ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704
HELENA, MONTANA 59620-1704
(406) 444-3742

ENVIRONMENTAL QUALITY COUNCIL
Agency Oversight/MEPA Subcommittee
FINAL MINUTES
December 10, 2001

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 September minutes
- Adopted a recommendation on the Big Hole/Beaverhead rule to present to the full EQC

I CALL TO ORDER

- Approval of past minutes

REP. BARRETT offered a change on page 12, the minutes say that there were no sage grouse on the forest service property, but it should say that there were no sage grouse leks. On page 13, she would like to add that the bag limit on sage grouse was increased.

REP. HARRIS asked that those changes be incorporated.

MOTION/VOTE: **REP. BARRETT** moved to adopt the minutes as corrected. Motion passed unanimously.

II MONTANA ENVIRONMENTAL POLICY ACT (MEPA) LITIGATION UPDATE

MR. MITCHELL referred to **Attachment 3**. Since December there have been a couple dismissals of appeals to the Board of Environmental Review on air quality permits. The Pompey's Pillar/United Harvest air quality permit was appealed to the Board of Environmental Review and the Board requested that the department revise its environmental assessment (EA). After the department complied, the Board heard testimony and decided that it was an adequate EA and upheld the decision of the department to issue the permit. The Pompey's Pillar Historical Society filed a complaint in district court, which is where that case is. The MEPA issue is one alleging that an environmental impact statement should have been done instead of an EA.

The Northwestern air quality permit was also appealed to the Board of Environmental Review. The appeal was ultimately dismissed. The permit has been issued and there is an agreement between the parties that Northwestern will spend $250,000 to plant trees or otherwise offset carbon emissions, and will spend $750,000 over five years to purchase and distribute a minimum of 50,000 energy efficient light bulbs.

The Holnam Cement air quality permit deals with the cement plant in Trident. The plant had proposed to increase the percentage of petroleum coke that was used as fuel in the lime kilns. That was appealed to the Board of Environmental Review. One of the grounds was that the EA was inadequate. That appeal has been dismissed. A settlement was reached whereby Holnam will agree to install continuous air emission monitors that will monitor sulfur released from the cement kilns.

The Cattle Development Center case is still progressing in court. This case deals with a confined animal feeding operation (CAFO) permit and some groundwater permits. The Northern Plains Resource Council (NPRC) coal bed methane case with Fidelity is still pending in court. The EIS that was asked for is under construction. The Golden Sunlight Mine case has been in court since 1992. The counts that are being argued now deal more with the Metal Mine Reclamation Act. The MEPA count in this case may never get heard. The Fort Belknap case is still in court. The two DNRC cases are in district court.

Fish Wildlife and Parks (FWP) and Montana Department of Transportation have no new or ongoing MEPA cases.

III MEPA CASE UPDATE - FRIENDS OF THE MARIAS AND MISSOURI RIVER CITIZENS, INC. vs. DNRC AND SUNNYBROOK COLONY

- ***Case Background***

Jack Stults, DNRC, said that he signed the final order on this case. The DNRC had an application from the Sunnybrook Colony for a new appropriation of water out of the Marias river, in the stretch of the river between Tiber Dam and the Missouri River. The Colony was wanting to put in a series of five pumps that can pump up to7200 gallons of water per minute for 1000

acres of irrigation. In the process public notice was given. An objection was filed by FWP. A fairly extensive EA was conducted under MEPA.

In the environmental review, FWP identified a need for a minimum in-stream flow rate of 560 CFS, which they felt was the best amount for maintaining the fisheries on the Marias. Under MAPA the parties came together for a hearing in front of a hearings examiner. The hearings examiner issued a proposal for decision and based on a rule that the department had in place, he conditioned the permit based on the 560 CFS number.

The applicants filed an exception to the proposal for decision disagreeing with the condition that was imposed by the hearings examiner. There was a request for oral argument. That argument was conducted with both sides present. The Colony's argument was that the base flow should be set at the FWP's actual reserved water right that was issued by the Board of Natural Resources and Conservation under statute. That reserved right is for 480 CFS. It was Mr. Stults' decision that it was more appropriate for the department to base its decision on the actual existing water right. The final order reduced the minimum flow rate to 480 CFS. That decision has been appealed.

- ***MEPA cause of action***

Laura Ziemer, Friends of the Marias, said that the plaintiffs' concern is that the permitting decision did not adequately take into account the objections raised by FWP in defending their reservations. Also, the MEPA analysis should have been followed. If it weren't for the statutory cap limiting FWP instream flow reservation to 480 CFS or 50% of the average annual flow, the reservation would be the higher number. The higher number was used in the EA, not the reservation number. The EA didn't disclose adverse impacts that would result from limiting the water right to the lower number. It found no adverse impacts when the higher number was used. The basis for changing the proposed decision to the final decision was due to the MEPA amendments of the last legislative session (HB 473) that limited the department's authority to use a MEPA analysis to condition a permitting decision. Friends of the Marias think that sharp curtailment on the limits of the scope of MEPA violate Montana citizens' fundamental right to a clean and healthful environment. That is the basis for challenging the decision.

Greg Duncan, Sunnybrook Colony, said that in the draft EA the smaller number was used. It was after the draft EA went out that FWP contacted the individual that was conducting the EA and asked for the 560 CFS number to be included. The 480 CFS that was initially used in the draft EA didn't find adverse effects either. Using those numbers it was found that the Colony would be able to use water out of the river for 18 of 20 years. The rest of the time they would have to purchase water or shut down their pumps. The colony has worked out an agreement with the Blackfeet tribe to purchase water if needed.

By allowing FWP to keep the 560 CFS figure, ultimately it would give FWP or the environmental movement the option to challenge existing water rights. Those rights are guaranteed by the state constitution. The Marias River is an artificially controlled river from Tiber Dam down. FWP has admitted that there are informal agreements with the Bureau of Reclamation that say that the Bureau of Reclamation will let down additional water if it is needed to protect the fishery. The Colony views the 560 CFS figure as a phantom water right allowing FWP to shut down water appropriation on the Marias River. There are other means available to gather more water.

Tim Hall, DNRC, said that it is important to note in this case that no parties to the appeal objected to the decision during the process. DNRC has moved to dismiss the case on several grounds. One of those grounds is that they don't have the right to appeal. Under the Montana Administrative Procedures Act (MAPA) the only people that can appeal are those who were parties in the contested case hearing. What may have happened is that the plaintiffs were focusing on the EA aspects of the case and were disappointed when FWP didn't appeal.

The other thing that is important in this case is that they combined a petition for judicial review and a complaint for declaratory action. The declaratory relief that they want is a ruling that the EA is inadequate and that an EIS should have been prepared. He moved to dismiss this as well because those two types of cases shouldn't be combined in court. There have been oral arguments on the motion to dismiss and a ruling is expected any day.

MR. STRAUSE asked if the changes to MEPA that were made in the last legislative session have any bearing upon DNRC's decision. **Mr. Stults** said that it didn't have a direct bearing on the decision. His analysis was that the Water Use Act says that the department must issue a permit if the statutory criteria are met. It also gives the authority to condition a permit, but the conditions must go directly to the criteria. The criteria discuss adverse effects to existing water rights and legal availability, which are within the context of the Water Use Act.

MR. STRAUSE asked if there is tension between the statutory authorizations for water use rights and the constitutional provision for a clean and healthful environment. Is it the position of the state that you can't look to Montana's constitution, and can only look to the statutes even if they don't provide to a clean and healthful environment? **Mr. Duncan** asked who is entitled to the clean and healthful environment, the people or the fish. **MR. STRAUSE** said that it seems that the statute that says the FWP can only apply for a certain amount of reserved water right is arbitrary. It doesn't take into account whether or not there needs to be more water in that stream for a healthy fishery. **Mr. Duncan** said that the reserve water right isn't the only mechanism available. It may be that those aren't sufficient, but he feels that the department needs to act within its statutory authority, which is the Water Use Act. **Mr. Hall** said that the DNRC has to assume constitutionality of the statutes that they work with. If there does become a conflict with the state constitution, it is something that will come up in litigation. **Ms. Ziemer** said that constitutional requirement could insert itself in the case only because of the constraints put on MEPA in the last legislative session. Their understanding of the Water Use Act, prior to that constraint of the scope of MEPA, would have allowed the DNRC to make a determination of water availability depending on the outcome of an EA. In the contested case hearing, the hearings officer determined that water availability was not shown above 560 CFS. They believe that was a correct decision. There is judicial precedence for allowing MEPA analysis to condition permitting decisions, even when the statute authorizing those permitting decisions does not specifically allow for conditioning.

REP. HARRIS asked if FWP provided any kind of legal brief, formal or informal, of how the higher number was reached. **Mr. Stults** said that the number came up through the consultation during the environmental assessment. There was some discussion as to whether it was a precise figure for identifying the real needs of the fisheries. **REP. HARRIS** asked if FWP's argument was scientific rather than legal. **Mr. Stults** said that it was both. **REP. HARRIS** asked if there was any particular statute that FWP used in their argument. **Mr. Stults** corrected that it was primarily the applicants that were challenging the scientific aspect and FWP was using a more legal basis.

REP. HARRIS asked how likely it is that a ruling from the judge will be receive on the argument that HB 473 is unconstitutional, conflicting with a clean and healthful environment. **Ms. Ziemer** declined to answer.

IV STATE AGENCY, MEPA PANEL - MEPA IMPLEMENTATION POST 2001 SESSION

• *2000 EQC MEPA Study Recommendation follow-ups*

Tom Butler, DNRC, said that DNRC has yet to experience any litigation on the 1999 amendments, let alone the 2001 amendments. Therefore, they are more than willing to just let the process work and see how MEPA will actually pan out. They do think that it is a good idea to review litigation from time to time because too often the focus is on the preparation of the documents and not on the judicial process, which is an integral part of MEPA. DNRC would support annual reporting of litigation to the EQC. See **Attachment 4**.

REP. HARRIS asked if DNRC is learning anything from the litigation. **Mr. Butler** said that they try to read every case that comes out and condition their MEPA documents accordingly.

John North, DEQ, said that two of the EQC recommendations bear further looking into. The first is the MEPA fee bill and the purposes for which the fee bill can be used. DEQ feels that if a permit applicant were to hold the department to the strict terms of the fee bill statute, there would be some unfunded responsibilities for holding public meetings, compiling the impact statement, preparing the analysis, etc. Under all of the major EIS documents that have historically been done by the department, the applicants have always been willing to enter into a memorandum of understanding to fully fund the EIS. The payments under those memorandums were credited against anything that could be assessed under the fee bill. They feel that the Legislature needs to look at this issue.

The second issue is, with regard to the public comment period, many of the EIS reports that DEQ prepares are done jointly with the federal government, either the BLM or the Forest Service. They have a longer comment period than DEQ. Currently the MEPA rules say that DEQ can have a 30-day comment period with a maximum extension of 30 days. DEQ feels that for a major EIS, there probably should be a presumption of a longer comment period, with the ability of the department to cut back on the time frame if necessary to comply with legal mandates. With regard to EAs, DEQ doesn't think that there should be a presumption of a 30-day time period. For many of the projects, 30 days is the amount of time that DEQ has to get the permit completed.

The DEQ hasn't had a lot of experience with the 2001 amendments yet. Therefore, they have not encountered any problems to-date. They don't anticipate any problems at this time. DEQ also doesn't feel that there is a need for amendments to the uniform MEPA rules to comply with the 2001 amendments. Most of the requirements are procedural. They don't see any inconsistencies between the rules and the act. See **Attachment 5 and 6**.

Lyle Manley, MDT, said that MDT doesn't have much experience with the 2001 amendments. Quite often you don't know what legislation means until a judge tells you. They are not in a position to say how the 2001 amendments will affect them. MDT also works with the federal government on much of what they do. They federal regulations are generally more detailed and

allow more time for public comment. MDT has to follow those regulations and therefore they don't see some of the suggestions as impacting them in any great extent.

One of the statutes says that the initiator of the project, which is often is MDT, can't propose that the project be changed once it has been initiated. Often they find that a project needs to be changed after it has started. See **Attachment 7**.

Bob Lane, FWP, said that each agency is different from the others in terms of the types of MEPA compliance that are required. FWP does some MEPA compliance on projects that come from outside the department, but the majority of the MEPA compliance deals with the department's programs.

FWP hasn't seen a need for rules to implement the 2001 changes. The changes seem to be fairly self-implementing and don't command the need for rule changes. He suspects that at some point they will find that some clarifying changes might be needed.

FWP is about to start a new round of training in 2002. They haven't started the process of setting that up, but they will be talking to EQC and would benefit from help from EQC staff. This training will serve as a refresher course for some, and an introduction for new employees.

He doesn't see a need for changing time periods and mandating certain periods of time. For example, on an EA a 30-day comment period is usually provided, but in some other areas public comment is not used. They like to have some flexibility in this in order to meet necessary deadlines.

In the EQC recommendations there were a lot of comments that had to do with making MEPA compliance better. They pointed out some good attributes that people should keep in mind when doing MEPA compliance. However, he doesn't know how that would be put into statute. Their experience is that they have a lot of tools and if they use those tools for scoping and public involvement throughout the process, and tailor what they are doing to the interest of the public and the issue, then it will make for a better product. The agencies have the tools to do the job, the question is: How well are the agencies using those tools?

FWP feels that the definitions are working now. There is some interpretation of those with federal cases and agency practice. Unless specific problems are found, he doesn't see the need for addressing those. See **Attachment 8**.

REP. BARRETT asked what process is followed when FWP uses advisory groups. **Mr. Lane** said that there are some statutory provisions that help set up advisory groups. It is up to the agency in terms of the direction and purpose that is given to an advisory committee. The intent of an advisory committee is to help the public be involved in solving problems. Although the advisory committees can't make decisions, they can help the Commission make their decisions. The membership of the group and the education of the groups on the issues are important.

REP. BARRETT said that in advisory groups there is sometimes not a consensus on whether the issue is really a problem or not. **Mr. Lane** said that applies to everything that we do. It is critical to identify the problems and issues; that is not always easy because some people will see a problem where others don't. Part of the public process is to help identify those issues and problems.

MR. STRAUSE said that the DEQ web site was really good. FWP was a little harder to get to the EAs and EISs. It would be nice to see environmental documents listed on the first page of the web site. The name of the person that was in charge of the project could be found with the individual EA or EIS, but there was not an email address listed. Is there a prohibition against accepting email comment as opposed to written comments through the mail? **Mr. Lane** said that there is not. There is a statute that says that agencies that have email capacity have to accept comment by email.

MR. STRAUSE said that a brochure that gave those hoping to give public comment some guidance was a recommendation. Is that a collaborative process that the agencies might be able to work together on in order to get one brochure? **Mr. Lane** said that he liked the idea of a brochure and that a common brochure would be appropriate because it would be easier for the public to use. They have found that those types of things can be very effective.

MR. STRAUSE asked if any of the departments saw a problem with coming up with one brochure for all of the departments. The consensus was that there was not a problem with that.

MR. STRAUSE would like to see that linked to the EAs and EISs on the web sites. He asked if the department is working on anything to make public notices more understandable to the public. **Mr. Butler** replied that they have. When agenda items are issued, not only is there the proper legal description, but there is also a map that generally shows the area. **MR. STRAUSE** asked if there was a process in place to determine whether or not a press release needs to be put out.
Mr. Butler replied that he was not aware of any instance where the department has done that. **Mr. Lane** said that FWP tries to use press releases as often as possible for any issue of significance to the public. The department can't command that the release be used, but they have had fairly good luck with getting the releases published.

MR. STRAUSE clarified that there is no set policy in any of the departments as to when they use a press release. The response was given that the departments almost always use a press release when there is an issue of significance to the public, when there are meetings, etc. The releases get the best response when they are published four or five days before the meeting. **Mr. North** said that the DEQ puts out a lot of environmental assessments and essentially what occurs is that the program determines if a particular environmental assessment is one that might be of interest to the public and then a press release is prepared for the public. It is the intent of the agency that when there is an EA that is of interest to the public, a press release should be put out. **Mr. Manley** read from an example. "A public meeting was held July 6, 2000, Libby, with advertisement through a press release and newsletter mailed to all landowners and members of the public who had previously commented on the project or attended meetings..." MDT tries to do a really good job because in a lot of cases they are taking people's property. The comment was made that the agencies are not always sure that they are getting opinions from the majority of the interested people. Sometimes the same people show up and make the same comments at every meeting. It is an issue in how to make sure that the agency understands the public feelings and that they are involved. They haven't yet found one particular solution.

MR. STRAUSE said that the public needs to have an expectation of what the process usually is. Perhaps the agencies could give a reason for a shorter time period in the press release so that the public knows what to expect. **Mr. North** said that could be done. He thinks that there would

be at least as many times when there would have to be an exception made as times when there could be a 30-day comment period. While it could be done, there would be a lot of the permitting processes with a different time frame, so that it might create with the public a sense that there is a presumption of a 30-day comment period, when under some programs there would never be a 30-day comment period. He doesn't feel that it would clear up a lot of the confusion. **Mr. Lane** said that FWP generally has a 30-day period for an EA. MR. STRAUSE's suggestion wouldn't change much that they do.

MR. STRAUSE said that the industry representatives like the idea of being able to do all of their permit activities in one spot. Is it the feeling of the agencies that is not something that can be done? The response was given that it was something that could be studied. If there are things that will help with one-stop, that would be fine. However, the agencies are not seeing that it would really help things because there are aspects such as lead agencies, inter-agency coordination, and different requirements in different agencies. The applicant needs to go to the particular agency that it would be working with. There would be no opposition to a study to see if there are ways to make that idea work. **MR. STRAUSE** asked if any industry representatives have made any suggestions of how this could be implemented. **Mr. North** said that he wasn't aware of any coming to DEQ. The other agencies had similar responses. One agency representative had heard complaints from the applicant about having to go to four different agencies, but he didn't know a way around that. Under MEPA the state agencies are really one entity.

MR. STRAUSE said that one of the recommendations from the last EQC was that with the assistance of state agencies and the university system, there needs to be developed sound and measurable economic and environmental trend and benchmark information so that the state can measure whether MEPA's purposes are being met. Have any of the agencies had any discussions about trying to measure trends and benchmarks in order to have a starting place to see if MEPA is working? **Mr. Butler** responded that the idea was fundamentally flawed in that MEPA is a process for thinking and for environmental investigation. It is not something that is measurable across the board in all instances because each situation is unique. The process that is followed is going to be comprehensive and done according to a scientific thought, is going to involve the public to inform the decision maker, and the process needs to be efficient in doing those things. To say that MEPA impacts a straight correlation with economics and the state, in one opinion can't be done. There are too many other impacts out there, such as technology or economy. MEPA is just a process. MEPA, by itself, doesn't specifically require any environmental standards.

Mr. Lane indicated a different experience that many of the FWP's decisions were based on their own regulatory authority. The comments that they receive through MEPA do help determine the decisions that are made. In terms of a poll and benchmarks, FWP has conducted a poll to ask the public how the agency was doing. They found that the public thought that FWP should listen better, should pay attention to whether FWP was influenced by special interest groups, and there was some concern given about whether the public felt the agency was making honest decisions. Perhaps a poll could provide helpful results with regards to MEPA. **Mr. North** said that the EQC used to assess the environmental trends in the state, and those documents were extensive documents. Since then, EQC has gotten away from that. DEQ thought that the intention of this was to come up with documentation similar to what the EQC had once produced. In some instances, such as TMDL, there is funding and a clear directive. However, in other instances there isn't a directive to do it and in those cases they don't have the staff or

funding needed. If EQC tries to produce something like that again, DEQ would be happy to provide whatever information they can to assist.

MR. STRAUSE said that the purpose of MEPA says that it is to encourage productive and enjoyable harmony between humans and their environment, promote efforts that will prevent or eliminate damage to the environment and biosphere, and stimulate the health and welfare of humans. If that is the purpose of MEPA, then it seems to him that some measurable guidelines are needed to show whether MEPA is doing that or not. He would think that there would be someone in the university system that could help study what those trends are.

REP. HARRIS asked, in regards to MDT, if the federal government has a longer comment period, does the department automatically defer to that longer comment period. **Mr. Manley** said that they do defer to the federal period of 45 days.

REP. HARRIS asked if DEQ saw a definite need for a statutory amendment in order to make sure that how the fees are paid is very clearly spelled out. **Mr. North** said that was correct. The director of DEQ feels that is something that should be done. **REP. HARRIS** asked if the other agencies had the same problem and solution. The response was given that mostly the other agencies didn't see that as a huge problem for them. **REP. HARRIS** asked if it was fair in every instance to take the costs, which are not currently statutorily imposed on the applicant, and shift it to the applicant so that there is no uncertainty, or would there ever be an occasion where the agency pays the costs. **Mr. North** couldn't answer that because it deals with policy and he had not discussed that in great detail with the director. He would be willing to provide that answer at a later date. **REP. HARRIS** said that he would also like to know the total costs that were being talked about.

- ***Public Comment***

Ann Hedges, Montana Environmental Information Center (MEIC), said that after reading the letters that were sent to the Subcommittee, it appeared that everybody thought that rule making was unnecessary. However, it looked like DNRC was engaging in some type of activity to see how the rules needed to be changed and begin that process. She would like to know why DNRC is differing from the other agencies in their perspectives. **Mr. Butler** said that the reference in the DNRC letter to changes in the MEPA administrative rules purely reflect the changes in section.

77-1-121 MCA, which granted additional exemptions to DNRC by the Legislature when MEPA applied. They need to respond to that and make their rules consistent with the MEPA exemptions. Further response was given that after the Session, these agencies, along with MR. MITCHELL, did have a meeting talking about the new statutes, what they meant, and whether the agencies felt there would be any need for rule making. The general consensus there was that the agencies didn't see a need for rule making at this point, but that as the agencies gain experience they may find that there are some things that need to be clarified in the rules.

Michael Kakuk, WETA, would like to know if any of the agencies, other than FWP, are having any problems implementing MEPA due to the 2001 changes. **Mr. Butler** said that DNRC is not experiencing any problems with the 2001 amendments to MEPA. **Mr. Manley** said that there may be some language that says that the project sponsor can't ask that the project be changed,

even if it is the agency. At this time they are unsure how to read that. **Mr. North** said that they don't have enough experience with the amendments to know if there are going to be problems. As they gain experience it may be a different answer.

Janet Ellis, Montan Audubon, asked about the rule-making process that DNRC is undergoing, and what kind of public participation is anticipated. **Mr. Butler** said that they haven't started the rule-making process yet, the rule changes haven't even been drafted yet. They are anticipating that notice will go out within three to four months, as an estimate. It will be before the State Board of Land Commissioners. It is up to the Board to do the proper publishing.

MR. STRAUSE asked if DNRC prepares annual reports for state lands on the number of agricultural lands that the state has, the condition of those lands, the number of acres of forested lands, etc. **Mr. Butler** said that there is an annual report that the department prepares on all trust lands. It is usually reported upon at the bureau level. They look at the uses of the lands under each bureau and any significant projects that the bureaus have undertaken. It also includes a run-down of the revenue from those projects. **MR. STRAUSE** asked where the public could find out this information. **Mr. Butler** said that he was unaware of any specific area where the public could go to look at specific information. They may be able to get general information from the local area managers. **MR. STRAUSE** said that there needs to be some measurements and baselines available in order to track how things are going in the future.

MR. MITCHELL said that one of the suggestions from DEQ staff was that the EQC might want to look at the impacts of SB 377, which imposed statutory deadlines on the production of an EA and EIS and see how that was affecting the agencies through time. He doesn't know how that would affect agencies that are not so permit driven. **Mr. North** said that he didn't see a great difficulty meeting some of those time lines. There was a feeling in the department that those time lines would supplant the statutory time frames that are provided in the permitting statutes. They don't believe that that is the case. If there is a time frame for issuance of a permit under a particular statute, that applies rather than the provisions of SB 377.

MR. MITCHELL said that one of the changes to MEPA said that any action taken regarding the adequacy of an EA or EIS under MEPA shall be filed in district court within 60 days of a final agency action. The question had come up as to what is that time clock start date in terms of what is the final agency action for filing a complaint in district court on a MEPA issue. The response from the agencies was that they had not had that particular question brought to them at this point in time, but they will be looking at it.

V BEAVERHEAD/BIG HOLE RIVERS SEASONAL RULE – REVIEW AND OPTIONS

- ***Discussion and Public Comment***

MR. MITCHELL referred to **Attachment 9**, which is an abbreviated time line for the recreational rule. Following the veto of SB 445 in the 1999 Session, Governor Racicot directed the FWP to create a rule using the newly authorized authority in HB 626, which authorized the Fish, Wildlife and Parks Commission to utilize the police powers of the state to provide for public health, safety and welfare, in developing a rule that would do essentially the same sorts of things anticipated in SB 445 for the Beaverhead and Big Hole Rivers. The Fish and Game Commission adopted the first rule as a seasonal biennial rule in June 1999. A watershed working group was put together in 2000, in order to help develop river management plans. That group came to the

Commission in November of 2000 with their recommendations. The Commission took those recommendations and decided to adopt a different rule than what was presented to them at that time. The rule that is in place now extended the moratorium that was in place in 1999 for another two years, effective May 2001 through May 2003.

In the spring of 2001, the Governor's Office asked the EQC to look at that rule and determine whether or not the FWP Commission had sufficient authority to adopt the rule, to provide some legal interpretation of the legislation under which authority the Commission used to adopt the rule, and to review some of the arguments that were presented by the Fishing Outfitters' Association of Montana, that had written a letter to the Governor's Office objecting to the process under which the rule was formulated. In May 2001, the full EQC had a hearing on this issue. The Council recommended that this Subcommittee look further at the rule and the process. The EQC voted to ask the FWP Commission and department to respond to some specific questions about the adoption of that rule and the substance therein. FWP responded, those responses can be found in **Attachment 10**.

Supplemental information can be found in **Attachments 11, 12, 13, and 14**.

Robin Cunningham, Fishing Outfitters' Association of Montana (FOAM), (opponent) said that they are opposed to the rule in the context of the legality of the procedure of accepting the rule. FOAM has requested a review of the process of adopting this rule. They are glad that the committee is focusing on the process by which the rule was achieved, rather than the content of the rule. The Montana Administrative Procedures Act (MAPA) has a whole set of criteria and standards that all the agencies must comply with. Included in those standards are public participation, registering with the secretary of state, and specific criteria for justification and explanation of the rationale for the rules. In this particular circumstance, the FWP has used a well noted exception to MAPA. FOAM finds difficulty with the use of this exception because it allows the department to adopt rules, avoiding the requirement of showing justification. It may touch on a general rationale, as they have done in this rule by citing concerns, but because of this exception, the department has not offered any actual justification for the rule.

MR. STRAUSE said that FWP indicated that another special use rule is the one in effect for the Smith River, which has been in effect for some time. It seems to be similar to the Beaverhead rule. Does Mr. Cunningham see a distinction between those two rules? **Mr. Cunningham** said that there may be parallels of the rules in some aspects, but the rules and the authority for the Smith River were generated through a piece of legislation, the Smith River Management Act, that in itself set out certain criteria for justification for the rule. There is no justification offered in the Beaverhead rule because there was no piece of legislation requiring the criteria. **MR. STRAUSE** asked if it was determined that this rule is invalid, will that affect the Smith River rule.

Mr. Cunningham did not think so. **MR. STRAUSE** asked in what way the public comment process was short cut. **Mr. Cunningham** said that it wasn't the public input process, it was the fact that by using the exception to MAPA, FWP is not required, nor have they chosen to offer justification of the rules. **MR. STRAUSE** clarified that Mr. Cunningham was not saying that the public didn't have the opportunity to comment, but his concern was that there wasn't ample justification in the rule. **Mr. Cunningham** said that there has been no justification offered specifically in the rule. In certain circumstances there has been insufficient justification for the rules and the specifics of the rules that have been made.

REP. HARRIS asked if there are any aspects of this rule that Mr. Cunningham doesn't consider to be seasonal in nature. **Mr. Cunningham** said that there were and he deferred to Tom Anaker, FOAM's legal representative. **Mr. Anaker** said that in analyzing the seasonal versus non-seasonal nature of the existing biennial rule, it appears that the regulation of non-resident use of the river is seasonal. He would look at the other issues that are covered in the rule as being non-seasonal. Those issues would be the outfitter moratorium, the prohibition on the transfer of outfitter privileges, the identity tags on outfitter boats and economic impacts, all of which operate year round. **REP. HARRIS** asked if the balance of the rule fit within the seasonal exception, in Mr. Anaker's opinion. **Mr. Anaker** said that those are the five elements of the rule that he had identified.

Jeff Hagener, FWP Director, said that he and staff would be available for questions. They feel that the Commission had the authority to do what has been done.

Bob Lane, FWP legal counsel, said that FWP adhered to a process that is an exception to the MAPA process that allows for annual and biennial rules for hunting, fishing, trapping, when there is a statutory provision for publication of those. It also allows for seasonal-use rules when the substance of the rules is indicated by signs. These are all basically fishing rules that regulate fishing, and as such they are not tested by whether they are seasonal or not, they are tested by whether there is fishing. Fishing is by definition a seasonal activity, whether it occurs throughout the year or not. They are simply regulating aspects of fishing on the two rivers. All that they do in the rules relate to fishing, not to other uses. If you are an outfitter on the river, all you are doing is fishing because you don't need to be an outfitter to do other commercial activities on the river, such as sight-seeing float trips. Everything in the rule relates to fishing. The transfer of outfitting licenses is considered a fishing activity. The Commission has broad authority to regulate all aspects of fishing.

REP. BARRETT asked, if the agency has the authority to regulate the experience, do they have the definitions of what is overcrowding, what is solitude, and other aspects that would be part of the experience. **Mr. Lane** said that is the kind of authority that was granted to the Commission. They have the authority to make determinations of what is, in their view, the appropriate mixture and definition of those terms. Those are the decisions that were delegated, in the statutes, to the Commission. It is not a statutory thing. The Commission and department have to make those decisions through a public process. **REP. BARRETT** asked if they are going to use solitude and quality, should the Commission have the definitions first so that the public who is participating knows what those are. **Mr. Lane** said that would be one way to do it, but in his opinion that would be the wrong way to do it because each river system and the interest of the public on that river system is particular to each river. The users and the nature of the river are the things that are going to help determine the best mixture of public use.

MR. STRAUSE asked what data FWP had gathered prior to adopting the rule. **Mr. Lane** said that the rule had something called Statement of Legal Authority and it has the introduction. That introduction includes the rationale for the rule. The rule-making process was to provide time to continue to do studies. **Pat Flowers, FWP**, said that this issue has never been a biological issue. It was never raised as a problem with the fishery. What has been an issue is crowding. Until about three years ago it was an anecdotal description of the problem as too much pressure or too much outfitter use. Because of that and because of legislation, FWP developed a survey that was done on both the Big Hole and the Beaverhead where the people on the river

were surveyed to find out if they were outfitted or non-outfitted, as well as the overall level of use. They have that information and it is in both river-use plans.

REP. HARRIS asked if the Big Hole was so crowded that no one fishes there any more. **Mr. Flowers** said that there are a lot of people fishing it. It depends on who you are and what your experience there is, whether you still fish it or when you fish it. Some people describe the crowding as only appearing during June and July, when the salmon fly hatch appears. It is all relative. There are probably some fishermen who have been crowded off the river and no longer fish there.

REP. HARRIS asked if the fishermen guided by outfitters were generally satisfied with their experience, but residents are not. **Mr. Flowers** replied that the survey focused on use rather that satisfaction. Resident versus non-resident was not addressed in the survey.

REP. HARRIS asked if Mr. Lane felt that FWP had authority under the seasonal-use exception to MAPA to ban all outfitter-guided fishing. **Mr. Lane** said that the rule was made under the fishing exception. He thinks that it would be difficult to sustain a ban of outfitting under a legal challenge because the whole burden of the river management would be on one group. **REP. HARRIS** asked, to the extent that the rule prohibits the transferring of property rights from one entity to another, does Mr. Lane regard that as seasonal in nature or outside the scope of the seasonal exception. **Mr. Lane** said that they do not see the ability to outfit on a river as a property right. The property right may be their interest in their business, boats, land, etc. The use of the river, in their view, is not a property right. The Commission was very clear that they did not want to create a property right of that nature. It is a privilege to fish on the river, and they are not going to allow that privilege to be transferred from one entity to another. These rules deal with who gets to fish on the river. **REP. HARRIS** asked if the moratorium portion of the rule doesn't create a defacto property right. **Mr. Lane** said that is one of the issues that the Commission was struggling with, how to do this without creating a property right. The way to do that is to not allow any transfer. If you allow it to be transferred, a defacto property right would have been created. As a matter of philosophy, the Commission didn't want to do that. **REP. HARRIS** asked, putting aside the fishing exemption, does Mr. Lane think that the transfer issue and the moratorium issue are justified under the seasonal exception. **Mr. Lane** said that he feels that it does. The activity is still seasonal.

MR. STRAUSE asked if Mr. Lane viewed HB 626 as doing for all the rivers in Montana what the individual bill did for the Smith River. **Mr. Lane** said that HB 626 does for all of the rivers what the Smith River legislation did for the Smith River. There are differences because HB 626 provided broad authority to address social conflicts. The Smith River legislation had specific guidelines and specific framework. The bills are similar in the scope of their authority for regulating the use on the rivers. **MR. STRAUSE** asked if the Smith River also had a moratorium on it for new outfitters. **Mr. Lane** said that was correct. **MR. STRAUSE** asked if HB 626 did the same thing for the Big Hole and Beaverhead Rivers. **Mr. Lane** said that was correct. He added that the Smith River rule was done as a biennial rule.

REP. HARRIS asked if the portion of the fishing exception that requires that the substance of the rule be put on signs had been observed in this instance and, if so, is there discussion on the signs about the moratorium and the transfer of property rights. **Mr. Flowers** said that they had

posted the large part of the rules at all fishing access sites. He wasn't sure what was put on the signs.

REP. HARRIS said that the EQC staff notes that the only item missing from the posted rule is the rule that limits the transferability of outfitter licenses. **Mr. Flowers** said that Mr. Lane had informed him that was correct. The rationale for that was that the outfitters knew who they were and who had authority to operate on those rivers, FWP didn't need to tell them that they weren't allowed to operate there.

Tom Anaker, FOAM, (opponent) said that the Subcommittee's task is to determine whether the biennial rules were lawfully promulgated by FWP. The Subcommittee is not being asked to determine if the rule is appropriate, good or bad, but was it lawfully promulgated and were the appropriate administrative procedures followed. It is FOAM's position that the exception to MAPA doesn't apply to this subject matter for rule making. This rule is not about fishing, it is not seasonal. This is about social conflict regulation.

Prior to 1999, when FWP was regulating fishing, they took the position that they couldn't regulate social conflicts and they didn't. It was the change in 1999 that added "public welfare" to the statutory scheme that caused FWP to decide that they have the ability to regulate social conflicts. He read from the response to REP. HARRIS's letter by FWP regarding the purpose of the biennial rule. "The Commission adopted its temporary rule to try and prevent a rush of increased commercial entry on the rivers while the interested parties and the Commission developed a longer term solution such as a river recreation resources management plan. To suspend the temporary rule in order to adopt a more permanent solution would defeat the Beaverhead and Big Hole rules very purpose." FOAM submits that the purpose is commercial regulation, not fishing and not seasonal. The text of the biennial rule defines float outfitting as the operation of any boat for commercial purposes by a fishing outfitter or guide. This shows that the outfitting is a commercial activity that they are regulating.

He doesn't see the logical distinction of the transfer of an outfitting license, which is considered fishing, but the type of equipment or training is not fishing. He thinks that these things are regulation of the outfitter commercial activity and are not just regulating of fishing.

Since neither the seasonal or fishing justification apply to this subject matter of the rule, the exception to MAPA can not apply. In order for the department to lawfully promulgate a rule with this subject matter, they need to go through the full MAPA procedures. If they had, there would have been an opportunity to look at the economic impact of the rule before it was implemented. They would have been required to produce the justifications that Mr. Cunningham mentioned in his testimony, but that was not done. They are requesting that the Subcommittee recommend to the full EQC that an objection be made against the biennial rules and that FWP rescind those rules immediately. They would also request that legislation be developed through EQC that would limit the MAPA exception. The exception has been abused and needs to be restricted to hunting and fishing take limits and seasons.

He doesn't think that there is any part of the rule that was lawfully adopted. The purpose was social conflict management, which is neither seasonal nor about fishing. He doesn't think that any part of the rule can be saved.

MR. STRAUSE asked if any portion of the two rivers under this rule is open for fishing year round. **Mr. Anaker** said that they were. **MR. STRAUSE** asked if that is why Mr. Anaker feels

that it is not a seasonal rule. **Mr. Anaker** said that is correct. **MR. STRAUSE** said that he had indicated that it should be up to the Legislature to regulate social conflict. Would Mr. Anaker agree that what is social conflict on the Smith River may be different than a social conflict on the Beaverhead River? **Mr. Anaker** said that he had never seen a definition for social conflict. There needs to be some guidance so that there is some uniformity of expectations. If we are setting statewide policy, then it is something that the Legislature needs to address.
MR. STRAUSE asked if FWP set bag limits for hunting because they have made the determination as to what is the proper level of game in an area, and if that is true, why can't they do the same thing with social conflicts. **Mr. Anaker** said that what the Legislature did with respect to the Smith River is to provide all sorts of sideboards to guide the department. We are in an area where there is a question of the department's authority to be doing this in the first place. This is not an area where the Legislature has transferred authority to the department.

Senator Bill Tash, SD 17, (proponent) said that he carried legislation in the House that was a solution that was insisted on by his constituents, not just fishermen. Those who are using the river need to stop and consider why the fishing is so good on the Beaverhead and Big Hole. It is because of the management of the irrigators, not the re-creators, and that is what creates a tail water opportunity that has created all the congestion and social conflicts. If we can't find a solution that is oriented to solving the problem, then this will continue on without any good results. He is in favor of the administrative rules as they have been submitted. Give them an opportunity to work, especially through the drought periods.

He felt that HB 626 was broad enough to carry forward the legislative intent that has been submitted by the opponents to the administrative rule procedures that aren't needed. There is legislative intent in HB 626, give it a chance to work. He doesn't object to tourism. It's all good if it's compatible. Why cancel the cow and the crop to make more rods and guns? The Big Hole and Beaverhead Watershed Committee has gotten national attention for being able to come up with collaborative solutions to find some middle ground in these conflicts. They represent all the users, not just the re-creators. It is short-sighted to think that we need to throw out what ground has been gained and start all over.

REP. BARRETT asked about the unintended consequences of the rule. It is a public resource. There are people who depend on the river, but who are not users of the river; those people have been left out. How do we address all the people, not just the users? **Sen. Tash** said that they were included as members of the advisory committees. Their recommendations were the ones that FWP and the Fish, Wildlife and Parks Commission acted on in setting forth the rules. They weren't operating in a vacuum. **REP. BARRETT** asked if the people on the committee who were representing businesses had fishing businesses. **Sen. Tash** said that was correct.
REP. BARRETT wanted to know about the businesses beyond those on the river. **Sen. Tash** said that he didn't know how to be all inclusive on these issues. You can ask for public comment and receive volumes of input, but it is hard to respond to every individual's solution. That is why we have committees.

REP. BARRETT asked if he would be opposed to having an economic impact study done to find out what impact the rules have. **Sen. Tash** said that it would be another study and the results are already known. They already know that the major contributor is agriculture. The things that are supplementing that are things like river recreation and the businesses that they support, especially if they can do it in a compatible way rather than a competitive way. He doesn't think that we need an economic study to determine that.

Representative Diane Rice, HD 33, (opponent) said that she is here in opposition to the river rule. The reason for her opposition is the adverse effects that it would have on the local communities and the businesses therein. What has resulted as one more year has passed are the rumors that Montana doesn't want any out-of-state tourists. This is critical at a time when our economy is so in need of stimulation. There are millions of dollars being spent to promote and bring tourism here. To sabotage our own customers is beyond belief.

She is also here as a commissioner of the Montana Heritage Commission (MHC). This is the agency that was commissioned by the Legislature once Virginia City and Nevada City were purchased. The tax payers of Montana invested 9 million dollars in the two cities. MHC was then mandated to operate and preserve the two cities in an operational break-even situation. It has become her personal mission to accomplish this. When she sees millions of dollars being invested, there is a fiduciary responsibility that the citizens of Montana have placed in the Legislature and state agencies to take care of that money. These rules are a form of sabotage to their customers.

There is a conflict of issues between the agencies themselves that also needs to be looked at. It is her recommendation that the Subcommittee rescind the river rule. There have been a lot of adverse effects.

Ray Gross, Beaverhead Advisory Committee, (proponent) said that the biennial rule for the Beaverhead and Big Hole Rivers is an interim plan that was passed to prevent crowding and uncontrolled growth of outfitting on these rivers. This was carried out at the request of Gov. Racicot after he vetoed SB 445. In vetoing SB 445, Gov. Racicot instructed the Montana FWP to use the consensus process to develop a management plan. Mr. Gross was a member of the advisory committee representing local sportsmen. The objective of the advisory committee was to seek an agreement on recommendations for addressing the specific task. Issues to be addressed were concerns about recreational use on the river, conflicts between types of use, resource and property damage, and demands upon public facilities related to the use of the river. The committee was given the guidelines that the plan should not be based on commercial outfitting opportunity, on historical use, and no element of the plan should create a vested property right for commercial owners.

Many special interest groups and public members were represented on the committee. The process was well advertised and every meeting was open to the public. At each meeting there was designated time for public comment. That comment was factored into the plan. The committee's proposed river management plan included outfitter boat distribution, limit of boats per outfitter per reach of river, Saturday outfitter closure on a certain reach of river, a permit system for outfitter use, mention of the petition for local citizens for a section of the river to be closed to commercial outfitting. Public meetings were held on the plans in October in Butte and Dillon. In November 2001, FWP reviewed the proposed plan. Final plans were redrafted and presented to the committee for review. For the most part the committee supported it. There were several public meeting and hearings. There was a lot of public involvement in this process, more than he feels would have happened if MAPA would have been used.

In a comparison between the biennial rule and what the advisory committee developed, the maximum number of boats in the advisory plan was based on the outfitters' use. The biennial rule considered complaints from small outfitters that only one boat per river would not allow them to take parties on the river and in the rule they allow them to have the same number of

boats as any other player: three per reach. The capped use of outfitter use in the advisory plan was capped in the years 1995 to 1999, and based on the average of their two highest years. There were outfitters who appealed to the Commission that if that were the case the businesses would fold. The Commission allowed use in the year 2000 for those outfitters. The section of the river that the residents had petitioned be closed to commercial outfitters was not considered in the advisory committee's plan. It was considered by the Commission and made it part of the rule. There was more content on the committee's plan dealing with transferability, which is one of FOAM's biggest concerns.

He suggests that the development of this rule is a true product of the public involvement process. What is happening is that a special interest group is trying to negate all of that public involvement. There was a lot of compromise in this plan and in no way was it constructed to limit non-residents or ban them from the rivers. It is unfair to say that outfitting and businesses weren't considered.

Mr. Gross presented a petition of over 250 Montana residents that support the biennial rule. **Attachment 15**.

Allen Schallenberger, outfitter, (opponent) submitted written testimony. **Attachment 16**. He said that outfitters were not allowed comment on the months of use that they could have. The issue came up just a few days before the rule came out. It came from a letter from the chairman of the Big Hole Watershed to the chairman of the FWP Commission. He never thought that Montana would regulate the number of days per month that he could work. He has a total of four days of use on the Beaverhead and 16 days of use on the Big Hole during the busiest periods. Businesses were poorly represented at the meetings. There were no use figures collected in the year 2001. In 2000, 18% of the use on the busiest part of the Big Hole River was outfitted use and 27% on the Beaverhead. Most small outfitters are almost out of business.

Steve Luebeck, Big Whole Watershed Committee, (proponent) said that he had been told by FOAM that what they wanted was for FWP to have the opportunity to go back and do it right. Mr. Anaker commented today that they want the whole thing torn out of place. He feels that if this was truly a legal problem, FOAM would have gone immediately to court claiming irreparable harm and asked for an injunction.

The issue comes down to whether the biennial rule-making process is valid. The intent of MAPA is to ensure that the public is involved in the rule-making process so that government agencies, in this case FWP, can't meet without public notice and start handing down regulations. There were 30 public meetings on both the Big Hole and Beaverhead. In addition to that, there were two public hearings, two FWP Commission meetings where public comment was taken. Certainly the public comment issue has been taken care of. FOAM is looking at an opportunity to kill these rules on a technicality. They say that it doesn't qualify for the biennial rule-making process, but he would disagree. This is not a simple issue of whether or not the public was involved, it is what flavor of rule making is wanted. FOAM is asking the EQC to split legal hairs, which is something that should be done in the court system.

He read from the May 2001 issue of Fly Fishermen's Magazine. "Threatened by imminent restrictive regulations in both the Beaverhead and Big Hole Valleys, Big Hole River Watershed Committee, a local consensus group, proposed what may well have been the most creative plan to regulate stressful competitive fishing pressure on public waters ever conceived. It should be

reviewed by other states as a possible model for solving river crowding problems." He would ask that the EQC dismiss this without any further consideration. This is a valid rule.

Eric Troth, Beaverhead and Big Hole Outfitters and Guides Association (BBHOGA), (opponent) agreed that this process involved the public, but we need to look at it if this is the end product of the advisory committee or the end product that the FWP Commission put in as the final biennial rule. There were a lot of changes that took place in the last couple of weeks of the process. BBHOGA is concerned to see constructive rules that address the problems on the river. They participated in good faith and agreed to go along with some of the suggestions that were made. However, some of the key structural components came at the last minute with the FWP Commission. The Commission didn't have adequate time for public comment on the changes. The Commission itself went back and forth because many didn't know what to do. He feels that it was done in good faith, but that they went too far with some of the elements that were added in at the last minute. They are finding that some of those last minute elements are having a very significant effect. This is where we get down to the procedure element of this issue.

He struggles with whether it would be good or bad to have the biennial rule go away because there are elements of it that the outfitters want to see in place. We need to look at how we create rules that are fair and justifiable. If we think about the American legal system in general, there are rules of evidence as to what can be admissible in court. Those rules are designed with the idea of protecting the rights of individuals. Hopefully a judge will be wise about what evidence is admitted. In the big picture, the integrity of the entire legal system is at stake in that. In the river management there is a process that, because of its newness, was struggling to find its direction. It came up with the product, however the procedure was flawed.

REP. BARRETT asked if the committee was informed that this plan may not be adopted.
Mr. Troth said that he saw that much of this went along, drifting away from some of the sideboards because the issue was very complex and the committee members didn't see any other way to deal with some of these issues without treading into that territory. Many members had the expectation that FWP may change their mind on some of those things. There were some indications late in the process that FWP wasn't happy about that.

Tony Schoonen, Anaconda Sportsmen Club, Public Lands/Water Access Association, (proponent) submitted written testimony, **Attachment 17**. He said that there are no private property rights to the rivers. He read from a document from Judge Molloy dealing with I 143. "The operators also claimed that the ban imposed by the initiative violates their Montana constitutional right to pursue employment. The plaintiffs want to equate the opportunity to pursue employment as a fundamental right in Montana with being able to run the business unfettered by state laws and regulations. Nothing that the Montana Supreme Court has said the right to pursue employment does not include the right to a particular job." This has already been tried in court. He felt that the representative from FOAM that sat on the committee with Mr. Schoonen tried to torpedo the whole process. Not all of FOAM is against the rule. The minute discrepancy is not worth tossing all of the hours of work. He would like to see the rule stay in place, giving it time to work.

Jerry Kustich submitted written testimony in support of the river rule. **Attachment 18**.

MR. STRAUSE asked if the moratorium and the non-transferability provisions of the present rule are the same as the provisions in the 1999 biennial rule. **Mr. Cunningham** said that the original biennial rule imposed a moratorium, but didn't address the issue of transferability. **Tim Mulligan, FWP Commission,** said that there was also a difference in the moratorium. In the first biennial rule there was not a cap for outfitters who had historical use and in the current rule that was capped in the busy months. The transferability is new under the current rule, but it is only for two years.

REP. HARRIS asked if EQC was to say that FWP went beyond the exception to MAPA, but they don't have any quarrel with the substance, can FWP promulgate a rule between now and May 1, 2002. **Mr. Haegener** didn't think that it could be done with the required time frames. **REP. HARRIS** asked if they could do it if all of the comments and transcripts were incorporated into the new rule-making record. **Mr. Mulligan** said that if it goes back out for rule making, then it is subject to the Commission vote with five members, three of which are new. **REP. HARRIS** asked if it would be difficult to do it between now and May 1, 2002. **Mr. Mulligan** said that it would be a true travesty. **Mr. Haegener** said that the process for the last time took close to 18 months. **REP. HARRIS** asked if the EQC's recommendation were to object to the rule, but keep the substance, could a new rule be made within a 10-month period. **Mr. Haegener** said that it could be done because something has to be done before 2002 because the rule will expire. They will be starting the process for the 2002 change in the next month or so. **REP. HARRIS** asked if there is any way to speed up the rule-making process. **Mr. Haegener** said that there might be, but if they are to go strictly with the MAPA procedures, specific time frames are required for public comment. That also requires commission approval before they can put out a tentative rule.

REP. BARRETT asked about the sideboard that was used requiring no vested interest, are they aware that is a written policy of the Montana Wildlife Federation. **Mr. Mulligan** said that was not brought to the Commission's attention or considered. There was considerable discussion within the Commission on the transferability issue. That was one of the key reasons they decided that they were not ready for a management plan and stayed with a biennial rule. **Mr. Haegener** said that they had requested from the Governor's Office a committee to look at the broader spectrum.

MOTION: REP. HARRIS moved to object to the rule on the grounds that it improperly invoked the seasonal use exception to MAPA, but to delay the effective date of that objection until May 30, 2002, and recommend that all of the comments and records dealing with the previous rule making be incorporated into the future rule making.

REP. BARRETT seconded the motion.

Discussion:

MR. STRAUSE said that he is saddened that there is this split between two groups that have a common interest. Those groups are those recreating for profit or pleasure. It would behoove everyone to try and reach some consensus on this issue. FWP has convinced him that the rule was correctly adopted as a biennial rule, although it is a close call. Because he is not convinced that FWP exceeded their authority, he would hesitate to send them back to the drawing board.

This is a work in progress, it is not over yet. Let's let the process work. There is no reason for EQC to intervene at this point.

REP. HARRIS agrees that this is a close call. He feels that EQC has some authority over an exception to MAPA if the rule-making process has been flawed. He thinks that the exception has swallowed up the purpose of MAPA. To avoid the disruption that may occur, the effective date will be deferred. And to make sure that everyone's comments are considered, the motion calls for those records to be incorporated.

VOTE: Motion passed 2 to 1 with MR. STRAUSE voting no.

VI COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT (CECRA) PROGRAM

- ***State remediation program and CALA overview***

For supplemental information see **Attachment 19.**

Sandi Olsen, DEQ Remediation Division, said that CECRA was passed in 1985, and amended in 1989. It is modeled after the federal Superfund law. CECRA is intended to protect public health, welfare, and the safety of Montana citizens and the environment from releases or the threat of releases of hazardous substances. It tries to encourage private parties to clean-up facilities where releases have occurred. It provides for funding to study, plan, and undertake the remediation of contaminated facilities. In 1995, the Legislature added the Voluntary Clean-up and Redevelopment Act (VCRA) to the CECRA program. In 1997, after a two-year consensus process CECRA was supplemented with the Controlled Allocation of Liability Act (CALA).

CECRA facilities are facilities which the EPA has not listed on the national priority list under the federal superfund program (CERCLA). There are differences between the state and federal programs. CECRA addresses petroleum contamination, while the federal program does not. In Montana there are 208 state facilities on the CECRA priority list. There are only 13 federal superfund facilities in Montana on the national priority list. State superfund has fewer resources than the federal. It also has the voluntary clean-up statute and the CALA statute.

Under CECRA, liability for clean-up is a strict, joint and several liability requirement. This means that past and present owners and operators, as well as generators and transporters are all considered to be individually liable for full clean-up of an entire facility regardless of whether the person caused the release, unless the person qualifies for one of the exclusions built into the state superfund program. Liable persons may conduct clean-up through DEQ's initiation or voluntarily.

Once a facility has been identified the person can voluntarily clean-up the site or go through DEQ. If they go through DEQ the process includes preparation of a remedial investigation work plan and the subsequent implementation of that work plan, preparation of a risk assessment to determine risks to humans, plants and animals; preparation of a feasibility study work plan, and possibly a treat-ability study. Various alternatives for clean-up will be looked at and those will go out for public comment. After an alternative is chosen it will be implemented and clean-up of the facility will occur.

DEQ's priority list is based on information given to them. Now that the list is in place, sites are added to the list as complaints come in. The facilities are listed based on risk. At this point, DEQ has the resources to address only the maximum and high priority sites.

DEQ gives the liable persons the opportunity to conduct remedial actions before ordering them to do that. Typically a person will step forward and take the lead on those remedial actions. DEQ approves all documents that come through this process. The applicant uses an environmental assessment (EA) to prepare a clean-up plan. The department evaluates the plan and approves it, providing for public comment and notice.

The benefits of the voluntary clean-up process include the fact that the process facilitates closure and delisting of facilities not ranked high enough for DEQ to initiate action. It facilitates property transfers and redevelopment is typically less costly and cumbersome. It often results in more rapid clean-up. DEQ maintains enough control over the process to ensure protectiveness, but provides less oversight than would be required under CECRA.

In 1995, industry representatives submitted a bill to the Legislature to repeal strict joint and several liability. Although the bill didn't pass, the Legislature directed the department to study CECRA's liability provisions, mandating the use of a collaborative process. The department contracted with the Consensus Council to design the study process. Committee members drafted proposed legislation that was introduced as SB 377 and HB 584. These bills were passed and are now known as CALA.

CALA is a voluntary process that allows PLP's to petition for the allocation of liability among responsible persons as an alternative to strict, joint and several liability. CALA provides a streamlined alternative to litigation and allows for the allocation of liability among persons, including bankrupt or defunct persons. Clean-up of facilities must occur concurrently with the CALA process and CALA provides for the funding of the Orphan Share for clean-up. Clean-ups typically involve historical contaminations. The share of clean-up costs for bankrupt persons is known as the Orphan Share.

The DEQ administers CALA and is charged by the statute with defending the Orphan Share. The nature of the Orphan Share is that there is no one to represent it.

DEQ has a lot of facilities that they are working on. There are 208 sites listed, 59 are being actively worked on. Of those 59, 19 are voluntary clean-up sites. There are 4 maximum priority sites and 36 high priority sites that are being worked on with existing staff. Two of the sites are CALA sites. The voluntary clean-up sites are mostly listed as medium priority.

CALA is a streamlined process compared to private judicial contribution actions, it does require resources to complete. Therefore, the Orphan Share for the facility must be estimated by the petitioner to be high enough to make the process worthwhile. In addition, the PLPs must have the resources to complete the clean-up in order to receive reimbursement. Therefore, PLPs that do not have a lot of resources typically will not be able to complete the process. Although CALA contains provisions for hardship, PLPs must be able to complete the process and the clean-up before they receive even partial reimbursement. Another limiting factor is that PLPs may not have enough information about their facility to determine whether or not it is worthwhile to go through the process. Overall the department believes that the process has worked. It provides incentives to PLPs to expedite clean-up.

Based on DEQ experience, they think it would be useful if the PLPs considered completion of a remedial investigation for the facility being addressed before they complete the allocation. That way the full extent of the contamination is known, as well as the parties to be included in the allocation process. In addition, currently it takes a PLP to actively petition the process and the department to access the fund. A possible change in this would be to allow for local governments or developers to access the fund to assist with clean-up and redevelopment of facilities that are completely orphaned.

VII INDUSTRY, CONSULTANT, AND PUBLIC INTEREST GROUP PERSPECTIVES ON CECRA/CALA

Steve Wade, attorney, said that he had represented a number of clients who had gone through the CECRA, VCRA, and CALA processes. The perception with respect to the program is that it is a cumbersome process. The time frames take quite a while, which is ultimately a disincentive for trying to get out there and do things, which is the goal of the voluntary clean-up program.

CALA is a worthwhile program and he would urge that the sunset provision be removed, making this a permanent program. There is a lack of awareness about the program. Perhaps the CALA process could be better articulated in a notice letter. He believes that the CALA process works. In the S & W Sawmill site in Darby, he represented the county as they went through the process. There were some procedural issues that came up, such as dealing with time lines. Things like this could be improved. Another issue that came up in a different case was that the notice letter went out later, which cause some difficulty and frustration in allocation negotiations. Perhaps a later opt-in process could help this issue.

Allen Stine, Olympus Technical Services, said that they had been working through CECRA sites since 1986, in various roles. The majority of his experience is through the VCRA process. He agrees that it is a cumbersome process that often takes longer than is expected, but it does give an opportunity to get sites delisted without going through the CECRA process.

Jim Barrett, Park County Environmental Council, said that they received a technical assistance grant from the EPA in 1995 to help the community employ two consultants to help interpret this program. Cumbersome is an understatement. The community has been working at this for 16 years. There has been some source removal, but the major source of pollution remains. Even with consultants, the frustration level is extremely high.

Sixteen years ago a group of citizens was formed to work through the process. That group burned out. The Park County Environmental Council is an environmental group and they may not be the proper entity to be the advocates for this. The process is a nightmare of bureaucracy.

John Schaefer, Montana Tunnels Mining, said that they are working on the mine site clean-up in Corbin Flats. Montana Tunnels operates a mine south of Helena. The site that they are working on is outside of their permit boundary. It is land that was acquired for mineral prospects at the time of the formation of the company. The VCRA process is difficult. In principle it is a good way to try to achieve clean-ups. In practice it becomes difficult because in going through the process you have to re-invent and argue every environmental standard or statute that is in effect at the time. A lot of the stuff that they are dealing with could probably be done with a check list. It is very frustrating to get through the procedure. Once the clean-up did get going, it was a lot of fun to work with the departments, but the process of getting there was very difficult.

In 1997, they petitioned to be in the CALA process. At that time the understanding was that when they were finished with the clean-up in the lower Corbin, that would be the end of the project, but because another entity backed out of the clean-up in the upper Corbin, they were named as the lead person to proceed with the clean-up. They again went through the VCRA program, which seemed to drag on. He would like to see something done to streamline that part so that it was truly voluntary. The CALA negotiation was another aspect of it. They got into the program with an understanding that they had a good chance to recover a fairly substantial portion of what they put into the clean-up. Then through a negotiating process that turned out to not be true, but they were able to negotiate back to middle ground. It would be nice if that could be worked out at the beginning rather than later on in the process.

REP. HARRIS asked if there was one recommendation to improve the CALA process, what would that be. Also, would it be better to have the Orphan Share funds at the beginning of the process rather than the end. **Mr. Schaefer** said that they have been collecting the money as they go by pleading a hardship case. DEQ determined that they could receive 100% reimbursement because of the money that was spent in the lower Corbin clean-up. Having the money as the clean-up proceeds would be a positive thing for the program. **REP. HARRIS** asked for one recommendation to improve the process. **Mr. Schaefer** said that the negotiation should be done up front. He would also like to see the voluntary clean-up program be streamlined. **Mr. Barrett** said that the consultants for the company that are frustrated by the process are usually ready to get started with the clean-up and there is some delay in the initial process. There needs to be a balance between the can-do and the bureaucracy. **Mr. Stine** said that it is a cumbersome process, but these are technical and complicated situations. There aren't a lot of ways to make it less cumbersome. The largest problem that he has seen is turnover in the department. **Mr. Wade** said that to make it operate better and to make it a permanent program, it needs to be made available to the people who need to move forward with the clean-up, but don't know how.

Ann Hedges, MEIC, said that she helped draft the CALA program through a consensus process. She thinks that we need to be clear in differentiating between clean-up and liability. They are different issues and they require a different study. She asked Mr. Wade if he thought time frames should be shortened or lengthened and how that should occur. She also said that having the negotiation process on the front end would make it difficult to determine all of the information needed to know who is responsible and how much they are responsible for. You have to look at staff turnover in this program.

MR. STRAUSE asked if Ms. Olsen thought that removing the sunset provision, allowing for a later opt-in process, and using checklists would be good ideas to help the program. **Ms. Olsen** said that DEQ also thinks that removing the sunset provision makes sense. The biggest concern with allowing for a later opt-in would be affecting the timeliness of the process, but that could probably be worked out. DEQ has some check lists, but they could re-evaluate them and see how they are working and whether there are ways for them to work better. **Denise Martin, DEQ**, said that she would be concerned that a later opt-in may delay the process. The intent of the program is to expeditious. **Cindy Brookes, DEQ**, said that she helped draft the CALA legislation and worked on the consensus team. The opt-in provision came up on the second site run through CALA. What happened is they issued the county a notice letter, began the process and about halfway through the process they realized that there was a party that no one had caught. The party should have been noticed at the beginning, but wasn't. At that point there was no way to bring another party in. The chances of that happening are slim, but it can occur. The

party that was missed did end up getting a 2% of the shared liability of that site. It would be possible to build in an opt-in process, but CALA would have to be significantly revamped because the process is designed to last for 12 months from beginning to end. If you are building in processes where somebody else could opt-in halfway through, all of the deadlines after that point will have to be juggled.

REP. HARRIS asked if it would make sense in some circumstances to have either a quick mediation on what the Orphan Share is, or have the department say that they think the Orphan Share is a certain amount. **Ms. Brookes** said that the department has looked at the different sites and tried to estimate what the shares might be. The problem is that until you get into the CALA process and go through the discovery process that is provided for in the statute, there might be information that is unknown at the beginning of the process. **REP. HARRIS** asked if the panel members agreed with that assessment. **Mr. Wade** said that he did. It was the discovery process that leads to information. It is the discovery time lines that he was talking about. There are some gray areas in CALA with respect to the discovery time lines.

REP. HARRIS asked Ms. Brookes if she had any recommendations for improving the CALA process. **Ms. Brookes** agreed that there are some gray areas in the statute with respect to the discovery time lines. At this point, the discovery time line is 90 days with the possibility of a 30-day extension if everybody agrees. On the opt-in issue, what happened in that case was that a PLP missed the deadline to petition. There isn't a provision for DEQ to allow someone to come in after they miss a deadline. Giving DEQ some authority to allow for that may be a way to correct some of the deficiencies that are in the statute. Another thing that she has seen is negotiations beginning before the remedial investigation is complete. The remedial investigation is to determine the extent and magnitude of contamination. There may be more sources attributable to one PLP than are known at the time of negotiation. She thinks that delaying the negotiation period until the investigations are complete would provide a more accurate allocation for the parties. She would also like to see DEQ or local government be able to access the Orphan Share fund for sites that are completely orphaned.

VIII CECRA/CALA PROGRAM STAFFING

For supplemental information see **Attachment 20**.

REP. HARRIS asked Ms. Olsen, DEQ, to address the concern that staff turnover is possibly the biggest factor in slowing down clean-up.

Ms. Olsen said that DEQ has 16 FTE, including program supervisor, attorneys, etc. Department-wide they are experiencing a 50% turnover rate for all grade 15 positions. To deal with that they are trying to develop an alternative pay plan. In the mid 1990's state government looked at competency-based pay and the Legislature authorized a pilot program that is now permanent. They are now working for an alternative pay plan, under which they can pay staff based on considerations such as market pay, competency-based pay, results-based pay, or look at strategic pay. They are working with the Department of Administration to get market information. The preliminary market information indicates that grade 15 salaries are ranging from $5,000 to $8,000 in salary per year below market in the four state area and in the Montana private sector salaries. They are $20,000 below the national market. They are looking at why people leave as well as why people stay. They hope to use that information to identify some non-pay incentives that would induce people to stay longer.

The people who are leaving are leaving for immediate or long-term changes of pay. Some are leaving to move closer to family or go back to school.

REP. HARRIS asked if there is any possibility of tapping into the superfund funds so that all staffers work on at least one or two federal superfund cases, and somehow get higher pay while working on federal cases. **Ms. Olsen** said that the limitations in pay are because the staff is assigned to pay plan 60, which has legislatively set pay rates. Moving to federal projects would not change that pay plan. They are looking at funding sources for the new pay plan and trying to determine which sources have flexibility in how they can be spent. **REP. HARRIS** asked if it would help if the Legislature gave DEQ greater discretion to shift funds. **Ms. Olsen** said that she doesn't know how that would work administratively. Through the alternative pay plan authority the Legislature has given the department a great deal of flexibility, but they have to develop a plan. To fund it they are looking at things like reducing contracted services. The workload factor may be a part of why people are leaving.

REP. BARRETT asked if there is anything through state government and the university system where we could pay for their education and keep the employees in the state. **Ms. Olsen** is not aware of explicit components. Most state programs have some training component in their budget. DEQ is working with Montana Tech to bring a hydrology program into the department and provide that kind of benefit for the employees now.

IX CALA CASE STUDIES, INITIAL REVIEW

Amy Reynolds, DEQ, referred to **Attachment 21**. There are two facilities that have completed the CALA process. Corbin Flats was split into to areas, upper and lower Corbin. Montana Tunnels still owns the lower Corbin, which is the portion that they planned to addresses. Without CALA upper Corbin may not have been addressed. There are high levels of arsenic, cadmium, and zinc in the tailings, which represent a hazard. In 1987, Montana Tunnels purchased lower Corbin, which was covered in tailings. There was a completed voluntary clean-up plan in 1997. Lower Corbin area was completed in 1998, and revegetation is in progress. The cost was 1.3 million dollars. The upper Corbin clean-up was completed December 2001. The estimated cost was $600,000, but the actual cost was higher. Montana Tunnels has receive two reimbursement checks and the third one is in the mail.

S & W is the other CALA facility. This was a sawmill that operated in the 1960's and 1970's doing wood treating with penta, which is the type of contamination. There were various areas of spillage. The original owners went bankrupt becoming the Orphan Share and later International Paper became the lead PLP for the site. The process went more smoothly in this case than in the previous one with Montana Tunnels and the Corbin site.

X CECRA/CALA FUNDING

Ms. Olsen referred to **Attachment 22**. She said that there are two funds of concern. EQPF supports CECRA and the voluntary clean-up plans, those funds are cost recovered to the extent practical. They don't cost recover all EQPF funds expended. DEQ is re-evaluating how they are charging out costs to ensure that they are maximizing what they charge to the sites. They have increased cost recovery by two changes in statute. Those changes improved the noticing process and allowed DEQ to charge interest on sites where the noticed party was not reimbursing the EQPF costs. However, cost recovery is not offsetting the expenditures.

Orphan Share funding changed this Session. Several bills were passed which took metal mine interest taxes away as a potential funding source; some funds that were previously going into Orphan Share were diverted to the Natural Resource Workers Re-education Program; some other funding was diverted to coal bed methane to reimburse landowners for damages to their properties. Now the funding in Orphan Share is adequate to deal with the number of sites that there are. Depending on the number of sites that come in, that may not always be true. CALA has a provision that bills are paid in the order that they are received and the state is not liable for any interest that might accrue.

REP. HARRIS asked if another site similar to Corbin Flats comes in, can the fund afford it. **Ms. Olsen** said that the fund can probably afford it right now, if the Orphan Share were no larger. The anticipated ending fund balance at the end of this biennium is 1.2 million. Their rate of expenditure is approximately 3 million dollars per biennium.

XI INSTRUCTIONS TO STAFF

MR. MITCHELL said that for the February meeting the work plan proposes an update on MEPA litigation, a panel involving CALA case studies, a potential financial review of the state Orphan Share and CECRA program.

MR. MITCHELL asked Ms. Olsen if money from the Orphan Share funds could be used to hire staff for oversight. **Ms. Olsen** said that Orphan Share can only be used for defending the fund and for site clean-up costs. **REP. HARRIS** asked if oversight was statutorily excluded. **Ms. Olsen** said that in theory, DEQ bills them for all of the oversight costs and they reimburse the department for the non-orphan share part. **REP. HARRIS** asked if the Subcommittee were to ask for a detailed summary of where the Orphan Share and the general CECRA funding stands, would that be readily available. **Ms. Olsen** referred to **Attachment 22**. **REP. HARRIS** said that if they are going to make recommendations to the Legislature for changes they need to be able to explain that the money is being robbed for other worthwhile purposes. This information is accurate, but it doesn't explain the whole story. He would like to know the trouble spots. **Ms. Olsen** said that the same problems are anticipated in the EQPF. It is predicted to be in the hole by the end of the biennium. **REP. HARRIS** asked how the department handles running in debt. **Ms. Olsen** said that they are going to leave two positions vacant. **REP. HARRIS** said that creates addition pressure. He would like to hear what the situation is. **Ms. Olsen** said that DNRC is a vested interest in RIT interest and how it is disseminated. She would be concerned about stepping on their toes in how she presents the information. She would be willing to provide any information that the Subcommittee may want. **REP. HARRIS** suggested that the Audit Department could look at these funds. The EQPF is in trouble already. **Ms. Olsen** said that the reason it is in trouble is because the program keeps expanding while the revenue coming in has decreased.

REP. HARRIS said that the could provide a series of budget questions to get a comprehensive story. **Ms. Olsen** said that would be fine.

MR. STRAUSE said that approach would be fine. Ms. Olsen had mentioned a lot of resources that had gone to other areas recently. He would like to have some information about where they are going and the rationale. **Ms. Olsen** said that information could be found in the budget book handout.

REP. HARRIS said that MR. MITCHELL, with member input, would develop a series of questions about the budget. This is not a small amount of funding.

MR. MITCHELL said that another item on the work plan is a CECRA staffing review, but that was covered this time. Does the Subcommittee want more information on that? **REP. HARRIS** said that they would if it gets worse. There may need to be legislation to address the turnover problem.

REP. BARRETT said that this isn't the only department that has a turnover problem. It is a general problem for the state.

MR. MITCHELL said that the only MEPA topic for the February meeting is the litigation update. One of the things in the MEPA work plan is a rewrite of the MEPA handbook, he can get started on that.

MR. STRAUSE would like to get some sort of handbook for the general public about making comments. **REP. HARRIS** said that the departments all agreed on that. He suggested that the Subcommittee send a letter to follow the progress of the brochure. **MR. STRAUSE** said that maybe they could report to the Subcommittee at the next meeting.

MR. MITCHELL continued with the work plan, review compliance and enforcement reports, meet with compliance and enforcement reporting agencies.

REP. HARRIS would like to see trends. He doesn't know if the current format shows any information about trends. **MR. MITCHELL** said that he can get the information to-date as to what they have done, some samples of what they have produced. **REP. HARRIS** asked if they have plans to follow the old format. **MR. MITCHELL** said that would be his guess. Given an opportunity to communicate with the Subcommittee there will be an effort, at least by DEQ, to get out of it entirely.

REP. HARRIS suggested distributing the current information or previous reports. He would guess that the Subcommittee will want to improve on it.

REP. BARRETT said that the agencies all have other reports that they do yearly too.

REP. HARRIS said that this is a statutory obligation. **MR. MITCHELL** added that it was amended into the MEPA law.

MR. STRAUSE said that the reports tend to be a waste of time if the EQC receives them in September. It doesn't allow time for the Committee to look at it. He thinks that the timing should be re-examined.

REP. HARRIS said that a potential upcoming issue has to do with consultants who work with DEQ. Apparently there are new written and informal procedures that place some severe restrictions. The consultants would like to have a hearing in February on what is going on, why is it going on, and what is the authority for it. They are upset with DEQ.

MR. STRAUSE said that there is an issue that has come up in Great Falls. Great Falls is doing an upgrade on its waste water treatment plant, so they took bids. They picked the second lowest bidder, claiming that the lowest bidder didn't submit the proper paperwork. The were intending to fund this through bonding through DEQ. DEQ said that the city was wrong to pick this contractor, but the city has already issued a contract with them. DEQ is refusing the city the bonds, leaving Great Falls to find another source of funding. **REP. HARRIS** said that he would be happy to put it on. Is it something that the city would like EQC to look at? **MR. STRAUSE** said that the city manager has approached him about it. **REP. HARRIS** said that if MR. STRAUSE decided that he wanted it on the agenda then the Subcommittee would hear it.

There was some discussion about REP. HARRIS's motion dealing with the Big Hole/Beaverhead rule objection that will be made to the to the full EQC.

MR. MITCHELL encouraged the Subcommittee to read the handouts that were provided by DEQ.

XII ADJOURN

There being no further business, the meeting was adjourned.

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