



# ENVIRONMENTAL QUALITY COUNCIL

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TODD EVERTS, Legislative Environmental Analyst

## ENVIRONMENTAL QUALITY COUNCIL ENERGY POLICY SUBCOMMITTEE MINUTES

Date approved: July 19, 2004

May 12, 2004

Room 102, State Capitol Building

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee exhibits are on file in the offices of the Legislative Services Division.

### **COMMITTEE MEMBERS PRESENT**

SEN. DANIEL MCGEE  
SEN. WALTER MCNUTT  
SEN. GLENN ROUSH  
SEN. KEN TOOLE  
REP. NORMA BIXBY  
MR. TOM EBZERY

### **STAFF PRESENT**

TODD EVERTS, Legislative Environmental Analyst  
CYNTHIA A. PETERSON, Committee Secretary

### **Visitors**

Visitors' list ([ATTACHMENT 1](#))  
Agenda ([ATTACHMENT 2](#))

### **COMMITTEE ACTION**

- ▶ Mr. Everts will proceed with the draft EQC study on Hydrogen, Wind, Biodiesel, and Ethanol and send the report out for public comment.
- ▶ Mr. Everts will incorporate the changes suggested by Ms. Moore to LC 3456 and work on developing language regarding the formula for administrative costs. Mr. Everts will

send LC 3456 out for public comment after the Subcommittee has an opportunity to review the new language.

- ▶ Mr. Everts will send LC2345 as submitted to the Subcommittee out for public comment.
- ▶ Mr. Everts was instructed to create a two or three-page pamphlet containing an explanation of the bonding process and updating the handbooks. The pamphlet will contain an explanation of the difference between General Obligation Bonds and Revenue Bonds that legislators can understand, a general glossary of terms, and a synopsis of what creates debt and what does not create debt.

### **CALL TO ORDER AND ROLL CALL**

Sen. Dan McGee called the EQC Energy Policy Subcommittee (Subcommittee) to order at 1:04 p.m. in room 102, State Capitol Building, Helena, Montana. The secretary noted the roll ([ATTACHMENT 3](#)).

### **UPDATE ON ENERGY AND TELECOMMUNICATIONS INTERIM COMMITTEE**

#### ▶ **Mary Vandenbosch**

Mary Vandenbosch, Legislative Research Analyst, reported the Energy and Telecommunications Interim Committee (ETIC) met on March 25, 2004, and most of the meeting was focused on Universal System Benefits (USB). The ETIC has requested a bill revising the laws relating to USB that are funded by the charge to electricity customers. The ETIC has now extended the USB until 2007, so the Legislature can have the opportunity to review the need and use of the USB funds. The ETIC also voted to increase the percentage of USB funds that must be spent for low-income assistance from 17 percent to 25 percent. Ms. Vandenbosch clarified all entities are subject to this requirement are currently spending at least 25 percent. The ETIC is also requiring uniform and detailed reporting of USB expenditures and limiting eligibility for renewable projects to those projects that are cost effective. Ms. Vandenbosch noted the ETIC has not defined "cost effective" and one proposal for the definition is the average cost of electricity for the distribution services provider.

Mr. Ebzery asked if any tax incentives or credits would be included. Ms. Vandenbosch reported the ETIC has not reviewed how incentives would be figured into cost effectiveness and stated if a project is cost effective, it should be in the portfolio.

Sen. Toole commented USB funding would only be used for cost-effective renewables, but wondered why they would not be rate based anyway. Sen. Toole stated USB should be research and development outside the market rather than things that could be rate based. Ms. Vandenbosch replied that has been the thinking, and that is why renewable projects are more expensive and renewable projects funded with USB funds are not things typically included in the rate base.

Sen. Toole noted providing a definition for cost effectiveness would be a disincentive to renewable development and inquired whether there was an additional rationale behind providing a definition. Ms. Vandenbosch replied she was unaware of any other rationale. Sen. Toole was curious whether the ETIC had any discussion about tallying up subsidy before determining

price, and Ms. Vandenbosch responded the ETIC had not discussed subsidies and how that would factor into cost effectiveness.

At the June meeting, the ETIC will hear about other energy projects, the status of coal bed methane, proposed legislative proposals by the Public Service Commission (PSC), and whether to propose legislation regarding ring-fencing. The ETIC is waiting for recommendations from the Governor's Task Force regarding ring-fencing. Additionally, the ETIC is also interested in PSC oversight over utility transactions. Ms. Vandenbosch submitted a copy of the Montana Code Annotated § 90-4-1003 (**EXHIBIT 1**), and suggested this law should be either repealed or amended during the next legislative session. Ms. Vandenbosch added repealing this law would improve consistency with the laws governing other interim committees. Ms. Vandenbosch pointed out the law is currently not being implemented and excludes many parties involved in energy policy, including the Governor's Office and the Northwest Power and Conservation Council. Ms. Vandenbosch also noted that § 90-4-1003(3)(c) conflicts with the Montana Constitution since the Legislature has the sole responsibility of developing policy, and it is inappropriate to imply an interim committee can forward recommendations to the Executive Branch for adoption. Ms. Vandenbosch suggested it would be simpler to repeal the section and allow any interim committee the authority to work on an issue within its jurisdiction.

Sen. Toole inquired whether there were any other sections in Montana State Law that required energy policy development. Todd Everts, Legislative Attorney, explained the Environmental Quality Council (EQC) developed state policy and made recommendations on an alternative fuels state policy and transportation policy, and the process was designed to further develop components of what was a very broad policy. Sen. Toole's concern was that there is no clear idea of what Montana's energy policy is, and did not feel the idea of developing an energy policy should be abandoned. Sen. McGee agreed, but stated it is the process for developing the policy that needs to be changed since it is confusingly redundant. Ms. Vandenbosch agreed the process is far more prescriptive than it needs to be.

Sen. Roush thought the EQC was the appropriate group to work on energy policy and noted there are too many other groups, including other interim committees, involved in the process.

## **NFTA AND STATE ENERGY REGULATION**

### **▶ Senator Jim Elliot**

Senator Jim Elliot introduced Joanna R. Shelton, Senior Fellow, Montana World Affairs Council, Idaho State Representative George E. Eskridge, and Professor Robert Stumberg, Georgetown Law School, who participated by telephone.

Sen. Elliot began the presentation by stating he became aware of the potential conflict Montana's energy laws have with various trade agreements at a presentation a few years ago by Prof. Stumberg. Sen. Elliot stated the National Free Trade Agreement (NFTA) and General Agreement on Trade in Services (GATS) are a set of rules drawn up by multi-national corporations to facilitate smooth and universal entry into trade markets around the world and were not crafted with thought to local or state jurisdictions. Sen. Elliot believed the United States is unique in that it has many subdivisions of government that can make laws, rules, and regulations. In speaking about the bankruptcy of NWE and the possibility that the company could be purchased by a foreign concern, Sen. Elliot cited Montana's three options as (1)

changing current law; (2) paying a settlement fee; or (3) getting a seat at the table during negotiations.

Rep. George Eskridge, Idaho State Legislature, submitted a copy of his written remarks made before the National Conference of State Legislatures, Committees on Economic Development, Trade and Cultural Affairs and Energy and Electric Utilities (**EXHIBIT 2**). Rep. Eskridge also submitted a letter sent to the U.S. Ambassador in the Office of the U.S. Trade Representative outlining several concerns of the State of Idaho with gas negotiations and how they may or may not impact Idaho's energy policy (**EXHIBIT 3**). Mr. Eskridge explained the letter was never answered by the Trade Ambassador or his staff. Rep. Eskridge explained that even though the letter was never formally answered, it raised enough concern that a working group was formed under the auspices of the National Conference of State Legislatures (NCSL) (**EXHIBIT 4**). Rep. Eskridge mentioned all the conversations with the working group and the negotiators are off the record in an effort to not jeopardize negotiations and explained the working group was diverse in areas of expertise and branches of government. Rep. Eskridge explained in Idaho there are concerns about the ability to establish an energy policy which gives priority for renewable energy, and Idaho has been working on a tax incentive program and that developing this program may be challenging under GATS or the General Agreement on Trade and Tariffs (GATT).

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

Rep. Eskridge explained they will be performing a legal analysis to determine whether energy is a good and, if so, whether tax incentives to promote renewable energy production violate GATS. In the event the analysis determines energy is a service rather than a good, it will need to be determined what that will mean in terms of tax incentives. Rep. Eskridge identified questions that remain to be answered as to determine which energy service providers are covered by GATS or GATT and which ones may be reserved or excluded. For those that are covered, they will need to identify which state and local measures are at risk for conflict with trade rules, and how state and local governments can assist trade negotiators in Congress avoid the risk of conflict.

Professor Robert Stumberg, Georgetown School of Law, commented that it is a difficult job being the trade negotiator for the United States since it is a large country with complex economic sectors. Prof. Stumberg thought Rep. Eskridge had created a one-stop point of consultation which will enable the trade negotiators to have meaningful dialogue with cities and states.

Joanna R. Shelton, Senior Fellow, Montana World Affairs Council, submitted written comments to the Subcommittee (**EXHIBIT 5**).

► **Questions from the Committee**

Sen. McGee stated in every segment of our society, leaders are owing to the people who elected them, and if the people are dissatisfied, the leader will not be re-elected. Sen. McGee wondered where the culpability lies with World Trade negotiators especially in light of the fact heavy fines could be imposed. Ms. Shelton responded there are various means for people to have input, including Congressional Committees. In addition, policy direction is set by each elected administration, and civil servants take their directions from elected officials. Ms. Shelton

noted monetary penalties are only assessed in the Investment Chapter of the North American Free Trade Agreement and the penalty is equal to the crime.

Sen. Toole understood the issue as an incentive program for renewables could be deemed as unfair competition in the international markets. Rep. Eskridge emphasized it could be challenged as unfair competition. Sen. Toole wondered if something like Montana's coal severance tax could be seen as violating free trade and whether state taxation policy is also a concern. Ms. Shelton replied that normally the ordinary exercise of tax authorities have not been challenged and should not surface as a problem. Ms. Shelton expanded that tax policies run into problems internationally when they are used to subsidize exports.

Sen. Elliot introduced a memorandum for the Harrison Institute of Public Law regarding how GATS may affect Montana's electricity policy ([EXHIBIT 6](#)) and a paper entitled "Why Should Local and State Governments Pay Attention to the New International Trade Agreements," by Jennifer Gerbasi and Mildred Warner ([EXHIBIT 7](#)).

Mr. Ebzery inquired if there was anything the panelists would recommend the State of Montana could do to assist the working group. Rep. Eskridge replied they would like to see more representation on the Energy Group and suggested a legislative representative and someone from the Public Service Commission (PSC) would be helpful. Rep. Eskridge noted there are generation issues and transmission issues in Montana, and these issues are being discussed by the working group.

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

Ms. Shelton strongly recommended encouraging the Governor to reappoint a state point-of-contact person.

Sen. Roush commented he is a member of Montana's Pacific Northwest Economic Region committee which has been very active on energy policy issues, but suggested the group does not have funding to attend many meetings. Sen. Roush spoke about energy development programs in Canada and predicted natural gas pipelines would be emerging from Canada. Sen. Roush identified water issues as critical because of the drought in the Western United States.

Prof. Stumberg gave specific examples of how Montana could play a role in the energy working group. Prof. Stumberg spoke about discrimination and noted it was important to understand that in addition to prohibiting explicit discrimination against goods or services or suppliers from another country, the Trade Rules go further and provide that governments have an obligation not to change the conditions of competition so as to favor domestic firms. Prof. Stumberg recognized the explicit purpose of most tax credits or deductions, in the context of energy or economic development, is to change the conditions of competition. Prof. Stumberg urged the Subcommittee to consider whether the combination of mechanisms, including investment tax credits, production credits, and/or strategically targeted subsidies, change the conditions of competition. Prof. Stumberg stated it was important for the Subcommittee to consider the downstream effect of energy policies. Prof. Stumberg closed by stating it is one thing to grandfather existing laws and preserve them from future challenges, but it is quite another thing to preserve your future law-making options.

## **OVERVIEW OF STATE BONDING FOR ENERGY PROJECTS**

### **▶ State Bond Counsel**

Mae Nan Ellingson, State Bond Counsel, provided an Overview of Types of Debt that may be Issued by the State of Montana and its Agencies (**EXHIBIT 8**) and explained state bonding as it relates to energy projects. Ms. Ellingson noted Tribes have the same capacity as state government to issue tax exempt bonds for the same purposes. However, for the Tribes to remain tax exempt, they would be subject to the same federal limitations.

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

Sen. McGee asked if a Canadian firm wanted to import electricity into the state and was somehow, in their view, prevented from doing so because there was economic development by a Tribe or the State using bonds to advantage that they could not enjoy as well, whether they would have a case in the tribunal arena of NAFTA or GATS. Ms. Ellingson was certain all states, including Montana, would want to be involved in the discussions as they develop and suggested paying particular attention to how Montana exercises its traditional governmental functions both with respect to tax and issuance of bonds. Ms. Ellingson thought it would be incumbent upon negotiators to ensure governmental entities do not lose their ability to foster the development of energy. Ms. Ellingson cautioned there could be problems if, while trying to facilitate energy development in Montana, someone else was excluded.

Sen. Toole was curious whether there was a bonding capacity limitation for general obligation bonds. Ms. Ellingson replied there is no specified dollar amount a state can issue, and noted Montana is low in the amount of general obligation bond debt per capita, and the amount that can be issued is a function of the rate Montana maintains.

Sen. Toole addressed revenue bonds and wondered if there was an advantage in choosing revenue bonds over private financing. Ms. Ellingson explained revenue bonds are tax exempt and the source of repayment of a bond would not necessarily dictate whether the bonds are going to be taxable or tax exempt. Ms. Ellingson added the bonds could still be tax exempt on a state level even though they are not tax exempt at the federal level. Ms. Ellingson suggested bonds could be credit enhanced and identified the coal severance tax bond program as a good analogy to facilitate a small alternative energy project.

Sen. Toole stated assuming the only commitment of revenue made in the bonding process is the generated revenue, whether there was an inherent benefit to public involvement. Ms. Ellingson responded the project would need to stand on its own.

## **REVIEW OF SUBCOMMITTEE DRAFT REPORT**

### **▶ Todd Everts**

Todd Everts provided the Subcommittee with a timeline for the draft report and noted any preliminary recommendations from the Subcommittee will go out for public comment for 30 days in June, and public comments will be reviewed at the July meeting and presented to the full EQC. Any proposed legislation would then go out for an additional 30-day comment period between the July and September meetings, and recommendations could be adopted by the full

EQC at its September meeting. Mr. Everts submitted the draft/non-edited EQC Study Report (September 2004) Hydrogen, Wind, Biodiesel, and Ethanol . . . Alternative Energy Sources to Fuel Montana's Future? (**EXHIBIT 9**). Mr. Everts explained the report summarizes information the Subcommittee received on alternative energy resources and will also include various funding mechanisms. Mr. Everts summarized the Subcommittee's recommendations as:

- ▶ Develop a small pamphlet on state bonding.
- ▶ Update the Energy Law Handbook and Energy Resource book developed by EQC by the end of the interim.
- ▶ Consider raising the loan eligibility amount for the Alternative Energy Account administered by the Department of Environmental Quality (**EXHIBIT 10**).
- ▶ Provide clarification that alternative renewable energy projects are eligible for renewable resource and grant loans (**EXHIBIT 11**).

Sen. Toole thought it should be pointed out blended pricing is already available, and it is a question of whether renewables sit outside. Sen. Toole identified distance to market as a potential barrier to hydrogen production. Sen. Toole identified an issue for wind development as the ability to have one consistent metering policy.

Tom Ebzery recalled a provision in the law regarding ethanol that a certain amount is reserved each year for projects. Mr. Ebzery recalled concerns expressed about applicants hogging allotments and that taking \$6 million from the Department of Transportation (DOT) fund would limit DOT from using the money elsewhere. Mr. Everts directed the Subcommittee to Table 6-2 and noted that the Yellowstone Power, Hardin, application is a placeholder application for Rocky Mountain Ethanol in case it does not meet statutory guidelines. Mr. Ebzery commented that he was in favor of ethanol, but thought it should be on a fair schedule.

Mr. Ebzery suggested sending out for public comment the subcommittee's recommendation of eliminating the provision where a company can reserve its place in line for the incentive program. Mr. Ebzery also thought the 10 percent provision in Sen. Black's bill from the last session should also be sent out for public comment.

Sen. Toole commented that corporations are being set up in order to get in line. Sen. McNutt added someone with a genuine interest in producing ethanol could be precluded by the current limitations. Sen. McNutt would like to see a discussion bill draft addressing the ethanol issue. Mr. Everts commented the 30 cents per gallon is paid when the ethanol is produced and that confusion comes in on the ability to reserve an allocation of money based on the projected volume that is produced.

Sen. McGee thought production was the trigger mechanism for the incentive, but getting in line first was the problem. Sen. McGee suggested requiring a certain percentage of financing to be locked in or construction completed before being able to apply for the incentive may be necessary. Mr. Everts explained certain statutory deadlines have to be met with regard to construction, and suggested the trigger could be placed behind those deadlines rather than in the front.

**(Tape 3; Side A)**

Mr. Ebzery commented that the 95 percent committed rate for Agritechnology MT was an odd number, and Mr. Everts explained he obtained the figures from the monthly status report from the Montana Department of Transportation. Mr. Ebzery requested Mr. Everts obtain an update from Dave Galt, Director of the Montana Department of Transportation.

Sen. McNutt moved that Mr. Everts be instructed to proceed with the draft EQC study on Hydrogen, Wind, Biodiesel, and Ethanol and send the report out for public comment. The motion carried unanimously.

Mr. Everts clarified that proposed bill draft requests designated at LC3456 and LC2345, Exhibits 10 and 11, would go out for public comment as well.

▶ **Louise Moore, Montana Department of Environmental Quality.**

Louise Moore, Bureau Chief, Air, Energy and Pollution Prevention Bureau, Montana Department of Environmental Quality, addressed LC 3456, and provided background information to the Subcommittee. Ms. Moore identified six loans out to date that total approximately \$48,000. Two of these loans are for wind systems and four are for solar system. Experiences of other states indicates these programs are initially slow, but will increase after five to seven years. In Montana, there is a \$10,000 cap per loan, but Ms. Moore suggested this was low, and \$40,000 would be more reasonable. Ms. Moore explained DEQ contracts out the loan application process. Ms. Moore submitted proposed changes to the bill draft (**EXHIBIT 12**). These changes would include nonprofits, as well as small businesses and individuals.

Sen. McGee inquired if the language proposed in § 75-25-102 should read “and energy conservation,” and Ms. Moore agreed the language should also reflect “when done in conjunction with an alternative energy loan” and the intent is to not do energy conservation separately, but to do them together to make them as efficient as possible.

In administering the loans, Ms. Moore suggested it makes more sense to take a percentage of the revenue coming into the account, so there are funds upfront to work with.

Upon question from Sen. McGee, Ms. Moore identified the annual amount as \$140,000, and acknowledged the amount varies greatly and could range from \$15,000 to \$300,000. Administrative costs would be ten percent of the fines and not ten percent of the loan.

Sen. Roush wanted to know if nonprofit organizations would be subject to public taxation after a certain amount of time. Ms. Moore replied they would be considered as traditional nonprofits are defined in statutes and having an alternative energy system would not change that status.

Sen. McNutt noted not all nonprofits are tax exempt. Sen. McNutt recalled that there is \$400,000 available for loans. Ms. Moore agreed that was the correct amount that could be going out to renewable energy projects.

Mr. Everts suggested he would need to include Ms. Moore’s changes to § 75-25-102 in LC3456, as well as the suggested amendments to § 75-25-101.



Sen. McGee stated he was inclined to be wary of administrative costs.

Sen. Toole agreed the administrative costs are unrelated to the number of loans and stated he would like to see a relationship between the administrative loans and the number of loans going out the door.

Sen. McGee asked Ms. Moore if the account currently has \$400,000, if subsection (3) would allow DEQ to take \$40,000 for administrative costs. Ms. Moore replied it would.

### **INSTRUCTIONS TO STAFF**

Sen. McNutt moved the subcommittee direct Mr. Everts to incorporate the changes suggested by Ms. Moore and work on developing language regarding the formula for administrative costs. The motion carried unanimously.

Mr. Everts will send the new language out to the subcommittee members before it is sent out for public comment.

Mr. Everts explained LC2345 clarified alternative energy projects are eligible to go through the application process for renewable resource grant loans. Sen. McGee noted LC2345 will add in the projects that facilitate the use of alternative renewable energy sources.

Sen. Toole moved that Mr. Everts go forward with LC2345 as submitted to the Subcommittee. The motion carried unanimously.

It was moved that Mr. Everts be instructed to create a two or three-page pamphlet containing an explanation of the bonding process and updating the handbooks. Sen. McNutt stated Ms. Ellingson will provide an explanation of the difference between General Obligation Bonds and Revenue Bonds that legislators can understand. It was agreed that a general glossary of terms would be helpful. Sen. McNutt suggested a synopsis of what creates debt and what does not create debt would also be helpful. The motion carried unanimously.

### **UPDATE ON FEDERAL ENERGY LEGISLATION**

#### **▶ Todd Everts**

Mr. Everts provided a brief update on federal energy legislation and reported the tax break bill passed the U.S. Senate and stated those tax breaks are in the amount of \$14 million, but did not have the details. Mr. Everts will get the details of the legislation for the Subcommittee.

### **PUBLIC COMMENT**

There was no public comment offered.

### **ADJOURN**

There being no further business to come before the EQC Energy Policy Subcommittee, the meeting adjourned at 4:35 p.m.