



# ENVIRONMENTAL QUALITY COUNCIL

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

GOVERNOR BRIAN SCHWEITZER  
DESIGNATED REPRESENTATIVE

HOUSE MEMBERS  
PAUL CLARK--Vice Chair  
DEBBY BARRETT  
NORMA BIXBY  
CHRISTOPHER HARRIS  
DONALD HEDGES  
JIM PETERSON

SENATE MEMBERS  
WALTER MCNUTT--Chair  
DANIEL MCGEE  
GLENN ROUSH  
ROBERT STORY  
KEN TOOLE  
MICHAEL WHEAT

PUBLIC MEMBERS  
THOMAS EBZERY  
JULIA PAGE  
ELLEN PORTER  
HOWARD STRAUSE

COMMITTEE STAFF  
CASEY BARRS, Research Analyst  
KRISTA LEE EVANS, Research Analyst  
JOE KOLMAN, Research Analyst  
CYNTHIA PETERSON, Secretary  
TODD EVERTS, Legislative Environmental Analyst

## ENVIRONMENTAL QUALITY COUNCIL MINUTES

Date: January 6, 2005

Room 172, State Capitol Building

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Exhibits are on file at the Legislative Environmental Policy Office.

### **COUNCIL MEMBERS PRESENT**

SEN. DANIEL MCGEE  
SEN. GLENN ROUSH  
SEN. ROBERT STORY  
SEN. KEN TOOLE  
SEN. MICHAEL WHEAT

REP. DEBBY BARRETT  
REP. NORMA BIXBY  
REP. PAUL CLARK  
REP. WALTER MCNUTT (Chairman)  
REP. JIM PETERSON

MR. THOMAS EBZERY  
MS. JULIA PAGE  
MS. ELLEN PORTER  
MR. HOWARD STRAUSE

### **COUNCIL MEMBERS ABSENT**

REP. CHRIS HARRIS  
REP. DON HEDGES

## **STAFF PRESENT**

CASEY BARRS, Research Analyst  
KRISTA LEE EVANS, Research Analyst  
JOE KOLMAN, Research Analyst  
TODD EVERTS, Environmental Research Analyst  
CYNTHIA PETERSON, Secretary

Agenda (**ATTACHMENT 1**)  
Visitor Register (ATTACHMENT 2)

## **CALL TO ORDER - ROLL CALL - ADOPTION OF EQC MINUTES**

Chairman McNutt called the January 6, 2005, meeting of the Environmental Quality Council (EQC) to order at 6:05 p.m., in Room 172, State Capitol Building, Helena, Montana. The secretary noted the roll (**ATTACHMENT 3**). There were no minutes of prior meetings to be adopted by the EQC.

## **ADMINISTRATIVE MATTERS**

Mr. Todd Everts, Legislative Environmental Analyst introduced new legislative staff, Mr. Casey Barrs and Mr. Joe Kolman.

## **HJR 4**

### **Database Update**

- **Jack Stults**

Mr. Jack Stultz, Montana Department of Natural Resources and Conservation (DNRC) provided an update (**EXHIBIT 1**) on the database project. Mr. Stultz explained that DNRC was unable to meet the deadline of January 1 for issuing a final decree, but will have the database fully functional by January 15. DNRC has implemented all the recommendations made by Information Technology Services Division (ITSD). Mr. Stults identified the ability to bill as critical and stated it would be imperative that they be able to use the database to generate the invoice. Mr. Stults suggested it would cost over \$100,000 and a couple of months' worth of work to get to that point. Mr. Stults stated they are prepared to determine an exact estimate of what the cost would be and estimated the cost as between \$85,000 and \$100,000. The existing contract would be amended, so the work could be initiated. Mr. Stults expressed concern about spending a significant amount of time and money to develop a system that might not be used. Mr. Stults identified the ability to facilitate the use of materials by district courts and water commissioners for administering water court decrees as a lower priority.

In addressing funding, Mr. Stults identified the total cost as \$400,000 - \$500,000 for the yet-to-be-done enhancements. Funding has been received from the Governor's Office, as well as the Water Court. Mr. Stults explained that the larger components of the projects remain unfunded.

- **Questions from the Council**

Sen. Mike Wheat clarified that if HB 22 passes, DNRC will need somewhere between \$400,000 and \$500,000 to complete the computer enhancements necessary to meet the requirements of HB 22. Mr. Stults agreed that was correct and explained he has sequestered approximately \$60,000. In addition, Mr. Stults believed any federal funding received would not be available for at least one year. In addition, Rep. Barrett has identified a possible funding source of approximately \$250,000, but was apprehensive about receiving those funds since there is competition for the funds.

Sen. Wheat inquired how long it would take to complete the enhancements if HB 22 passes and funding is obtained. Mr. Stults estimated it would take one year.

Mr. Stults asked the EQC to note that some of the functions, such as enforcement, are not critical elements of HB 22.

Chairman McNutt inquired about the ability to complete the billing process and asked how long it would take to get that aspect of the system operational once funding is received. Chairman McNutt believed the Department of Revenue (DOR) would need the data by November in order to bill December. Mr. Stults stated he would request an estimate as soon as it is determined that there is genuine viability to HB 22. Mr. Stults suggested he could be requesting the estimate as early as March.

Chairman McNutt followed up by asking if the \$400,000 to \$500,000 was contained in DNRC's original projection of costs to implement and accelerate the adjudication process. Mr. Stults replied the amount was not contained in DNRC's original calculations. Mr. Stults stated he would also be working with the new director, administration, and budget office to see if additional funds could be obtained.

Sen. Daniel McGee stated there is currently \$750,000 in the alternative energy revolving fund. Sen. McGee suggested there could be a one-time transfer of money from the alternative energy revolving fund to help expedite water adjudication.

Ms. Barbara Smith, Associate Analyst, Fiscal Division, stated it would be necessary to first determine what the money was originally designated for in statute and a determination would have to be made whether the statute would need to be changed. In addition, a decision package would have to be brought before the Executive for approval or a member of the Natural Resources Appropriations Subcommittee would have to bring forward a package to appropriate the money to DNRC. Ms. Smith agreed

it would be possible to transfer funds from the alternative energy revolving fund to the DNRC.

Sen. Toole expressed his concerns about searching other programs for money to fund the adjudication process and stated it was his understanding the EQC had agreed to implement a fee system to complete the adjudication process. Sen. Toole thought the EQC should stay within the users-pay principle.

Mr. Stults pointed out that under the constraints of HB 22, funds will not actually arrive until 2006.

Chairman McNutt noted that Exhibit 1 identified a \$103,865 contract with Northrop-Grumman. Chairman McNutt explained that to date \$20,357 has been spent and asked how the expenditures were being made. Mr. Stults replied the contract is a fixed-price contract and the money is paid upon delivery.

Rep. Paul Clark asked if Mr. Stults was implying that he was not 100 percent sure that the direction DNRC is going with the database is going to reliably meet the requirements outlined in HB 22. Mr. Stults replied he was not making that implication and stated it is impossible to be confident in the level of compliance and level of funding.

- **Kyle Hilmer, ITSD**

Mr. Kyle Hilmer, Bureau Chief, Policy and Planning Services Bureau, ITSD, Department of Administration, explained that even though it was necessary to miss the December 31 deadline, the team worked extremely hard. Mr. Hilmer also expressed concerns about funding and suggested Jack Zanto's impending retirement would also have an impact. Mr. Hilmer expressed concerns about the servers located throughout the state and encouraged DNRC to look at its server protections. Mr. Hilmer applauded the work that had been completed, but stated there was a significant amount of work remaining.

Sen. Story suggested the entire cost for rebuilding DNRC's computer system was falling solely upon the water adjudication program. Sen. Story thought a lot of the work being done by DNRC would have been required regardless of the decision to accelerate the adjudication process. Sen. Story asked what percentage of computer improvements within DNRC are a result of the acceleration of the adjudication process and what percentage is normal depreciation and maintenance. Mr. Hilmer replied that the environmental protections and the backup process should be considered part of the normal operational responsibilities.

Chairman McNutt suggested it would be appropriate for DNRC to ask for an appropriation for the computer work that would be considered part of DNRC's normal operations.

## **On Motion Rule Update**

- **Judge Loble, Montana Water Court**

Bruce Loble, Chief Water Judge, Montana Water Court, stated he filed his proposed rules with the Montana Supreme Court on December 30, 2004. Judge Loble provided the EQC with an overview of the rule which is being proposed to address all unresolved issue remarks placed on claim abstracts by DNRC. Judge Loble submitted a Petition to Revise Water Right Claim Examination Rules (**EXHIBIT 2**). Judge Loble explained proposed Rule 1.II(7) and stated the Water Court would not be calling in the claims by using the on-motion authority of the Water Court, and the Water Court would be reviewing the claims at the direction of the Montana Supreme Court based upon its constitutional authority to exercise supervisory control over all other courts. Judge Loble explained every claim with an issue remark would be placed on the basin objection list along with the claims that received objections. Notice of the objection list would be mailed to every water user in the basin and the notice would be published in one or more newspaper of general circulation, and a copy of the objection list would be placed on the Web. Water users would then have an opportunity to seek intervention on any claim that might concern them. For each unresolved issue remark, the Water Court would first determine the level of review that would be applied to each remark. The first level of review would be to examine the claim file to determine if information is available in the claim file to resolve the issue remarks. The second level of review would consist of contacting the claimant, identifying the issue, and conducting an informal conference. The third level would include traditional judicial procedures. The fourth level of review would involve issues of nonperfection and abandonment issues. Judge Loble explained how, if claims are to be subject to termination, someone will need to review the claim file and develop evidence needed to contradict and overcome the *prima facie* statement of claim. Judge Loble did not believe the Water Court should become an adversary to the water user. Therefore, Judge Loble suggested that the State of Montana, through the DNRC or the Attorney General, should be joined as a party to determine whether either of those issues should be prosecuted. If the DNRC or the Attorney General decline, the issue remarks could be removed. Judge Loble noted this process would be time consuming and labor intensive. Judge Loble had been advised there 29,602 issue remarks currently pending on 13,455 claims, and approximately 57,000 claims are left to be examined.

### ***(Tape 1; Side B)***

Judge Loble stated in 2003, DNRC only had 3.5 FTEs actively examining claims, and DNRC's current projection for completion of examination is over two decades. Judge Loble believed it would be imperative to increase DNRC's staff. Judge Loble noted that interaction with water users should be done with extreme sensitivity to water users' due process. Judge Loble stated if the effort is worth doing, it should be funded and that the provisions of HB 22 will provide funding. Judge Loble stated requiring the Water Court to review, resolve, and remove all issue remarks before the final decree without

providing funding will extend the adjudication process by decades and, perhaps, even halt the process.

Sen. Story asked if the information is only available in paper format and not available electronically. Judge Loble agreed the claim files are all on paper.

Rep. Clark wanted to know how a valid final decree could ever be realized without a proper review and removal of issue remarks. Judge Loble responded the first method would be to arbitrarily remove the issue remark if there is no objection. This could be done with an order from the court. The other method would require pulling the claim file and physically reviewing the file to determine whether the issue remark is worth pursuing. Judge Loble noted the importance of providing the opportunity to object to a water right claim. Traditionally, if people do not file objections, their rights are waived. Judge Loble could not say how this would affect the accuracy of the adjudication process.

Mr. Ebzery directed Judge Loble to the language on page 2, Exhibit 2, which states "The EQC appears to have adopted the Attorney General's suggested solution." Mr. Ebzery disagreed with that statement and recalled that EQC had difficulties with Judge Loble's suggested approach of utilizing a lawyer's committee. Judge Loble replied the Attorney General wants issue remarks removed, and his proposal is that all issue remarks be called in by the court's on-motion authority. Judge Loble referred to Chairman McNutt's letter of September 16, 2004, which states the EQC feels that unresolved issue remarks remaining on water rights that are in final decrees are not acceptable. Judge Loble stated the projected funding for HB 22 incorporates implementing staffing requirements for a mandatory on-motion process. Based on those two items, Judge Loble believed the intent of the EQC is that all issue remarks be reviewed, resolved, and removed before a final decree is issued.

Rep. Peterson asked if the EQC needed to wait on making a decision on Judge Loble's proposed rule until after the disposition of HB 22. Judge Loble stated if HB 22 passes and raises the projected revenue, that would be significant legislative intent and would indicate the legislature approves a mandatory call-in of all issue remarks.

Sen. Toole commented that he understands the uncertainty of whether issue remarks left on decrees may be result in decrees being challenged. Sen. Toole commented a decree would be tighter and more defensible if the issue remarks are resolved. Judge Loble agreed.

Sen. Wheat stated the Legislature needs to declare its intent as to what it wants done in the water rights adjudication process and the rules to get that process done are left to the courts. Sen. Wheat did not feel the Legislature should be making recommendations to the Supreme Court; but rather, the Legislature should be adopting policy.

Chairman McNutt agreed with Mr. Ebzery that the EQC did not approve or sanction the Attorney General's suggestion. Chairman McNutt recalled the EQC believed the on-motion practice was a judicial matter that needed to be taken care of by the Water Court. Chairman McNutt stated the EQC's intent was for Judge Loble to complete the on-motion rules that he had committed to do in 1999 and to have those proposed rules to the Supreme Court by the end of the year. Chairman McNutt stated the on-motion practice is a judicial matter and not a matter for the EQC.

Sen. Story commented that the Water Rights Adjudication Subcommittee looked at all the costs involved and developed a comprehensive bill. Sen. Story stated it is easier to remove components of the bill during the legislative process than it is to add components.

Chairman McNutt directed the EQC to a letter from Chairman McNutt to Chief Justice Karla Gray stating that the petition contains inaccuracies regarding EQC's recommendations ([EXHIBIT 3](#)).

Mr. Ebzery requested that the proposed letter not only reference inadequacies in the petition but also spell out the inaccuracies.

Sen. Story commented that the letter should reiterate the process the proposed legislation has gone through and summarize the EQC's position.

Rep. Peterson thought the letter should be reworded and explain the fact that EQC feels it is important the issue remarks be removed so when the adjudication process is complete, the final decrees are more defensible.

Sen. Wheat agreed and noted the proposed rules would be subject to public comment at least from the State Bar.

Ms. Krista Evans explained that prior to the EQC's September meeting, she had asked Chief Justice Gray whether the Water Court Rules would be open for public comment, and Chief Justice Gray's reply was that she would not guarantee the rules would be open for public comment, and it would be left to the Justices.

Sen. Wheat stated the EQC could suggest in the letter that the rules be open for public comment. Chairman McNutt stated he would revise the letter and circulate it to the members of the EQC.

- **Congressional Letter Update--Ms. Evans**

Ms. Evans reported letters were sent to the Congressional Delegation seeking assistance in funding the adjudication program since the federal government has a large number of objections in the process. Ms. Evans stated that money for the adjudication process itself is not available since this is a problem throughout the West.

However, the delegation will attempt to obtain an FY06 appropriation to secure funding for the database and other computer issues.

### **OTHER ADJUDICATION /WATER RIGHT BILLS**

Ms. Evans directed the EQC to a list of bills related to water quantity that will be coming before the 2005 Legislature (**EXHIBIT 4**).

### **PUBLIC COMMENT**

Mr. Bob Goffena, from the Musselshell River and Chairman of the Board of Deadman's Basin, testified that he supports any process that will start with an examination of the entire Musselshell River. Mr. Goffena stated there is no way amateurs can go through all the water rights and make complaints to become issue remarks. Mr. Goffena submitted a "Comparison of the Water Court Verification Procedures to the Supreme Court Examination Procedures for Musselshell River Below Roundup Drainage (**EXHIBIT 5**). Mr. Goffena stated any changes made will be based on faulty information because of the inaccuracies in the temporary preliminary decree. Mr. Goffena stated it would be impossible to obtain a petition requiring reexamination which would be signed by 15 percent of the water right holders.

#### ***(Tape 2; Side A)***

Mr. John Bloomquist, representing Montana Stock Growers Association (MSGA), testified that MSGA passed a policy to endorse a fee within the range being proposed and requires the fee to terminate by 2015. Mr. Bloomquist suggested additional technical amendments would be required before the bill is passed and offered to bring those amendments. Mr. Bloomquist testified that support from MSGA was tempered on commitment from the legislature. Mr. Bloomquist identified the key components of the legislation as being funding, a funding mechanism, benchmarks, and accountability.

Mr. William Bergin, Melstone, Montana, agreed with Mr. Goffena about the inability to obtain signatures from 15 percent of the water right holders. Mr. Bergin thanked the EQC for their work on Montana's water adjudication process and testified he supports the proposed legislation.

Mr. John Youngberg, representing the Montana Farm Bureau, stated his organization supports the water adjudication fee in principle. Mr. Youngberg recalled the fee was not going to be implemented until the computer system was in place and expressed confusion regarding how the computer system could be funded by the fee.

Mr. Mike Murphy, Montana Water Resources Association, testified that his association supports expediting the adjudication process and endorses HB 22.



Mr. Steve Snezek, Montana Grain Growers' Association, testified that they support the water adjudication process as outlined in HB 22.

Ms. Mary Sexton, Director of the Montana Department of Natural Resources and Conservation, testified that she supports a thorough and accurate examination process for adjudication. Ms. Sexton testified that the current administration supports the efforts of the EQC and supports and encourages the expedited process for adjudication of water rights. Ms. Sexton stated Governor Schweitzer has proposed extra funding in the budget for an expedited adjudication process.

Mr. Richard Stevens, Flathead Valley, stated most water right users in the Flathead are opposed to an additional tax when it has not yet been determined who owns the water. Mr. Stevens suggested there are other ways to appropriate money.

- **Questions from the Council**

Sen. Toole asked Mr. Bloomquist if the MSGA members had commented on the proposed allocation within the fees and why MSGA members were agreeable to the proposed allocation. Mr. Bloomquist replied there was discussion regarding the allocation and a recognition of where the burden is falling. Mr. Bloomquist recalled MSGA did not spend a substantial amount of time addressing the proposed fee matrix since they thought the proposed matrix would change. Mr. Bloomquist noted the members recognized there may be some inequities with the proposed fee matrix.

Sen. Story asked Director Sexton to elaborate on the additional money the administration is proposing be put into the adjudication process. Director Sexton replied an additional \$1 million per year has been included in the budget, and the money is coming from some general obligation bonds. Director Sexton stated the money is to be used to expedite the water adjudication process.

Sen. Story asked Mr. Bergin about the reluctance to object to their neighbor's claim to water. Mr. Bergin stated he has objected to his neighbor's water right claim, and commented it is difficult to object to your neighbor's claim because it takes time to heal the process in a small community. Sen. Story commented that he had objected to some of his neighbors' claims, and they all survived the process.

## **HB 22**

- **Reexamination Amendments--Rep. McNutt**

Chairman McNutt discussed HB 22 ([EXHIBIT 6](#)) and commented that he has spoken with legal counsel about the mandatory reexamination portion of the legislation and has been advised there is no rational legal basis to only reexamine irrigation claims since the matrix covers all water rights. Chairman McNutt submitted proposed Exhibit HB002201.ak1 ([EXHIBIT 7](#)). Chairman McNutt explained the petition would require the

signatures of owners of at least 15 percent of the number of water rights affected by the examination. Chairman McNutt requested Mr. Goffena to investigate whether the basins on the Musselshell consisted of more than one examination. Chairman McNutt stated the EQC purposely attempted to design the language to handle the problem on the Musselshell. In addition, Chairman McNutt stated technical amendments to the legislation could be brought during the process. Chairman McNutt was cautious about having legislation that could be challenged because of a mandatory reexamination of only irrigation rights.

Sen. Story agreed and inquired if there was another way the reexamination could take place without an amendment. Ms. Evans replied that reexamination has occurred in the Judith River Basin based on an order from the court and, therefore, Ms. Evans believe reexamination could occur. Sen. Story asked if the amendment could preclude the court from ordering a reexamination. Ms. Evans thought it could and directed the question to Judge Loble. Judge Loble addressed the issue and stated often times if a statute has a specific method attached to it, that method becomes exclusive. Judge Loble suggested the language could be crafted so it would not be the exclusive method to achieve reexamination. Sen. Story suggested research should be conducted on the issue.

Sen. Story asked about the new money being proposed by administration and asked if the money could be used to help the DNRC in updating its computers. Ms. Evans replied if the \$2 million is deposited in the account set up in HB 22, the fee would disappear sooner since it is designed to go away when the account has earned \$31.6 million. Director Sexton added the intent is that the \$2 million would be additional money over and above what is produced by the fee. Director Sexton stated they would consider other recommendations.

Rep. Barrett clarified to Mr. Youngberg that the user's fee would go into the adjudication process. Rep. Barrett suggested using the \$2 million first and foremost to get the DNRC database up and going.

Chairman McNutt stated HB 22 must be amended to remove the mandatory reexamination of only irrigation claims. Chairman McNutt stated he would work with legal counsel and Ms. Evans to draft either/or language.

- **Final Decision on HB 22 as Committee Bill**

Sen. McGee moved that EQC authorize amending SB 50, the alternative energy revolving fund revisions, and to have a one-time cap of \$250,000, and the balance of the account be reverted to DNRC for the specific purpose of funding computers for the water adjudication process.

Sen. Toole resisted the motion, and suggested Sen. McGee could bring the amendment when the bill is ready for executive action in the committee hearing.

Mr. Ebzery agreed with Sen. Toole and suggested the motion is outside of the scope of the legislation.

Sen. Story suggested moving money out of the revolving fund account would be an appropriation. Ms. Smith replied she would have to obtain a clarification on whether this would be considered an appropriation.

Rep. Clark commented he was unsure about the process, but stated he was unsure whether the current administration had plans for the revolving fund.

Sen. McGee's motion that EQC authorize amending SB 50, the alternative energy revolving fund revisions, and have a one-time cap of \$250,000, and the balance of the account be reverted to DNRC for the specific purpose of funding computers for the water adjudication process, failed by voice vote.

***(Tape 2; Side B)***

In addressing HB 22, Sen. Toole stated he would not support the legislation because he believed the fee schedule was unfair. Sen. Toole also suggested the proposed fee system would add a level of complexity to the computer problems experienced by DNRC.

Rep. Peterson stated concerns were expressed by MSGA and the Farm Bureau about the fee structure, but stated the \$200 cap helped alleviate those concerns. Rep. Peterson encouraged the members of those organizations to attend the hearings and present alternative suggestions on how the fee could be structured.

Rep. Clark commented that if the process is never started, they will never be able to resolve the problem. Rep. Clark agreed with Sen. Toole that he is uncomfortable with the uncertainties, but Rep. Clark stated he wanted to move toward resolution.

Sen. Wheat moved the EQC authorize Chairman McNutt to introduce HB 22 as an EQC adopted bill.

Sen. Wheat's motion carried 12-1 by roll call vote ([EXHIBIT 8](#)).

**ADJOURNMENT:**

There being no further business to come before the EQC, the meeting adjourned at 8:15 p.m.