environmental Quality (DEQ), explained an appeal is not planned on the particulate matter decision. The BER issued summary judgment on the CO₂ issue, and that decision was appealed to district court.

00:11:41 Chairman Shockley wanted to know how Southern Montana Electric (SME) would proceed. Mr. Livers stated the DEQ is meeting with SME, and SME is moving forward. Chairman Shockley emphasized the Subcommittee's decisions are not about the Highwood plant and cautioned the Subcommittee should not insert itself between the BER and SME. Chairman Shockley summarized the questions as being: (1) whether the rules were in place when the permit was examined by the DEQ; (2) whether the permit met the rules that were in place; and (3) whether, when the BER reviewed the actions of DEQ, the BER was imposing and enforcing rules already in place. Chairman Shockley noted rules have to be supported by statute. Chairman Shockley stated there was some doubt whether the appropriate technology was available to measure for 2.5.

00:16:00 Rep. Vincent believed rules should not be changed as the permitting process moves forward because it is devastating for Montana's economic development. Rep. Vincent saw a need to look at corrective legislation.

00:16:42 Rep. Witte urged the Subcommittee to address the jaded permitting process and the fact that the BER changed the rules and remanded the air quality permit previously issued by the DEQ. Rep. Witte believed the issue should be addressed by the Subcommittee.

00:17:57 Chairman Shockley believed the law should be enforced and respected, but thought the Subcommittee and the Environmental Quality Council (EQC) are not in the chain of command to address a BER ruling. Chairman Shockley did not see a place in the system for the EQC to interject itself into the process.

Chairman Shockley believed the Subcommittee could address the procedure and the process and not address a particular case.

- 00:19:56 Rep. Witte envisioned a need for accountability in government and asked to whom the DEQ is accountable. Chairman Shockley responded the DEQ's decisions are appealable to the district court.
- 00:20:41 Rep. Dickenson addressed David Klemp, Bureau Chief, Air Resources Management Bureau, DEQ, and stated she viewed the decision as being based on BACT in such a way that the decision was based on a different standard than when the permit was granted. Rep. Dickenson asked whether technology is now available to measure and capture. Mr. Klemp responded control technology is available to control smaller particulate, but measurement techniques have not been finalized. Rep. Dickenson asked whether the 2.5 could be measured and used as opposed to the surrogate of 10. Mr. Klemp explained the use of conditional test methods, and stated the question relates to the accuracy of the number.
- 00:23:49 Rep. Dickenson commented the BER is there for everyone, including industry. Rep. Dickenson cited the purpose of the BER as protection of public health. Rep. Dickenson agreed with Chairman Shockley that the Subcommittee is not in the chain of command.
- 00:27:12 Rep. Vincent stated there is no precedent set for the BER's decision, and the technology is not coming to fruition; in the meantime, utility bills are rising. Rep. Vincent disagreed that the BER's decision is the best consideration for public health and safety since many people will be adversely affected. Rep. Vincent believed the BER knew there was no precedent for the technology.
- 00:29:00 Rep. Witte noted the Columbia Falls Aluminum Company layoffs because of the price of electricity. Rep. Witte pointed out the BER was established by the Legislature, and that the BER is accountable to the Legislature and the Governor. In turn, legislators are accountable to the public.
- 00:31:18 Chairman Shockley clarified the Governor cannot fire a board that disagrees with him. Chairman Shockley emphasized the Subcommittee is not the Legislature, and that the issue could be addressed in the 2009 legislative session. Chairman Shockley viewed the issue before the Subcommittee as whether the laws and rules were properly followed, not whether the Highwood Generation Station was a good idea. Chairman Shockley asked Mr. Kemp whether a 2.5 micron particle could be measured and whether the technology was available. Mr. Klemp explained that there are various methods for measuring, but there is no specific approved reference method.

Public Comment

- 00:33:59 Mr. Klemp provided an update on the Highwood Generation Station and explained Bison Engineering submitted a PM 2.5 BACT analysis. Mr. Klemp

stated the DEQ hopes to have a complete BACT analysis, so the permit can move to the public comment portion of the process.

- 00:35:32 Jeff Chaffee, Bison Engineering, explained SME started working on the air quality permit in 2004, and the permit was submitted by 2005. SME's concern is with the BER second guessing the DEQ's decision. Mr. Chaffee stated the technology is available but identified a lack of reference methods. Mr. Chaffee depicted the process as very challenging.
- 00:39:53 Mr. Livers saw a need to clarify the process and stated the BER made a policy call when it disallowed use of the surrogate. Mr. Livers thought additional rulemaking could address the regulatory uncertainty issue.
- 00:41:40 Anne Hedges, Montana Environmental Information Center, believed the BER issue would come up during the next legislative session, and stated there is a lack of information about how the BER operates and who they serve. Ms. Hedges suggested the majority of appeals and issues are from industry. Ms. Hedges emphasized it is less expensive and faster to go through the administrative process rather than appealing directly to district court. Ms. Hedges noted not a single rule has changed and the question was whether there had been a lack of consideration given to the existing rules. Ms. Hedges agreed there is a need to continually improve on what has been done in the past. Ms. Hedges suggested a need to look at other states that are issuing permits for the same type of facility and how long those permitting and appeal processes take.
- 00:46:29 Don Allen, WETA, asked the Subcommittee to look at why appeals are coming from industry. Mr. Allen noted the BER members are political appointments. Mr. Allen envisioned a need to ensure there are statutes to back up the rules.
- 00:47:57 Chairman Shockley submitted a proposed letter to be sent by the EQC ([Exhibit 1](#)).
- 00:50:11 Rep. Dickenson commented the DEQ believed the issue should be put into a formal rule and questioned whether the proposed letter is necessary.
- 00:50:56 Rep. Witte recalled Ms. Hedge's suggestion that the DEQ may have misinterpreted the rule of measuring particulates at 2.5. Mr. Livers explained 2.5 is a pollutant and is subject to regulation and is subject to BACT analysis in a permitting process. The Environmental Protection Agency (EPA) has a policy which allows for use of a surrogate. Mr. Livers summarized the question as at what point is enough information available to do a direct analysis.
- 00:53:56 Rep. Bixby did not believe the letter was needed since the DEQ is working out SME's concerns and issues and will address the problem during the next Legislative Session.
- 00:54:43 Chairman Shockley clarified the letter is not a criticism of the DEQ and that the problem lies with the BER. Chairman Shockley cited a need to let the full EQC vote on the issue.

00:56:19 Rep. Witte addressed the last paragraph which states the DEQ and the BER should obey the law. Rep. Witte did not support changing the standard to a 2.5 study. Chairman Shockley clarified the 2.5 measurement is always there and letter says if the technology is available and if there is a need to directly measure, then there should be a rule.

Subcommittee Action, if any

00:58:32 Rep. Bixby moved to submit Sen. Shockley's proposed letter concerning the 2.5 particulate to the EQC for review. The motion carried 4-2 by voice vote with Rep. Bixby and Rep. Dickenson voting no, and Mr. Cebull voting yes by proxy.

DEPARTMENT OF AGRICULTURE COMPLIANCE AND ENFORCEMENT REPORT

00:59:52 Dan Sullivan, Bureau Chief, Agricultural Sciences Division, Department of Agriculture, submitted and reviewed "Report to Environmental Quality Council on Pesticide and Ground Water Enforcement Programs, Pursuant to Title 75, Chapter 1, Part 3, Section 314" ([Exhibit 2](#)).

Questions from the Subcommittee

01:06:34 Chairman Shockley thought the issue seemed more like it should fall under the purview of the Department of Natural Resources and Conservation (DNRC). Mr. Sullivan clarified the program looks specifically for pesticides and chemicals used in agriculture. Chairman Shockley asked whether the Department of Agriculture coordinates with the DNRC, and Mr Sullivan agreed there is a collaborative process with both the DNRC and the DEQ.

Public Comment

There was no public comment.

DEPARTMENT OF ENVIRONMENTAL QUALITY COMPLIANCE AND ENFORCEMENT REPORT

01:08:48 Judy Hanson, Administrator, Permitting and Compliance, DEQ, submitted "Report to the Montana Environmental Quality Council, Environmental Enforcement and Compliance, FY 2006 - FY 2007" ([Exhibit 3](#)).

Questions from the Subcommittee

01:14:34 Rep. Dickenson wondered why the complete assessment for oil and gas development had not occurred. Mr. Klemp stated the DEQ has been struggling with oil and gas development in Montana due to lack of staffing. Mr. Klemp stated there is a need to register approximately 1,200-1,500 facilities. Rep. Dickenson asked about the purpose of the registration, and Mr. Klemp explained the registration is similar to a permit by rule and is needed to comply with the rule. Rep. Dickenson asked whether there was a problem with newly permitted power plants being in violation of their air quality permits. Mr. Klemp stated it is difficult

to project what the emissions from a facility should be before the facility is constructed and in operation. Rep. Dickenson asked Mr. Klemp whether he finds facilities that were less than honest when they did their preconstruction permitting, i.e., Thompson River Co-Gen. Mr. Klemp could not speak to whether parties were dishonest and noted sometimes the actual situation on the ground is different than initially thought.

- 01:20:46 Rep. Dickenson addressed Warren McCullough, Environmental Management Bureau, DEQ, and noted the leakage of the wet process ash disposal system from Colstrip and the reference to the two litigation actions. Rep. Dickenson asked whether the DEQ is involved in the lawsuits. Mr. McCullough clarified the DEQ is not involved in the lawsuits.
- 01:22:18 Rep. Dickenson addressed John Arrigo, Administrator, Enforcement Division, DEQ, and expressed concern about the high instances of cancer in north central Montana and asked about sites in north central Montana that were not addressed because they were not of maximum concern. Mr. Arrigo could not readily address the question, but offered to provide the information.
- 01:24:34 Rep. Dickenson noted the large number of enforcement actions taken under the public supplies law and the failure to provide public notification of the violations. Rep. Dickenson wondered how that procedure might be corrected. Jon Dilliard, DEQ, responded smaller systems or mom and pop operations sometimes do not sample in a timely manner. Mr. Dilliard identified continued education as key to compliance. Rep. Dickenson recalled the EPA believes more people are needed to conduct inspections of public water supplies, and asked Mr. Dilliard whether he had any comments or suggestions on how Montana might protect public health better. Mr. Dilliard admitted the DEQ has struggled and enforcement is a continuing effort, and the DEQ is attempting to prioritize work and establish a priority list, so it can focus on issues with the most risk to public health.
- 01:28:41 Rep. Witte was curious why the Subcommittee was receiving all the agency environmental enforcement and compliance reports. Mr. Everts cited § 75-1-314, MCA, which requires the reports be given to the EQC. Rep. Witte asked whether there was something in the reports citing the reporting requirement. Mr. Everts agreed that information could be contained in the report. Rep. Witte was also interested in knowing what the cost of the reporting requirements is to the taxpayers of the state. Mr. Everts agreed that information could be provided. Rep. Witte noted the presence of information in the reports that indicate there were no violations so no action was taken. Rep. Witte was concerned about taxpayers having to pay for that information.
- 01:33:05 Rep. Witte addressed the Clean Air Act, and noted the DEQ participated in Earth Day events. Mr. Klemp could not readily address the Earth Day events and offered to obtain specific information and report back to Rep. Witte. Rep. Witte specifically wanted to know what events were participated in, where the events were located, and the cost to Montana taxpayers.

- 01:34:32 Rep. Witte noted the number of registered facilities went from 0 to 550. Mr. Klemp responded there was a January 2006 deadline placed in statute to register facilities.
- 01:35:35 Rep. Witte addressed Mr. McCullough and asked about the complaint about stolen dynamite on page 10. Mr. McCullough explained there was a theft of explosives from a smaller quarry and offered to obtain the specifics.
- 01:37:44 Mr. Arrigo addressed the dynamite complaint and explained the complaint was referred to the appropriate area of law enforcement and was not handled by the DEQ.
- 01:38:31 Rep. Witte requested that the full EQC receive a list of the 209 listed sites referred to on page 12. Mr. Everts offered to obtain the updated list and added the EQC would be receiving a performance report on the Comprehensive Environmental Cleanup and Responsibility Act (CERCA) sites.
- 01:40:40 Rep. Witte next addressed page 19, Inactive Mines Sites, and wondered about the reference to conducting one inspection per quarter for both inactive and active mines. Specifically, Rep. Witte wondered why there would be a need to inspect inactive mines and asked about the cost of performing the inspections. Ms. Hanson responded the inspection of inactive mines is required and funded by federal regulation. Neil Harrington, Chief, Industrial and Energy Minerals Bureau, DEQ, agreed with Ms. Hanson that it was a federal requirement to conduct a complete inspection of all inactive mines once per quarter.
- 01:44:16 Rep. Witte addressed the Hazardous Waste Act and noted the extreme issues with dust in Kalispell and that used oil cannot be placed on public property, but can be placed on private property by the owners. Ed Thamke, DEQ, explained the used oil exemption could apply to an individual's private driveway; however, used oil could not be applied to county roads. Rep. Witte explained Kalispell has dust police to keep the speed limit down to help eliminate dust. Rep. Witte saw a need for legislation. Mr. Thamke responded there were alternative means for dust suppression available, and the DEQ would be glad to assist. Rep. Witte was curious who at the DEQ has the authorization to suspend a penalty. Mr. Arrigo addressed the issue and explained the Enforcement Bureau has the authority to suspend a penalty, and the suspension, or partial suspension, is usually dependent upon compliance.
- 01:50:07 Rep. Witte noted the report indicated there was one infectious waste treatment facility in Montana and asked where that facility was located. Mr. Thamke responded the facility is located in Butte.
- 01:50:45 Rep. Witte noted that the report included the Methamphetamine Treatment Act, and indicated 112 properties have not been cleaned up. Mr. Thamke explained the DEQ is working with property owners and pointed out the statute is voluntary. Mr. Thamke explained the cost to remediate a property is between \$1,500 and \$2,500.

01:52:14 Rep. Vincent noted the frustration the DEQ is experience in gathering information to effectuate cleanup. Rep. Vincent wondered what information was needed that the DEQ is not receiving and asked how the Subcommittee could help. Mr. Thamke identified poor communication with law enforcement which is supposed to provide the information to the DEQ when drug busts are conducted at inhabitable properties. Mr. Thamke explained measures that are currently being taken to improve communication efforts with law enforcement and state agencies.

01:54:16 Chairman Shockley noted gravel pit permits have been in the headlines and asked whether DEQ is under staffed. Ms. Hanson agreed the DEQ is under staffed and added the Legislative Audit Division had identified business process improvements.

01:55:37 Mr. Arrigo provided a statistical update regarding DEQ enforcement actions.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION COMPLIANCE AND ENFORCEMENT REPORT

02:01:02 Mary Sexton, Director, DNRC, submitted "Report to the Environmental Quality Council: Natural Resources and Environmental Compliance and Enforcement" ([Exhibit 4](#)).

Questions from the Subcommittee

02:16:21 Rep. Vincent congratulated Director Sexton and the DNRC Forestry Division on the results of the Best Management Practices (BMP) audit. Rep. Vincent addressed the forest land audits and asked whether the DNRC had considered providing a fire assessment for properties that participated in the Non-Industrial Private Forest Landowner (NIPFL) portion of the audit. Director Sexton stated she would present Rep. Vincent's idea to the committee. Rep. Vincent asked for the amount of current level of FEMA funding for map delineation. Laurence Siroky responded the funding is approximately \$250,000 per year, and DNRC is doing two to three counties per year. Rep. Vincent asked Mr. Siroky if the funding would only allow for two to three counties to be completed per year. Mr. Siroky agreed, but added it would depend on the size of the county. Rep. Vincent asked whether the counties are prioritized by flood history. Mr. Siroky identified population, insurance claims, and potential damage as prioritization factors. Rep. Vincent asked whether funds would be removed as the benchmarks are met. Mr. Siroky responded 72 percent is the benchmark and then FEMA moves on to another state. Mr. Siroky stated federal legislation is considered for a map maintenance program.

02:21:29 Chairman Shockley requested information regarding the Canyon Creek Dam. Mr. Siroky explained the Canyon Creek Dam is a small dam in the wilderness and is being repaired. Mr. Siroky reported the water users are paying for the maintenance and received a grant/loan from the DNRC. Chairman Shockley noted there was a controversy among the water users. Mr. Siroky was not certain how the issues were resolved.

02:23:10 Chairman Shockley asked whether well logs are used to chart the underground aquifers. Director Sexton explained well logs are utilized for ground water assessments and that well logs are a tool used by the Montana Bureau of Mines and Geology (MBMG) and DNRC hydrologists. Chairman Shockley reiterated Rep. Vincent's comments on the proficiency of the DNRC Forestry Division.

Public Comment

There was no public comment.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA AND THAT IS WITHIN THE JURISDICTION OF THE EQC AGENCY OVERSIGHT SUBCOMMITTEE

02:24:58 Wally Congdon addressed the public comment for the Trust Lands Conservation Study document. Mr. Congdon testified the Musselshell Planning Project did not believe the EQC's findings answered the questions that were asked. Mr. Congdon stated the document does not clearly confront the question of how easements will ensure that multiple use management occurs. Mr. Congdon emphasized the importance of including language stating how the easement will ensure multiple use management. Mr. Congdon also identified a need to address the existing incentive for landowners to subdivide land that lies against state land. Mr. Congdon suggested there is no guarantee an easement will consist of multiple use.

02:32:24 Commissioner Bernie Lucas, Meagher County, testified that Meagher County is experiencing the closure of large areas to access, and that state lands often lie within that area. Mr. Lucas believed less public access and less land for agriculture is becoming a problem. Commissioner Lucas acknowledged money to manage resources is increasingly difficult to obtain. Commissioner Lucas also stated a conservation easement is not worth as much if the state retains the mineral rights.

02:37:34 Chairman Shockley commented zoning would be needed to control development of the area around a conservation easement. Mr. Congdon agreed zoning would be a tool, but also suggested requiring a subdivision to implement a weed management plan and an agricultural management plan. Mr. Congdon suggested the way to regulate is with subdivision regulations. Chairman Shockley noted the mineral estate on state lands cannot be alienated. Mr. Congdon agreed, but noted under the existing federal rule, if you donate it, you cannot mine it. Therefore, the question becomes how to ensure the state can keep its mineral rights.

STAFF REPORTS - Mr. Everts

Approval of Minutes

02:42:02 Rep. Witte moved to correct the May meeting minutes on the last paragraph of page 4, and striking the statement that "Mr. Gregori explained the most

significant attribute of the project; however, the boiler is not issue." The motion to adopt the minutes as amended carried unanimously by voice vote.

ADJOURN

There being no further business to come before the Subcommittee, the meeting was adjourned.