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May 21, 2008

TO: EQC Agency Oversight Subcommittee Members

FR: Senator Dave Wanzenried, EQC Chair

RE: EQC Agency Oversight Subcommittee and Full EQC Authority Regarding the Highwood Generating Station Contested Case Proceeding before the Board of Environmental Review (BER)

It is my understanding that the EQC Agency Oversight Subcommittee has tentatively scheduled a meeting for June 10, 2008, to review the BER's contested case order regarding the adequacy of the Department of Environmental Quality's Highwood Generating Station's air quality permit best available technology analysis. I want to strongly re-emphasize what Mr. Everts stated during the May 11th EQC meeting regarding the limited nature of the Subcommittee's and full EQC's authority over a contested case proceeding.

A contested case proceeding is a quasi-judicial administrative activity that determines the legal rights, duties, or privileges of a party as required by law. The Legislature has given the BER the statutory duty of conducting contested case proceedings under the air quality permitting laws and the Montana Administrative Procedure Act. Once the BER issues its order in the Highwood Generating Station contested case proceeding, the administrative record is closed. The parties have the option of proceeding to District Court and appealing the BER order.

Unlike the administrative rulemaking process, the EQC is extremely limited in its ability to intervene in a contested case process. The EQC clearly has the authority to request that representatives of the BER come before the Council to explain the BER's decision. The Council can also hear public comment from the parties involved in the contested case proceeding. The Council can also hear from the general public regarding the matter. Outside of those actions, the full EQC has the following options to:

- ✓ Take no action regarding the matter.
- ✓ Vote to write a letter to the BER expressing the full EQC's opinion regarding the BER process and the BER order. This letter would not be a part of the contested case administrative record.

- ✓ Vote to take some sort of prospective action involving legislation or requesting a special legislative session.

Obviously, any recommendation adopted by the Agency Oversight Subcommittee at its June meeting will have to be presented to the full EQC at its July meeting. I appreciate all of the Subcommittee's work on this important matter. I feel that it is important for me to clarify the EQC's existing authority because the EQC has not previously used its oversight authority with respect to a contested case proceeding.

cc: EQC members that are not on the EQC Agency Oversight Subcommittee

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