ENVIRONMENTAL QUALITY COUNCIL

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ENVIRONMENTAL QUALITY COUNCIL
Agency Oversight/MEPA Subcommittee
May 8, 2002
FINAL MINUTES

COUNCIL MEMBERS PRESENT

REP. CHRISTOPHER HARRIS, Chair
REP. DEBBY BARRETT
MR. HOWARD STRAUSE

STAFF MEMBERS PRESENT

Mr. Larry Mitchell

AGENDA

Attachment 1

VISITORS' LIST

Attachment 2

SUBCOMMITTEE ACTION

- Approved February minutes.
- The Subcommittee will send a letter to the agencies regarding the timing of the compliance and enforcement reporting.
- Recommend to the full EQC that they send a letter to the Governor asking her to direct the DEQ and the DPHHS to work together on cleanup standards for meth labs.
- Recommend that the full EQC adopt and recommend to the Legislature a bill clarifying the oversight authority of the EQC for boards and commissions.
- Recommend that the full EQC send a letter to the FWP Commission regarding the use of the MAPA exception.

I CALL TO ORDER

The February minutes were approved by consensus.

II SEVERED MINERAL RIGHTS - LANDOWNER NOTICE AND PROCESS PANEL

• Overview - State and Federal Mineral Rights

Monte Mason, Department of Natural Resources and Conservation (DNRC), said that his bureau deals with state-owned trust lands. There is approximately 6 million acres of mineral ownership in school trust lands throughout the state, which is about 6% of the total in the state of Montana. Last year the DNRC generated almost $21 million from the minerals alone. This was from 2,700 leases. The ownership records that they manage are kept and maintained by the DNRC. Anyone interested in finding the ownership of minerals or surface on state-owned land can call the DNRC, which can provide the information. The process is relatively straightforward with state-owned lands.

Federal lands have a similar process. There is a public land section in Billings where people can call to find out ownership and lease status.

The DNRC does manage some split estates. The mineral owner has the right to have access to and develop their minerals. This has been upheld in the Montana Supreme Court in cases where there have been attempts to deny a mineral owner reasonable access to his property. There is a balance to that. There is the Surface Owner Damage and Disruption Act, which says that the mineral owner has the right to make reasonable use of their minerals, but they also have an obligation to work with the surface owner and compensate them for any damages to the surface estate. The DNRC incorporates that provision in the leases that they issue.

• Records Search

Sen. Tom Keating, Billings, (by conference call) said that the Bureau of Land Management (BLM) in Billings has plats that shows the minerals that they own. Sometimes they have reserved gold and iron, other times they have reserved oil and gas, and sometimes they have reserved all minerals. They have about 30 million acres of minerals and lands in Montana. The largest fee mineral owner in the state is Burlington Resources. Another large private mineral owner is Ag America in Spokane. They acquired their minerals through mortgage foreclosures on ranches during the 1930's and 1940's. When they sold the land back they would reserve half of the minerals.

There are a lot of fee land minerals that have been reserved over the years. The feds would reserve the minerals in the land patents when they issued them. This started in the early 1900's. Severed minerals were also disbursed through families through probates. There is a difference between a royalty reservation and a mineral reservation. The mineral reservation carries with it the right to lease and receive rentals and a share of the royalties. A royalty reservation provides that the royalty owner only shares in the proceeds in the sale of production of the mineral. That generally is how severed minerals are passed around. All of the ownership information is in the county records. The surface owner can go to the courthouse to look up the book and page to find out about the mineral rights. However, most people are not trained to do that.

• Title Transaction and Guarantees

Russ Gowen, Helena Abstract and Title Company, is here to answer questions.

• Clerk and Recorder Perspective

Bonnie Ramey, Jefferson County, presented supplemental information, **EXHIBIT 1**. The county clerk and recorder's office keeps track of the land transactions and the ownership of the lands, any divisions that occur, subdivisions, and certificates of survey, so that they can see the ownership line going throughout the history. They do not keep track of the mineral interests. The reason for that is that they are not taxed. About 70% of Jefferson County came from a patented mining claim.

Included in EXHIBIT 1 is a realty transfer certificate. Realty transfers address water rights. Those are kept track of by the DNRC. However, on each land transaction they have to report whether the water rights are going with the land, whether there are any, if it has public water and sewer, or if the water rights are transferring, to whom. There is a form that must be sent to DNRC to transfer those water rights.

• Questions

REP. BARRETT asked if it was correct that the county doesn't keep track of the mineral rights because they are not taxed. **Ms. Ramey** said that was correct. **REP. BARRETT** asked if they are taxed in any other state. **Ms. Ramey** didn't know. **Sen. Keating** said that in North Dakota they had a law that if the minerals laid dormant for 20 years the surface owner could claim it, but that law has been challenged and is not workable. The same law in Ohio has been accepted in the courts and is workable there. In Louisiana there is a law that the minerals are restored to the surface owner after 50 years if they are not producing. He doesn't know of any state that primarily taxes minerals because there is no way of valuing those minerals for tax purposes.

REP. HARRIS asked if there are taxes on the severance of any mineral other than coal. **Sen. Keating** said that there is the oil and gas severance tax, the local government severance tax on gas, oil and coal, and hard rock minerals are taxed. Those are taxed on the basis of the proceeds from the sale of the minerals. It is a tax on royalty, not on minerals in place.

MR. STRAUSE asked how the state's severed interests came about. **Mr. Mason** said that the majority of the lands that the state was originally granted from the federal government were whole estates that included both surface and minerals. Over the years there have been sales of land. Many years ago the state loaned money for mortgages for farmers and ranchers, but when the depression hit, the state foreclosed on many of those. There was a process done to get the land back out into private ownership, but in any of those situations the state is prohibited by federal law from selling title to the mineral estate. This is based on the fact that you don't know the value of the mineral until it is developed, so you can't be assured of getting fair market value. Over the years the state has accumulated mineral estates where the surface estate has changed hands over time. **MR. STRAUSE** asked if there are any policy differences in the process that is followed when the DNRC wants to lease out mineral rights for development purposes where the state actually holds both the minerals and the surface rights. **Mr. Mason** said that they are aware at the time that they issue a lease whether or not the state owns the surface because they need to know whether the DNRC has to deal with their own lessee or another surface owner. In terms of issuing the lease, there is not a significant difference. **MR. STRAUSE** asked if most of the state lands have some lease interest that has been given to someone else for development purposes. **Mr. Mason** said that is true for surface estate. For the mineral estate there is a very small percentage that has been leased and is being developed.

MR. STRAUSE asked how the mineral leases came about. **Mr. Mason** said that they let the mineral exploration industry tell them what areas they are interested in when they nominate tracts for lease. When the industry does that, then the DNRC begins to review and consider issuing leases. If the DNRC goes forward with the leases, it is the State Land Board that actually votes on the leases. **MR. STRAUSE** asked if the state has the mineral rights on a piece of property where the state is not the surface owner, what steps does the DNRC take to notify the land owner. **Mr. Mason** said that they do not notify the surface owner. In the lease there is a provision that if actual activity is ever proposed, the lessee is required to contact the surface owner, show the surface owner what they plan to do and mitigate the surface owner's concerns, and compensate the surface owner for any damage to his property. The decision on whether or not to issue any leases on the mineral property rests with the Land Board.
MR. STRAUSE asked if, when an operator proposes some sort of lease, is there any public notice given. **Mr. Mason** said that they don't individually notify the surface owner, but there is a public process in place where notices are put on the web site or local newspapers, or a mailing list. **MR. STRAUSE** asked if the DNRC has done something to be more sensitive in the situation where they may be dealing with a state park. **Mr. Mason** said that the DNRC has recently traded some mineral estates and worked themselves out of Makoshika State Park. **Sen. Keating** said that the lease has no impact on the surface owner at the time of the lease. The surface owner is only affected by the lease when the lessee intends to do something on the surface. By law the lessee is required to notify the surface owner and receive a written permit for activity. They are required to work with the surface owner on arranging access to the specific location. The surface owner has some say in the operations that occur on the surface.

MR. STRAUSE asked if there is any MEPA compliance when the lease is granted. **Mr. Mason** said that state lands are subject to MEPA. The DNRC does a pre-lease MEPA document, which results in the stipulations to the lease. This is just the first step of the process. The issuance of the lease has no direct impact on the land. Every time that a land disturbance is contemplated, the lessee has to request a review of that and that triggers the appropriate MEPA review on that proposed activity. **Sen. Keating** said that the federal leases also have those stipulations depending on the area. **MR. STRAUSE** asked about the situation where the federal government had granted leases without doing a NEPA process. Once the leases were granted the federal government took the position that they couldn't stop development, they could only put possible mitigating measures on the right to drill. **Sen. Keating** said that the argument comes down to the interpretation of the National Environmental Protection Act (NEPA). The BLM has set certain requirements for the lands that they handle; the Forest Service has certain requirements for their lands. Presumably, those policies were created through their interpretation of NEPA. **MR. STRAUSE** asked about the situation where someone doesn't know that they have an interest in the mineral rights. **Sen. Keating** said that he has found people where the minerals were reserved in 1936. In one case there were 85 heirs in a half section. It takes a lot of time, but you can locate the heirs. If they come across some that they are not able to locate, they can go to the District Court and county to establish a trust and obtain a lease from the trust. The proceeds from the lease go into the trust.

MR. STRAUSE asked what can be done to get a chain of ownership redeveloped for that mineral right. **Mr. Gowen** said that the probate process is most often used. There is a quiet title action process where an attorney gets a disclosure of all of the heirs and the attorney will then start an action through the District Court to try and notify the heirs. If no one shows up, the

person starting the action gets a decree of quiet title where the state gives the title to the person who started the action. **MR. STRAUSE** asked if title policies do not ensure mineral rights.

Mr. Gowen said that water and mineral rights are exempt from the title policy. **MR. STRAUSE** asked if there is any way to buy a title for those. **Mr. Gowen** said that there is. A mineral guarantee sets out all the reservations that are found in the chain of title. Generally, the person that orders it usually takes it to an attorney who will then give an opinion based on the findings in the report. There is also a product where the title company can insure the ownership of the mineral interest. These are expensive and time consuming.

MR. STRAUSE asked if there is any way to post the information on the internet that the DNRC has about the mineral rights that the state owns. **Mr. Mason** said that they are working on that. Currently the way to do that is to call the DNRC on the telephone. The current database system is not set up to where they can set up an internet access to it. They are working to get switched over to a newer database that will have some web capability. **MR. STRAUSE** said that it seems that the state could do more regarding the description of the property in the public notice. **Mr. Mason** said that they do provide a map that shows the general area.

REP. HARRIS asked what the policy basis is for the federal prohibition on the selling of Montana's mineral rights. **Mr. Mason** said that the source is federal statute. It is picked up in the enabling act. The concept behind it is a recognition that mineral estates are speculative in value. In its undeveloped state the value is unknown. **Sen. Keating** said that they are school trust lands and the idea was that the revenues from those lands were to be used for education. The production from the mineral leases is an asset and the sale of the asset is required to go into the school trust fund. **REP. HARRIS** asked if any version of the laws that are attempting to reunite the surface estate with the mineral estate would make sense for Montana. **Sen. Keating** said that the laws have been tried. At one time there was an attempt to tax severed minerals. The constitution says that all taxes have to be based on market value, so a flat tax is unconstitutional. A measure to reunite the estates lost by one vote in the Senate on the basis that it is still private property and the state shouldn't enact laws that would take someone's private property rights away from them without cause. In a lot of cases in Montana, the owners at one time actually sold the minerals for a price. There was a mineral deed written up. They set out the percentage of the minerals that are conveyed. **REP. HARRIS** asked whether the recent amendments to MEPA in any way restrict the DNRC's ability to impose stipulations. **Mr. Mason** said that it doesn't because they are not a regulatory entity. **REP. HARRIS** asked if the board has inherent authority to impose those stipulations and doesn't need MEPA as a source of authority. **Mr. Mason** said that is correct.

REP. HARRIS asked if Montana law currently provides adequate notice to a perspective buyer about what the mineral rights are for any given piece of property that might be purchased. **Mr. Gowen** said that he was not aware that there was any notice. **Ms. Ramey** said that as far as she knew, there was no notice given. Landowners will come to her asking about the mineral rights and she will have to refer them back to their title company. **REP. HARRIS** asked if it was fair to say that if a prospective buyer asked for that information, it couldn't be provided. **Ms. Ramey** said that the information can be provided, but the buyer would have to go through every deed to find that information. To do this thoroughly, some background in land search is needed. **REP. HARRIS** asked if the title company could provide that information. **Mr. Gowen** said that they could and they do it all the time. **REP. HARRIS** asked what fee was charged for

that. **Mr. Gowen** said that his hourly fee on a mineral report is $126. **REP. HARRIS** asked how much information would the buyer be given. **Mr. Gowen** said that he would give them either a report or a policy showing all the reservations on the property starting with the patent.

REP. HARRIS asked if any of the panel members are troubled that the information would require an expert to spend a fair amount of time in order to obtain that information.
Sen. Keating said that the abstractor can give a verbatim on all of the reservations that are of record, but the interpretation of those reservations is what is complicated. It usually takes a legal interpretation. The surface owner is not impacted by severed mineral rights unless there is some mineral development operation to take place on the land. There is sufficient law requiring notice for any of those developments. There is also a requirement for just compensation for the use of the surface for that development. The requirements for reclamation for the surface disturbance are also in place. He doesn't know that many land owners are concerned about the severed interests for the most part. He doesn't see any reason for the government to spend time and money setting up a system that would notify a buyer that there is a severed mineral interest.

REP. HARRIS asked if Ms. Ramey would like to have the ability to answer questions on mineral rights for people who come to her office. **Ms. Ramey** said that if somebody wants to research it, they can help them locate all of the deeds, but you would have to have some legal advise to interpret those findings. She doesn't want to be put in the position of telling someone that they have or don't have the mineral rights. She is not an attorney.

MR. STRAUSE said that if people are buying a small piece of recreational property, they are interested in the mineral rights. **Sen. Keating** said that those things do get emotional. They should ask at the time that they purchase the property if there are severed mineral interests. In a lot of cases, the federal government owns the minerals. The operator is not anxious to disturb the surface; they will have to pay mitigation and for reclamation. The land owner has to be compensated for any damage. Every situation is different.

- ***Public Comments***

Steve Gilbert, Northern Plains Resource Council (NPRC), said that we can't dismiss the notion that there are problems associated with the landowner who may have 30,000 acres. Farmers and ranchers in southeast Montana are busy with operations and don't have time to do the research that is necessary to determine who may own their minerals. There is a lawsuit against the BLM for failure to perform NEPA prior to leasing hundreds of thousands of acres with thousands of leases, and not one surface owner was notified. Part of the process in the revelation for these people is that they find out that someone else has purchased the lease and they weren't notified. The law doesn't require notification, but it is critical to these people that they are given every opportunity to understand. The owners should be given the same opportunity to lease the minerals that the industry is given. There are no rights to the landowner through a stipulation or restriction placed through either NEPA or MEPA. The lessee takes precedence. The issue would be cleaner if there was a process in place where a surface owner knew ahead of time.

Gail Abercrombie, Montana Petroleum Association, said that, regarding the notification, in Colorado they have enacted some legislation where the buyer in the realty transaction has to sign off on a disclaimer that says that they know they are not buying the mineral rights. They are

looking at an awareness process, but not having to do a title search. In Colorado, they have enacted legislation that the mineral owner has to be notified of surface activities because of the issue of developing and putting in place permanent structures that may impact what is able to be done with the minerals. There are two sides to this.

MS. PAGE, EQC, said that it was stated a couple times that there shouldn't be much of a problem because the land owner can be compensated for damages done. What rights does that landowner have; is compensation for damages defined? Also, is reclamation defined? What right does the land owner have to actually negotiate with the company?

REP. BARRETT said that she has some concern that people think that the BLM, DNRC, or the state should take it upon themselves to notify everyone. She thinks that it would be cost prohibitive.

MR. STRAUSE asked, in Montana, how would we ever have a situation where the surface owner would have to notify the mineral owner when most surface owners don't know who the mineral owner is. **Ms. Abercrombie** said that she could research that and let them know what Colorado is doing.

MR. STRAUSE asked about notifying the surface owner of a potential lease. The response was given that it is not just the mineral rights that can have a bunch of different owners. The same problem can be found on the surface. In many cases they would have to go to the quiet title action and get the surface straightened out as well. **Mr. Mason** said that they have a process that makes the information about DNRC's activities easily available to anyone. It is out there for people who are interested. At that point, there is no specific action proposed for development. **MR. STRAUSE** asked if the surface owner could bid on the lease. **Mr. Mason** said that they can do that now. **MR. STRAUSE** said that since they have to notify the surface owner once there is activity on the ground, why not back up one step and know who they are when the leases are made. **Mr. Mason** said that they have issued nearly 35,000 oil and gas leases on state land, but less than 500 currently have activity on them. **MR. STRAUSE** said that if there is a diligence requirement to explore, once they lease the property, something will have to be done to find out what is underneath it. **Mr. Mason** said that diligence is an implied covenant of oil and gas leases. The standard is the reasonable and prudent operator standard. If nobody is drilling wells on the surrounding lands, a lease can't be canceled for not drilling on state land. Just because you own the mineral estate, doesn't mean that there is anything there that is commercially viable.

Sen. Keating said that regarding the proposal for requiring notice of the surface owner when there is a mineral lease, state law would only apply to state lands. The federal lands would be exempt. On the fee lands, if you are going to require a company to notify the surface owner that they are going to lease the minerals, this may be something that the state shouldn't be involved in. Surrounding the state lands are fee lands. Generally people who are interested in leasing state lands have already leased the adjoining fee lands. There is a statute that requires that the operator and the surface owner agree on the settlement for any damages to the surface. If they can't agree, it can go to District Court. He thinks it would be a waste of time and money to try and notify everybody that there is a lease that is going to happen.

REP. HARRIS asked how feasible it would be to notify the surface owners of a lease.

Ms. Ramey said that it would not be difficult. Whether they would have to do it on patented land claims, they might have 64 or more owners for one piece of land, so it could be very costly. If it could be done in the newspaper or legal paper of the county, that could be done easily. **REP. HARRIS** asked how often there are that many owners. **Ms. Ramey** said that in Jefferson County there are about 4,000 mining claims. There are at least 40% that have more than 1 owner. **REP. HARRIS** asked if it would be possible to put all this information on the internet to make it public. **Ms. Ramey** said that not every county has access to the internet at this time. **Mr. Gowen** said that it would be quite costly for the county to undertake that. Most of the counties are struggling for money as it is.

Mr. Gowen said that Montana works under the reservation system. If a deed to the property is given without specifically reserving the mineral rights, they transfer to the new owners.

III MEPA COST AND FEE STRUCTURE - PRIVATE APPLICATION PERSPECTIVE

• *Mike Stahly - Cenex Harvest States*

Mike Stahly, Cenex Harvest States, said that the main project he wants to talk about was a 77 mile replacement on their refined products pipeline. They were experiencing some corrosion on that line and decided to replace it rather than to continue to maintain it. It was decided early on that an environmental assessment (EA) was the appropriate level of review. That was in 1997. The EA took about 13 months to complete; it was a 300 page document.

The Department of Environmental Quality (DEQ) advised them early on that the DEQ didn't have the resources to produce the level of MEPA documentation in the time frame for the project, so they advised the company to contract a consultant to prepare it. This was done. The DEQ also requested that the company enter into a fee agreement with the DEQ to pay their fees. The DEQ's MEPA regulations prohibit assessment of fees for an EA by the agency. The DEQ was predicting fees of $34,000. Under the consultant process, the company was not under any written agreement with the DEQ, but they did have a contract with the consultant. The consultant's proposal was about $66,000. The original time frames showed the EA being produced within 5 months. It ended up taking 13 months and costing $99,000 for the consultant. There were additional internal costs and costs of other consultants and engineers to help provide information. Those cost were between $100,000 and $150,000. The total cost was approximately $250,000 for the project. The total cost was near the statutory limit for an EIS for a project of this size.

• *Doug Parker - ASARCO*

Doug Parker, ASARCO, said that he was involved with the proposed Rock Creek Mine project. This was a mine project located in Sanders County. He referred to a map and project history, **EXHIBIT 2**. The mine is expected to employ 350 people and last for 30 years. The original discovery of the ore was in the 1960's and 1970's. In 1987 ASARCO submitted a comprehensive plan of operations to the Forest Service and the state of Montana. In 1989, DEQ determined that the permit application was complete and the formal MEPA process for an EIS began at that point. The draft EIS was released in 1995. Upon review of the draft the Forest Service and the state determined that there needed to be a supplemental draft with some changes in the design primarily of the tailings impoundment and water treatment facilities. It took 3 years to complete the supplemental draft EIS. In 1998 the supplemental draft was

released to the public. In 1999, ASARCO sold the Troy Mine and the Rock Creek project to Sterling Mining Company. In 2001, the Forest Service and the state issued a final EIS on Sterling's Rock Creek Mine and started the process of the actual issuance of permits.

The MEPA and the NEPA requirements were handled under a Memorandum of Understanding (MOU) between the Forest Service and the state of Montana. The state of Idaho also had some involvement. The project development costs are near $18 million. About $9 million went into exploration, drilling, land acquisition, and land holding costs. The other $9 million is associated with preparation of the permit application and the MEPA documents. Fees paid to the state of Montana for the MEPA analysis were approximately $2 million by ASARCO. Since 1999, the Sterling Mining Company has added about $500,000. There have also been some direct payments to the Forest Service. In addition to that, there were costs of $1 million to the company associated directly with requests by the agencies for additional analysis or engineering work. Montana DEQ reports that of the $2.5 million that was funneled directly through them, about $1.8 million went to the contractor producing the EIS and various subcontractors; $700,000 went to DEQ staff costs.

Not being able to manage the time, schedule, or funding associated with the EIS projects is a major issue for the companies. The companies feel that by not having control over the costs, the costs become excessive and schedules get extended. This is a disincentive to produce projects like that in Montana. Industry would like to have more input and influence over selection of contractors used by the state.

- ***Terry Webster - Continental Energy Services***

Terry Webster, Continental Energy Services (CES), said that the Continental Energy Project in Butte is a 500 megawatt, gas-fired electric generating facility. It will cost about $350 million to complete this project. They spent $700,000 to $800,000 collecting all the data that the DEQ needed. At that point the DEQ said that the data was complete. The next step was to write the EIS. CES entered into an agreement that they would agree to pay for someone to be contracted to write the MEPA document. He doesn't think that should change. If the DEQ had the ability to charge the company to collect the data and then to hire whoever the DEQ wanted to at whatever price they wanted, the companies would have no control. The companies need to keep some control of the price and the time frames. They had a negotiated price of $250,000 with a firm to write the document. In the end it was closer to $350,000. Much of the extra cost was caused by a lack of communication between the people writing the document and the DEQ. If the company had more control over that process, that could have been avoided. Without some oversight, it would have been even worse. The company was the last to find out things about the permit, or when they owed more money. It took 10 months to get this done. The total cost was about $1.2 million. A smaller project couldn't afford to pay these fees. The DEQ needs someone that will speak for the applicant.

- ***Bruce Gilbert - Stillwater Mining***

Bruce Gilbert, Stillwater Mining Company, said that they have gone through 7 major MEPA reviews. Under a Memorandum of Agreement (MOA) developed for hard rock mining, the developer is required to pay all associated costs incurred by agencies to conduct the MEPA analysis. These costs include a third party EIS contractor, DEQ oversight, travel and per diem for agency personnel, all costs associated with public scoping, all costs associated with change

in scope, all costs associated with a supplemental EIS, additional baseline information, printing and distribution of the draft and final EIS. An MOA allows the developer and the applicant to sit down and structure the process. It is reasonable to assume that permit monitoring and compliance monitoring is a function that should be funded out of the general fund since economic development in the form of an extended tax base is in the best interest of the state and the people of Montana. The public has a vested interest in the permit and the MEPA permitting process. Although many may consider these expenses part of the cost of doing business, it should also be recognized that economic development and the revenues that it generates are in the best interest of the state of Montana. This is a public policy issue as well as a monetary issue. It needs to be addressed by the Legislature. The MEPA fees for a large mining operation are small in comparison to the exploration costs, the environmental baseline acquisition, the preliminary engineering, and the generation of a plan of operations. The time delays are significant.

What is the solution? In the case of a large and complex project, an MOA may be the appropriate funding measure. Another thing to look at is tax crediting. The template for this process already exists in the Hard Rock Economic Impact Act. Under this, the developer would pay for MEPA expenses by prepaying taxes into the general fund, which are then converted into tax credits. Tax crediting would only be eligible against tax obligations of the project under construction, not other projects that the developer may have in the state. The state would not be required to credit back a tax refund larger than the amount that the applicant was required to pay. Should the permit be denied or the development not go into operation, the developer would not be entitled to tax credits. From an agency perspective, this process would provide a definable process for assessing funds for MEPA reviews through general fund appropriations. The process would assure the public that the process is not being leveraged due to money constraints. Since the fees are prepaid taxes, the current years budget is not impacted and future budgets can be adjusted during the budget approval process to account for tax credits. These tax credits could actually stimulate economic growth by showing the industry that the state of Montana is serious about economic development.

Another solution would be to have some kind of advocacy for the applicant working at the state government. Another solution would be to allow the applicant to produce the MEPA document and then reimburse the agency costs associated with the document review and coordination for public participation.

For supplemental information see **EXHIBIT 2A.**

MR. STRAUSE asked if the pipeline was reviewed under NEPA or just MEPA. **Mr. Stahly** said that it was under MEPA. **MR. STRAUSE** asked how the NEPA process is paid for. **Mr. Stahly** said that the state collects fees based on the size of the project and the number of outfalls. Further response was given that the federal agencies have their own team members involved and basically they divide up the responsibilities amongst those agencies. In general, the federal agencies have equivalent people at the table involved in all the meetings. They pay their own costs. In some cases companies have agreements with federal agencies to reimburse their costs.

MR. STRAUSE asked, when there is a contractor involved, is he doing work for MEPA, NEPA, or both. The response was given that the contractor was doing work for both. **MR. STRAUSE** asked how we determine the amount that is chargeable to MEPA as opposed to NEPA. The

response was given that they don't make an attempt to do that. **MR. STRAUSE** asked if the work to be done is duplicative, why does the state want to be involved in that part of the process. The response was given that if the state wasn't involved, we wouldn't be getting the analysis done and the projects wouldn't go forward. If it was left to federal agencies to do those, in general they would not be able to meet the time requirements in the state law. **Mr. Stahly** said that regarding an earlier answer, in both cases for his company, there were federal agencies at the table. They were exclusively Montana projects, but after an interagency meeting or two early on, a lead agency is selected and that is where most of the communication is occurring. The federal agencies are reviewing and eventually sign off on a MEPA document. Further response was given that the federal government gives the state money to do the permitting for water and air. The state then also collects fees to do those federal mandated programs that they have taken over. **MR. STRAUSE** asked if the public confidence in the process would be diminished if the public knew that the permittee was in charge of doing all of the MEPA work. **Mr. Parker** said that it would depend on who the public is. Ultimately it is the agencies that sign off on the document. It is their document. **MR. STRAUSE** asked, other than the company choosing the contractor, could the communication problem be solved in some other method. **Mr. Parker** said that we need to find some way to improve the input process. **Mr. Gilbert** said that it is a perception. The agencies still have control. The state controls the final content of the document and is responsible for approving the document.

REP. HARRIS asked if you could eliminate the time delays in the project for more money, would it be an acceptable trade-off. The response was given that it would be an important trade-off for industry. The problem is that the schedules are not met. It is a contract with no guarantees from the state's side. **Mr. Stahly** said that time is money. It depends on how much time and how much money. **Mr. Webster** said that time is money, but it doesn't do you any good if you get a poor product and have to do it all again. **Mr. Gilbert** said that time is money. It is a trade-off. You still have to be involved in the MOA process and making decisions on how far the analysis goes. Timing for most of the major projects is as critical as the money.
REP. HARRIS asked to what extent the DEQ staff turnover has contributed to the delays in the MEPA process. **Mr. Stahly** said that it didn't contribute very much in their case. What did cause some delays was a landowner getting involved with the consultant as well as the agency.
Mr. Parker said that there had been a lot of change in the personnel, but he didn't feel that it was critical in terms of the timing. **Mr. Webster** said that in their case they started with a lot of new people. Communication wise, it may have been a problem. The new people didn't know who to talk to. **Mr. Gilbert** said that turnover affects the consistency. It impacts the process, but not greatly. **REP. HARRIS** asked how Montana compares to other states in negotiation of the fee process. The response was given that in other states, most of the other states don't have a cost recovery program set up as thoroughly as Montana. **Mr. Gilbert** said that in 1987 he felt that it was significantly harder to go through the process in Montana. **REP. HARRIS** asked if any of the delays had been caused by environmental groups. **Mr. Parker** said that there were a number of issues on the Rock Creek project raised by environmental groups which have lead to timely reassessment on some redesign. There has been an impact. **Mr. Stahly** said that there were possibly some, but they were minor when compared to the other delays. **Mr. Webster** said that there are some appeals that slow the process down. **Mr. Gilbert** said that it depends on the document. The applicant has no control over that. What we need to do is build defensible documents. **REP. HARRIS** asked if either the EA or EIS resulted in actual improvements to the project. **Mr. Parker** said that some of the issues raised through the permit process and environmental review process have resulted in improvements in design and operation that have

both environmental benefits and long term benefits to the company. **Mr. Stahly** said that the pipelines are highly regulated in terms of engineering standards and design. The only issue there would be associated with digging a trench. **Mr. Webster** said that it helped environmentally. It raised issues that they were then able to deal with. **Mr. Gilbert** said yes. Sometimes things are brought to the attention of the developer during the process that can be either from an environmental or engineering perspective. They have made lots of changes in regards to issues that were raised during the MEPA process.

MR. STRAUSE asked if keeping the fee schedule as it is, but anything that is charged above that fee schedule could then be considered a prepaid tax credit would be a viable compromise. **Mr. Gilbert** said that the biggest part of the process is getting people comfortable with the fact that the projects are actually prepaying their own way. Once developed the revenues actually pay for the process. It would make the process better. It is a radical concept, but it has advantages to everybody. He would be willing to look at something like that.

- ***Public Comment***

John Wilson, Montana Trout Unlimited, said that recently they had lots of experience with Continental Energy and Stillwater Mining. There is somewhat of a third wheel here. The DEQ is doing the analysis, the company is trying to get their permit and do their own engineering, and the good neighbor agreement is outside of that parameter, but still connected. They have found that if the conservation organizations can get to the table with a good analysis, if you can then sit down with the company to figure out a mitigation, and then bring that back into the document, we are shortening the process. It has worked. There may be ways to remove the contentious side by not just doing the document and then having it appealed. Regarding a pre tax credit, the burden should be on the people proposing the change. Putting that into the general fund doesn't seem a very good idea.

REP. HARRIS asked for Mr. Wilson's reaction to having an advocate for the industry in the DEQ. **Mr. Wilson** said that it is a good idea, but the industry could share that same person with the conservation community. The problem is a lack of communication throughout the entire process. He would be in favor of that.

REP. BARRETT asked if conservation is part of the process, would that group help out with the funding of that advocate. **Mr. Wilson** said that the people he represents don't get a financial benefit from environmental protection. There is a potential that they would help fund the advocate.

Mr. Gilbert said that his proposal would be to tax credit or reimburse through tax credits the actual MEPA fees. He doesn't think that we are talking about a real impact on the budget.

IV MEPA PUBLIC PARTICIPATION BROCHURE

MR. MITCHELL said that one of the work plan elements that was decided on was that the EQC would attempt to produce some sort of public participation brochure for use by the agencies. He referred to **EXHIBITS 3 and 4**. Exhibit 3 is a more detailed explanation of what MEPA is and how to participate. Exhibit 4 is written more in a first person manner from the point of view of an agency that is holding a scoping meeting. The tone is lighter.

MR. STRAUSE said that he likes the tone of Exhibit 4 better. He likes the emphasis on public participation and how to make your comments count. That is the way we should be going with this. He didn't see an example of a comment that is expertise based to let the public know that if they have a specific expertise in an area, how they should apply it to the project. Right now the comments in the draft are more general and could be refined a little more. He thinks that both drafts should be put out to the agencies to get input.

REP. HARRIS said that both drafts should go out. He liked both of the drafts. There is significantly more information in Exhibit 3. He is wondering if there might be a compromise in which the longer version could be posted on the internet, but the shorter version could be printed. The fact that there is some overlap wouldn't be a problem.

John Wilson, Montana Trout Unlimited, said that he likes the shorter version, but neither version speaks to the purpose of MEPA. We do MEPA to look at what the impacts of any particular proposal would be on the right to a clean and healthful environment.

MR. MITCHELL said that there is a Montana Supreme Court decision that pointed out that MEPA came out before the constitution. He wanted to put that in there, but it is not quite right. There is a purpose and policy section. Part 1 of MEPA is very thorough in addressing what the purpose of MEPA is. The problem is condensing it.

REP. BARRETT said that they are 2 separate things. One is our constitutional guarantee. The other one is just a policy.

REP. HARRIS said that we might want to include the phrase that it is a "look before you leap" act. The public may understand it in that context.

Janet Ellis, Montana Audubon, said that the statement that agencies are required to provide opportunity for public review and comment on the level of public interest is included in both. Some decisions never get the opportunity for public comment. She would like it better delineated where the public has a right to comment and where they may not have an opportunity.

MR. STRAUSE said that having the longer version on the internet was a good idea. What they want is a pamphlet that is readable. He would suggest that the pamphlet refer people to the web site.

Mr. Wilson agrees that the constitutional right to a clean and healthful environment and the MEPA are two separate things. He questions why the constitutional right wouldn't be connected to our major policy. Maybe it is time to reconnect those things.

REP. BARRETT said that she shares Ms. Ellis' concern.

MR. MITCHELL will try to include today's comments and get the brochures edited and out for review before the next meeting.

V LITIGATION UPDATE

MR. MITCHELL referred to **EXHIBIT 5**. There isn't much new regarding MEPA action. There is one new case. The Continental Energy Services (CES) Silver Bow electrical generation plant air quality permit has been appealed to the Board of Environmental Review. One of the charges is the adequacy of the EIS for the project. The Board has been asked to hold a hearing or a contested case. This case may be influenced by the Pompey's Pillar case. That case was appealed and the Board upheld the department's decision. The Board's decision was then appealed to District Court and the judge recently ruled that she had no jurisdiction to review the Board's decision on the MEPA case because the appeal was under the air quality law. If they had brought the case as a MEPA case, the review could have been conducted. The case was dismissed. It gets to the question of who makes the final decision and where do you take MEPA appeals. With the new statutory changes, MEPA appeals must go to District Court within 60 days of the final agency decision. There is a question of what impact the Board has in terms of a MEPA analysis done by the department.

Other MEPA cases have been settled or waived with the exception of the cattle development feed lot water discharge permit, which is still active. The coal bed methane (CBM) cases are still active. In the Golden Sunlight Mine case, the judge ruled that SB 9 from the 2000 special session was unconstitutional. This was the bill that said that reclamation didn't include back filling of pits. The MEPA claim in that case was waived by the plaintiffs.

REP. HARRIS asked what the basis of the unconstitutional ruling was. **MR. MITCHELL** said that the constitution requires that lands disturbed by the taking of natural resources be reclaimed, and further that the Legislature shall establish legal standards for reclamation. The Legislature established a standard in SB 9 that says the open faces of pits and pits do not require reclamation or partial or full back filling unless it is necessary for air and water pollution prevention. The judge ruled that the standard is not sufficient. **REP. HARRIS** asked if that is being appealed to the Montana Supreme Court. **MR. MITCHELL** hadn't heard that it had been appealed yet, and he doubted that it would be.

MR. MITCHELL said that the Assiniboine and Gros Ventre and Fort Belknap Community Council et al vs. DEQ is an inactive case that has been going since 1998. The issue is over the proposed reclamation plan for the Zortman/Landusky Mines. BLM and DEQ just issued a final decision for reclamation of that mine. The tribal groups are not happy with the decision and have discussed reactivating that case.

VI METHAMPHETAMINE DRUG LABS - PROPERTY RECLAMATION

• Background and status, DEQ and state funding

Mike Batista, Department of Justice (DOJ), said that this is the most serious problem that Montana law enforcement is facing in the state. About 5 years ago the first meth lab in Montana was encountered. Since that time seizures and identifications throughout the state have grown by leaps and bounds. It is expected that this year we will first exceed more than 100 labs seized in the state. As labs are seized, the disposal costs and the cleanup cost continue to increase. The DOJ has not only been involved in the seizure and cleanup of labs, but also the public education campaign. They have put information together for first responders telling the type of chemicals involved and some other critical information. Historically, the U.S. Drug Enforcement

Administration (DEA) has provided funding to cleanup meth labs. The money is normally furnished to state and local law enforcement agencies to remove the chemicals and dispose of them. About a year ago there was some discussion as to whether or not DEA would continue to fund the removal and disposal of these chemicals, and they have continued to do that. The DOJ has sought additional funding for help with meth enforcement in the state. They have been able to get some High Intensity Drug Trafficking Area (HIDTA) money. This is money that is available from the Office of National Drug Control Policy if it is convinced to provide increased resources for drug enforcement as a result of a serious problem. This money is used for investigative support. The DOJ will soon be awarded a $2 million grant to further help with the meth lab problem in the state. The seizure of assets can also be used for cleanup and education type of activities. There are other sources of funding for the DOJ, but the seizure of assets has been real valuable in helping with the enforcement efforts. Much of the state's drug enforcement efforts are funded by federal grants that limit spending for equipment and cleanup. Funding for meth lab investigation is very expensive and this is where the seizure of assets becomes very valuable in helping to continue to fund enforcement efforts. The reality of court ordered restitution is that oftentimes it is not collected. The people arrested rarely follow up on the restitution amount, which are usually fairly small.

Cascade and Flathead counties have had more meth lab activity than other places in the state. Because there isn't a central reporting mechanism, we may be missing a few labs. This problem has probably been here for the last 8 or 9 years, but there wasn't a good method for tracking them. He doesn't see a decline in meth labs over the next few years.

- ***State Remediation Response***

Ed Thamke, DEQ, said that about 4 years ago he started getting an increased frequency of calls from local disaster and emergency coordinators, local sanitarians, local health officers and others asking how to cleanup meth lab property. The difficulty with meth labs is that it is a combination of outdoor environmental impacts and indoor environmental impacts. The cooking generally occurs inside the structure. The DEQ doesn't generally have the authority to go inside the structure. The outdoor remediation relies on standards for petroleum releases and the Risk Based Corrective Action (RBCA) standards. If the opportunity arises, the DEQ can sample waste that has been deposited out of doors, such as in septic tanks. Getting access to the property in order to sample the property to see if it is contaminated and might require cleanup has been a problem.

The DEQ is not aware of 1/10 of the meth labs that the DOJ or the DEA is out there busting. The communication has been an issue. If they are not aware of the lab, then they can not help with the cleanup of the site. The DOJ and the DEQ have recently coordinated that the agents in the field will report to the DEQ. This is still a small amount because it doesn't include the labs busted by drug task forces.

Another issue is that the property owner is not always cooperative in helping with the cleanup. What typically happens is that the DEQ requires the property owner to be responsible for any environmental contamination at their site if there is no viable responsible party. There needs to be an oversight entity to work directly with the property owners, especially with regard to indoor air quality. This would also be a means to say that the property has now been cleaned up and is now clean. This doesn't exist today.

• Landlord/Tenant Concerns

Brian McCullough, Montana Landowners' Association, said that they find this a troubling area in that there is interest from a variety of groups, local government, law enforcement, and property owners. All these people have a different point of interest. The problem comes because the solutions to the problem can conflict with the resources that are available to deal with this. This is where the Legislature is going to need to help.

From the landlord's perspective, we need to prevent this from even occurring. There is a problem with privacy and people's rights. A meth lab can be set up or taken down in half an hour. You need to be able to just drop in on your tenants in order to prevent it from occurring. If the meth lab is left operating for any period of time you increase the chance of risk of damage to the structure. Even if you arrest the people with the meth lab, then there is the issue of cleanup and who pays for the cleanup. Once the meth lab has been in place, the risk of damage is there. The removal and cleanup is serious, but not well defined.

The risk to the landowner is that because of the concern over meth labs there are times that law enforcement may suspect something and will break into the property to catch the bad guys, thereby damaging the property. The landlord has the responsibility for paying for the repairs.

There is also public impact. If a property is contaminated, people will not want to live there because of the risk to their health. Housing is then taken off of the market. There are other collateral issues. Property values of the actual building and surrounding buildings will fall.

• Insurance Issues

Angela Caruso, deputy insurance commissioner, said that they regulate around 1,400 insurance companies that operate in Montana. Typically, whether this would be covered depends on what is written in the policy. There is oftentimes an exclusion for criminal acts. A typical exclusion is any type of vapors, fumes, acids, toxic chemicals, toxic gases, toxic liquids, irritants, contaminants, pollutants, et cetera. Fire is typically covered. What is covered is determined at the time of loss. If meth labs were mandated to be covered by insurance, it may cause insurance companies to pull out of the market. North Dakota has seen no insurance activities dealing with meth labs. She has not seen any specific exclusions to meth labs.

• Questions

REP. BARRETT asked if it was an Idaho company that was doing most of the cleanup and disposal. **Mr. Batista** said that was correct. **REP. BARRETT** asked if they dispose within Montana. **Mr. Batista** said that he wasn't sure where the disposal occurred. He believes that the disposal occurs in Idaho.

MR. STRAUSE asked about the kinds of health problems that exist after the chemicals have been cleaned up. **Mr. Thamke** said that the health impacts are typically respiratory. They work with the Agency for Toxic Disease and Substance Registry. They are affiliated with the Center for Disease Control. At risk people tend to experience respiratory symptoms such as burning of the air ways. It depends a lot on the materials being used for the cook, the duration of the cooking activities, and the volume of methamphetamine that may have been produced.

MR. STRAUSE asked if there had been complaints from people who have moved in after the meth lab is gone. **Mr. Thamke** said that there had been complaints. **MR. STRAUSE** asked if the septic tank concerns were of pollution of the ground water. **Mr. Thamke** said that is one of the concerns. The chemicals used in meth production are more soluble and mobile in the environment than most. **MR. STRAUSE** asked if there is a commonly accepted standard in other states regarding how clean is clean. **Mr. Thamke** said that it took years to develop the RBCA standard, but it was done in concert with existing environmental standards and looking at what other states had done. If we are going to have a program, it needs to be funded. In Montana it will not have the same degree of funding as other states. The number of busts are increasing, but many of the sites are not very contaminated on the outside. The cost of cleanup varies with the site and it can be very expensive. **MR. STRAUSE** asked if the landlord is responsible for the cleanup costs. **Mr. Thamke** said yes.

MR. STRAUSE asked about the landowner's perspective on insurance coverage.
Mr. McCullough said that is part of the solution. They have a responsibility to insure their businesses adequately for the risks that they incur. Depending on the depth of the risk, there may be others that need to share in it. For example, if an individual was under investigation for some period of time, but the landlord wasn't ever informed, is there a social responsibility because to get the bad guys, someone's property was deliberately put at risk. If local government is aware, but not acting, there is a liability to the government as a whole. **MR. STRAUSE** asked if the Landowners' Association had considered getting a captive carrier. **Mr. McCullough** said that the problem with that is pulling together the players with the seed money necessary to start a captive insurance fund. Most of the landlords in the association are small business people.

MR. STRAUSE asked about other mandated coverages. Also, did other captive carriers have to come up with seed money. **Ms. Caruso** said that there are many mandated coverages, especially in the health arena. There is an issue of enough health insurers in Montana that will write here. Montana has trouble attracting health insurers because of different mandated reasons and because we are a small state. The minimum capital and surplus requirement for a captive provider is $750,000. If there is one large loss, what will it do to the premiums? **MR. STRAUSE** said that Montana landowners could band together with landowners in other states. **Mr. McCullough** said that these are small operations. Getting people to band together and put funds into a pot, a lot of landlords don't have a lot of cash sitting around.

REP. HARRIS asked if it was fair to say that when we look at how clean is clean in Montana, we also need to look at what the resources are. **Mr. Thamke** said that is correct. In order for the insurance carriers to evaluate coverage, they need to have a known financial risk. The contractors working for the insurance company need to have a target. A target needs to be established standards. It is critical that some sort of standard be established, but they need to be feasible for Montana. **REP. HARRIS** asked if DEQ feels like they don't have the authority to establish how clean is clean standards. Wouldn't it be worthwhile for the DEQ and the Department of Public Health and Human Services (DPHHS) to get together and establish the criteria for cleaning up in Montana? **Mr. Thamke** said that it is an unfunded mandate and DPHHS is not going to do that until they are tasked to do that. The DEQ is not qualified to talk about health standards. **REP. HARRIS** asked why the DEQ and the DPHHS can't get together and decide what the criteria for clean up is. **Mr. Thamke** said that if it were up to him, they would have already done that. **REP. HARRIS** asked if it would require legislative action for this

to happen. **Mr. Thamke** said that to get the 2 agencies to work together it would have to come from someone with more clout than he has.

REP. HARRIS asked, if there were no federal funds, does the state have the resources to take care of the meth labs that are being abandoned at a rate of 86 or more per year. **Mr. Batista** said that we would be scrambling to find money. At the highest year, the costs ran $631,000. The DOJ doesn't have any money to do this. They are banking on the federal government continuing to help us out in this regard. **REP. HARRIS** asked if that money was going to be gone in 2 or 3 years, wouldn't it be necessary for the DOJ to come to the legislature with a proposal to deal with this. **Mr. Batista** said that either the DOJ or local governments would have to foot the bill on their own and there would have to be some sort of funding to help alleviate the problem.

REP. HARRIS asked, if the cleanup criteria were to get done, does Mr. Thamke envision that a cleanup contractor does the clean up and then hands the landowners a clean bill of health. **Mr. Thamke** said that that is how it works with non-methamphetamine issues now. They have been dealing with orphaned materials all the time. This is a big chunk out of local budgets. **REP. HARRIS** asked if it would be possible to develop a special criteria for meth lab cleanups. **Mr. Thamke** said that it could be done.

REP. HARRIS asked if a cap on the amount of coverage for a meth lab would be reasonable. Also, could states band together in making this mandate therefore possibly preventing the insurance companies from leaving the state. **Ms. Caruso** said that would be more palatable to the insurance carriers. The other alternative is some kind of target to know when cleanup is done and that there won't be any additional charges to the insurance company down the road.

REP. HARRIS asked if the Landowners' Association had considered coming to the legislature and asking for a tiny increase in the bed tax that would go into a special fund exclusively for meth lab cleanup. **Mr. McCullough** said that he is not involved in the motel side, but rather the residential rentals. He doesn't see how the people in the tourism industry would support that kind of proposal where it would also be used for residential apartments. **REP. HARRIS** asked if there was a mandate for every $100 of rent there would be 3 cents devoted to a cleanup fund. Could the groups get together for a temporary taxing method. **Mr. McCullough** said that they would look at that. This is definitely an area where everyone wants to come clean without any impact to their business.

Dona Dobler, Landowner, said that she went to her congressional representatives for help when her property was the site of a meth lab. She was forced to do that because no one would even talk to her. The county attorney's office told her to go get a lawyer. She got a phone call at 1:00 o'clock in the morning saying that law enforcement officers were breaking the door to her rental house. She had the renter checked before renting the house. It has taken her 1 year to get the meth lab notice letter off of her property. There was no testing for any chemicals in the house. They said that the drug dealer lived there, but didn't have the chemical or equipment at her house. This all came about because there was a 19-year-old informant say that there was cooking going on at the residence. This was nothing but hearsay. Her family has been under extreme stress because of this. She has been forced to take a month off of work to deal with this. There is no help for landowners out there. The house is now rented. There needs to be a way to get a decent background check on renters.

REP. HARRIS asked if that type of background check could be used as a tool for enforcement making it more difficult for a producer to find somewhere to set up a lab. **Mr. Batista** said that there would be some serious legal questions to contend with if landlords made their decisions on who to rent to based on their suspicions. They are finding that regardless of whether someone is selling out of a home or rental property, historically they have moved labs from one place to another. It is difficult for law enforcement to do notification of suspected criminal activity. If they were wrong, the liability and infringement on personal freedom is huge. **REP. HARRIS** asked if it would help if the Legislature could expand the state of Montana's sovereign immunity to include law enforcement officials who made recommendations to landlords regarding potential renters. **Mr. Batista** couldn't answer that. **REP. HARRIS** said that the object would be to prevent people who are cooking meth from finding a place to carry on those activities. **Mr. Batista** said that one of the things that is beneficial is where it could be applied. If the determination can be made early on in the course of the investigation by getting the landowner involved in the investigation, then that is how the determination can occur. **Ms. Dobler** said that she was told by the drug agents on the phone that they had checked out her family and friends through the FBI database. There needs to be some sort of trust between the drug agencies and the landlord. **Mr. Batista** said that the law allows for a dissemination of criminal information and convictions on people. Here we are talking about providing information on the basis of suspicion or information that may be intelligence information. This is something that has historically been protected. If the suspicions were unfounded, but that information had already been given to the public, there is an enormous liability. There is a delicate balance in the individual's rights.

Mr. McCullough said that through the discussions in terms of the landlords, at this point people won't say it outwardly. The trust is that law enforcement has the public tell them anything that they know, but the law enforcement doesn't tell the public. There needs to be legislation so that law enforcement isn't as nervous about working with the public and that law enforcement figures out a way to determine pro-actively and swiftly whether or not they can trust someone.

MR. STRAUSE said that we need to think about it before we allow law enforcement to tell the public that someone is under suspicion. There are a lot of people that have come under suspicion that have done nothing wrong. And for those people to not be able to rent a place to live is something that we need to think long and hard about. Under 1983 we can immunize the state of Montana, but not the local law enforcement officers on the ground. They are the ones that are going to be sued. Maybe the fact that the landlord has to give 24 hours notice to a tenant before they can come on the property is something that needs to be looked at. He thinks that if the landlord has a suspicion, they should have the right to go onto that property and look around. This is giving the landlord power and responsibility.

Mr. Batista said that meth dealers are the most violent and irrational people that law enforcement has dealt with. He would recommend that if a landlord had suspicions they report it and then keep in contact with law enforcement agencies. He thinks that a lot of harm can come from trying to do self inspections of those premises that you suspect a meth lab cook is occurring. There have to be standards in place that allow health inspectors to do an inspection of these premises and give an idea of how severe, if at all, the exposure to meth lab chemicals is.

REP. HARRIS said that there might be a role for technology to play here. Perhaps something similar to a smoke detector that would alert homeowners that there might be a meth lab in

operation. **Mr. Thamke** said that their contractors use an organic vapor analyzer. This reads a broad spectrum of halogenated compounds. These machines start in the market place at about $10,000. It is a good idea, but it might not work as intended. He would like to team up with justice so that when their agents are already suited up for the potential health risk exposures they can pull some of the sample that may eliminate some properties from consideration. He would like to see the health risk evaluation get underway immediately.

REP. BARRETT said that this issue will take legislation and funding to solve it. Maybe the proactive things we could do in Montana is have a clearinghouse and get some of the people who are already dealing with it together to share ideas. It is a state issue because the state constitution guarantees the right to a clean and healthful environment.

MR. MITCHELL said that Legislative Counsel bill 17 is a bill draft request to revise laws governing methamphetamine. This bill draft request is written, but it is currently just an empty box with some concepts. This may be a decent vehicle to move forward.

VII DEQ PETROLEUM RELEASE COMPENSATION FUND

MR. MITCHELL referred to **EXHIBIT 6**, which is a letter from the DEQ Remediation Division addressing some questions that were asked by subcommittee members. There are 758 active eligible releases identified at the end of the fiscal year 2002. Twelve are local government tanks; 13 are owned by school districts; 7 belong to state agencies. Generally, the agency's response was that there are sufficient funds to fund Pay Plan 20. The DEQ has said that they will fund it within their current budget. In the past, the department has only been assessing the actual cost of cleanup and oversight in its cost recovery efforts, but that process will be changing by the end of the next fiscal year in an attempt to include additional indirect costs. The petro fund was authorized to be able to borrow funds against the petro fund from the Board of Investments, in case it should ever need more funding. In 1997, they took out a loan and they anticipate paying it off by August 2007 or earlier.

REP. HARRIS said that he got the impression from earlier testimony that the fund was running out of money and therefore it probably would be necessary to have 1/4 of a cent increase in the per gallon fee charged on gasoline sales. He is reluctant to proceed with that before hearing from the petro board.

REP. BARRETT said that it would be up to the Petro Board to carry their legislation.

REP. HARRIS said that the subcommittee's role is to do oversight. The question that he has is whether there is data to demonstrate that they are in fact running out of money.

MR. STRAUSE said that he was also under the impression that the Board wanted a 1/4 cent increase in the fee, but didn't get a feeling of whether they would be asking for it or not.

REP. HARRIS asked if it would be worthwhile to ask the Petro Board if there is any reason that they would not want that increase. **MR. MITCHELL** said that he would expect that the Board would answer that forthrightly. He would also expect that if they were in desperate straights that they would come to a legislator with the bill to ask for that. **REP. HARRIS** said that if such an increase were to be endorsed by the full EQC, then despite the fact that it is an increase, it will

have some momentum. He would like to put the question to the Petro Board. If the answer is yes, then we should carry that recommendation to the full EQC.

REP. BARRETT said that the subcommittee hasn't heard all the information. We have heard from the Board, but not from other people.

REP. HARRIS said that he has heard from a number of environmental consultants who say that their impression is that the Board is trying to cut down on costs, and the way they do that is by putting severe limits on the environmental consulting community and then it backfires by causing an increase in administrative costs.

REP. BARRETT said that she had been told that the environmental consultants are in charge and the state is not.

REP. HARRIS said that ultimately the consultants have to have approval by the Board for reimbursement. It is the Board that has the final say. He thinks that we should pose the question to the Petro Board as to whether they want the increase. We should also ask the marketers and the contractors what their view is of the need for an increase.

REP. BARRETT said that there are other people whose wells are being contaminated while stuff is simply being monitored for 10 years instead of being cleaned up.

REP. HARRIS said that is one of the symptoms of not undergoing the process of the evaluation followed by a cleanup plan and then actual cleanup.

REP. BARRETT said that the problem is getting worse. The companies are off of the hook because of the consultants and the cleanup is not taking place. She would not be in favor of funding it further.

REP. HARRIS said that we need to ask what the fiscal need is and that could be followed up by some cautionary instructions to get the job done.

REP. BARRETT said that Sen. Tester brought up this issue of monitoring that is going on and on and on as well.

REP. HARRIS suggested that we pose the questions to the DEQ or the Petro Board, but also ask for comments from the Montana Petroleum Marketers Association and various environmental consultants. Then the subcommittee could hold an 1 ½ hour hearing on this question of whether a 1/4 cent increase in the fee is warranted, coupled with, if they get this increase will it be wisely spent.

MR. STRAUSE asked if the goal was to have legislation drafted by the EQC staff.
REP. HARRIS said that the increase would easy be to draft, but the instructions on improving the quality of the administration and increasing the administrative costs may not need legislation. A hearing would reveal if there are some serious problems in the administration. **MR. STRAUSE** asked if the EQC is asked to vote on specific legislation or just the idea of the legislation.

MR. MITCHELL said that the July meeting is the last meeting of the subcommittee unless there is some special meeting between July and September. Typically, legislative recommendations of the EQC go out for public comment before they get assigned a sponsor. At the September meeting, the EQC makes final decisions on what legislation to proceed with and find sponsors for. Any bill draft that the subcommittee wants to put forth should be fairly complete by July.

REP. HARRIS asked if the recommendation was only for the increase in the fee and the subcommittee heard it in July and then recommended it to the full EQC the following day, would that be appropriate? **MR. MITCHELL** said that it could work that way. If the EQC decided to go forward with it, the bill could go out for public comment between the July and September meeting.

REP. HARRIS said that the subcommittee should say that, depending on the reaction at the July hearing, they plan to move quickly with this.

MR. STRAUSE said that the way he understood it was that the subcommittee would hold a hearing, at the end of the hearing they would make a recommendation. At the end of the hearing, MR. MITCHELL would have a bill draft and the subcommittee could vote on whether or not to recommend that to the full EQC. He would support that.

REP. HARRIS said that if the consensus at the hearing was that the increase was needed and that the Board could spend its money a little more efficiently, then the subcommittee would likely recommend it to the full EQC.

MR. STRAUSE said that if the subcommittee could send the letter right away and get an answer right away, then they would know if a hearing was needed. Only if they say that the increase is needed, would a hearing be needed.

REP. HARRIS said that his concern was that they might hear back from the Petro Board that they could use the increase, but that they can't recommend it. The letter could get an ambiguous answer and a hearing would be needed.

MR. STRAUSE said that he would like to invite some of those with specific concerns to the hearing.

REP. HARRIS said that those people would testify as to whether the money is being spent efficiently. The subcommittee needs to learn that information.

MR. MITCHELL asked if staff was to write the letter to the Petro Board and the DEQ asking about whether they feel that a fee increase is necessary. If the answer is no, then that is the end of the process or is a hearing still wanted? **REP. HARRIS** said that if the answer is simply no, then that would be the end of the process. If the answer is ambiguous or yes, then a hearing is needed.

MR. MITCHELL said that there is a link to the Petro Board web site from the DEQ web site. It shows their budget, expenditures, et cetera. They are cutting it pretty close on the budget. They are either spending up to what their revenue is, or they are holding back expenses trying not to go over what their revenue is.

REP. HARRIS said that the information from the contractors suggests that the costs are being clamped down on because of budget constraints. One result of this is inefficiency because it creates a tremendous amount of consultation between the Petro Board staff and the consultants. It would suggest that the Petro Board is working within their budget, but not getting the job done.

VIII CALA/CECRA DRAFT BRIEFING PAPER

MR. MITCHELL said that one of the work plan elements was to develop some sort of summary document on the CALA/CECRA program. At the last meeting, the comment was made that we should have a report that documents staff turnover at DEQ and some of the consequences. The conclusion was that we are losing people to other states and that the turnover was preventing cleanup from getting done in an efficient manner. He referred to **EXHIBIT 7**.

MR. STRAUSE said that he had heard from an attorney representing mostly mining companies who said that the agency was doing what it could with the people power it had, but that he felt that the personnel didn't have the time to devote to any one project to get it finalized. This attorney saw the staffing as a major problem. He also thought that some training should take place in teaching agency personnel how to finalize actions.

REP. HARRIS said that his impression from the report is that the higher the level of the personnel, that the turnover rate is at the 50%. Part of this is because other states offer higher compensation. These people are well trained and highly educated and much in demand. The DEQ recognizes this and feel that they can fund the alternative pay plan. They might be funding that at the expense of lower level positions that will remain empty. The question to the subcommittee is whether the alternative pay plan is something that will actually solve this problem or is it merely a bandage that is just concealing the problem. This is something that could be heard at the next meeting.

MR. STRAUSE asked if the subcommittee would hear from Sandi Olsen. **MR. MITCHELL** said that it is a management issue within the agency as to how the agency manages it positions and staffing. The Legislature provides funding and authorizes positions. It is a difficult line to cross to have a legislative body tell an agency how it should manage its programs. He would guess that the subcommittee would want to hear from someone from the director's office. What would the end recommendation be?

REP. HARRIS said that the EQC had heard about the White Pine Sash property, which had 5 different project oversight people in 7 years. There is a consequence to not having adequate staff who can get the job done. He would like to have Jan Sensibaugh here to ask the question of, is the alternative pay plan going to solve the problem, or only a portion of the problem? How are we going to faster pace cleanup and can we improve the stability of the DEQ staff?

MR. STRAUSE said that he would agree.

MR. MITCHELL said that the subcommittee seems to have made a finding and that a recommendation is not needed. This would be more fact finding from the agency.

REP. HARRIS said that the report was submitted in response to the subcommittee's request. The statistics speak for themselves. He thinks that the natural follow-up question is whether or not this will work.

MR. STRAUSE said that his concern is that if nothing is done at the next legislative session because we are waiting to find out if this will work or not, then it will be another 2 years that we will still hear that the cleanup is not getting done.

REP. HARRIS agreed. His recommendation is that the hearing with Jan Sensibaugh take place at the July hearing.

There were no objections.

IX COMPLIANCE AND ENFORCEMENT REPORTING

MR. MITCHELL said that in February there was some discussion of the compliance and enforcement reports that are due biennially. The timing and content of that was discussed with the DEQ, the DNRC, and the Department of Agriculture (AGR). The end result was that there would be further subcommittee deliberation on the issue and that the subcommittee would produce a letter or report to the agencies with the subcommittee's suggestions in terms of the timing and content of the report. He referred to a draft letter to the agencies that discussed the meeting, the content and timing of the report, and it provides some alternatives for the subcommittee to discuss in terms of the timing.

REP. HARRIS asked if there is any preference as to what will help the agencies produce a more meaningful report. **MR. MITCHELL** said that it might be preferable to switch the fiscal year reporting system. Instead of reporting on an even numbered fiscal year, the reports could be submitted on the odd numbered years so that the report comes at the beginning of the interim. The EQC would then have the entire interim to analyze that information. Option 2 lumps together 3 fiscal years, so there wouldn't be a report this September. From then on, there would be 2 years of information submitted in the fall of a post legislative year.

REP. BARRETT asked if we would be requesting a full report each year and not just an update with trends. **MR. MITCHELL** said that he had asked the agencies if they could use other reports that they do for this. The Department of Agriculture was the only one who could do that. **REP. BARRETT** said that the subcommittee had heard from people that when we get the reports that are nothing but statistics, they don't do any good without a narrative.

REP. HARRIS said that the letter does request the trend information.

MOTION: REP. HARRIS moved to send the letter out from the subcommittee, adopting the recommendation of Option 2b, which has the report coming in the August or September meetings of 2003.

Discussion:

MR. MITCHELL asked if the letter takes in REP. BARRETT's concern that the subcommittee emphasize sufficiently the trend information. **REP. HARRIS** said that he felt that was the case.

MR. STRAUSE said that we could have a line in there that said that if the agency already has the data in other reports, it doesn't need to be republished, rather they could just file a supplement.

REP. HARRIS said that could be added to the letter. It is his feeling that the subcommittee can handle this rather than sending it out to the full EQC.

There were no objections.

MR. STRAUSE said that even though the report was supposed to be submitted in the fall of 2003, it would be nice if the report were submitted a couple weeks before the meeting. He would suggest that the reports be staggered so that the committee can handle one at each meeting.
REP. HARRIS said that was a good suggestion.

The motion was approved by consensus.

X MAPA EXCEPTION RULE - FWP DRAFT COMMISSION LETTER

REP. HARRIS said that this is a worthwhile letter that asks whether the exception to the Montana Administrative Procedures Act (MAPA) for seasonal rules would be abused and requests some assurance from the Commission that it will not be abused. He thought that the letter was very diplomatic and entirely appropriate. **EXHIBIT 8**.

MOTION/VOTE: **REP. HARRIS** moved to recommend to the full EQC that this letter be sent to the FWP Commission. Motion passed unanimously.

XI EQC OVERSIGHT FOR BOARDS AND COMMISSIONS

REP. HARRIS said that a potential gap in EQC's oversight authority has been identified. The EQC does have authority, but it was a more convoluted route than what should be seen in legislation. He referred to a draft bill, **EXHIBIT 9**.

MR. MITCHELL said that this bill takes the same language that is in all of the other authorities for the other interim committees and adds it to the authority for the EQC. He would like to narrow the title of the bill somewhat.

MOTION/ VOTE: **REP. HARRIS** moved to recommend to the full EQC that the EQC adopt and recommend to the Legislature this bill. Motion passed unanimously.

XII OTHER BUSINESS

- ***Work Plan Review***

MR. MITCHELL said that there is one subcommittee meeting left on July 29. He would like to get a sense of where the subcommittee feels that it is in terms of the work that they wanted to accomplish this interim. The work plan anticipates an update on MEPA litigation, final subcommittee decisions on findings and recommendations to EQC for proposed legislation or other recommendations, review of the revised MEPA Handbook, and the final CALA briefing

paper for the July meeting. There is other work that the subcommittee has done, but they don't necessarily need to do anything about that. If the subcommittee does make recommendations that have impact, they should go out for public comment.

REP. HARRIS said that there are 3 topics in which there may be some legislation, not including the EQC authority legislation. One is the fee on gasoline, which will be decided at the next meeting. The second is the staffing issue, which may be just a finding. The final one is the meth lab issue, which he feels is worthy of some consideration by the subcommittee to determine whether some legislation is appropriate. He would like to recommend to the full council that they send a letter to the Governor recommending that the Governor convene a meeting between the DEQ and the DPHHS so that they can get started on cleanup standards.

MR. MITCHELL said that he is not certain that the DPHHS has the capability to deal with this issue. He gets the sense that the agency has a very hands-off approach to this problem. They are struggling with tremendous budgetary problems on other fronts and are very sensitive to additional tasks.

REP. HARRIS asked if it is clear what needs to be done between now and July.
MR. MITCHELL thought that it was. One of the major work plan topics that is not done is the revision of the MEPA handbook, but it will be done for July. It won't be significantly changed, just updated.

MOTION/VOTE: **REP. HARRIS** recommends to the full EQC that the Chair and the Vice chair sign a letter to the Governor suggesting that the appropriate officials from the DEQ and the DPHHS get together to formulate criteria for the remediation of abandoned meth labs, both indoor and outdoor. The letter should also explain why such criteria is necessary.

Discussion:

MR. STRAUSE asked if the letter should include that the DOJ participate in the meeting.

REP. HARRIS said that he envisioned these meeting as being the working experts in the field. It's the indoor experts and the outdoor experts figuring out how to do the appropriate standards. He thinks that the DOJ would not have much to input into a technical discussion.

REP. BARRETT said that she had the impression that there were 7 departments involved.

REP. HARRIS said that the indoor and outdoor experts need to get together.

VOTE: Motion passed unanimously.

- ***Next Meeting - Possible Agenda Items***

MR. MITCHELL said that in July there will be a final update on MEPA litigation, the revised MEPA handbook, a brief presentation by the DEQ director on funding CECRA, CALA, and the pay plan, a hearing regarding the petro fund and its implementation.

REP. HARRIS said that it may be worthwhile to consider whatever legislation on meth lab cleanup may be appropriate.

MR. STRAUSE said that the public participation brochure needs to be dealt with at that time as well.

MR. MITCHELL said that by that time the comments should be back from the agencies and others and a final revision available for approval. There may be cost-sharing from the agencies for publishing.

REP. BARRETT said that it should be posted on the internet even if there is no way to pay for printing.

REP. HARRIS said that if the agencies will not use it, there is no use in printing it. If the text is made available and if the agencies want to use it, they can print it.

MR. MITCHELL said that he would have funding information for the next meeting regarding the printing of the brochure.

XIII ADJOURN

There being no further business the meeting was adjourned.

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