

SJR 29
WATER
QUALITY
NONDEGRADATION
STUDY

Final Report to the 54th Legislature
of the State of Montana

January 1995

Prepared by the
Montana Environmental Quality Council

Senate Joint Resolution 29
WATER QUALITY NONDEGRADATION STUDY
Summary Report

January 1995

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Introduction

What are the requirements of Montana's *nondegradation* statute?

Montana is fortunate to have substantial amounts of clean water--water cleaner, in fact, than the minimum federal standards. In an effort to protect these high-quality waters, section 75-5-301, MCA,¹ as passed in 1971, required that water cleaner than the statutory and administrative standards be maintained at its original quality. In other words, the state did not allow the degradation of high-quality waters.

The only exception to this requirement was if the Board of Health and Environmental Sciences (BHES) determined, upon petition, that a lessening (degradation) of the quality of the water was justified due to necessary economic or social development.

Throughout the past few years, the correct interpretation of this nondegradation statute and its implementation had become an increasing source of controversy for the BHES, the Department of Health and Environmental Sciences (DHES), the regulated community, and public interest groups involved in water quality issues.

Previous Council Involvement

Although the Environmental Quality Council received a specific request (Senate Joint Resolution 29) to study nondegradation during the 1993-94 biennium, the Council has had a historic interest and involvement in water quality issues. One of the recommendations resulting from the EQC 1989-90 interim ground water study was that the DHES and the Department of State Lands (DSL) jointly review their responsibilities in protecting the state's water quality from the adverse effects associated with hard rock mining. During the

¹ This section was amended by Chapter 595, Laws of 1993 (SB 401).

1991-92 interim, the EQC received several updates on this issue from the DHES and DSL. Representatives from both agencies attended Council meetings, answered questions, and discussed and provided background information on mine permitting, water quality and the controversies related to the state's nondegradation policy.

During the same interim, the Environmental Quality Council also held a nondegradation panel discussion in order to examine the larger public policy implications of Montana's water quality nondegradation policy. To promote this policy discussion, the Council invited representatives from the state regulatory agencies, the regulated community, and public interest groups to the Council's August, 1992 meeting.

To facilitate participant preparation for this panel, Council staff prepared the following general questions regarding the nondegradation issue:

EQC August, 1992 Panelist Questions:

- * *What, in your opinion, does the current nondegradation statute require?*
- * *Is this good public policy? If not, how should the policy be changed?*
- * *How should the policy be implemented?*
- * *What do you see as the public policy implications of the nondegradation policy?*

Please include the environmental, social and economic impacts of the policy in your discussion.

The panel participants, (Mr. Dan Fraser, DHES, Water Quality Bureau Chief; Mr. Alan Joscelyn, a Helena attorney in private practice; Mr. Richard Parks, president of the Northern Plains Resource Council; and Larry Brown, a hydrologist with Chen-Northern, representing the Western Environmental Trade Association) presented their varying

perspectives on the nondegradation issue. Comments from the participants in the panel included the following:

- * *The goal of the nondegradation statute is to prevent the incremental degradation of existing high-quality waters.*
- * *The nondegradation statute has enough ambiguities that only the Montana Supreme Court could actually answer the question of what the nondegradation statute requires.*
- * *It is easy for most people to require a multinational corporation to fully treat its waste discharge to ensure nondegradation. But it is harder for those people to apply that same standard to residential developments where septic systems could impact the ground water.*
- * *Montana must take an honest look at the costs and benefits of a fully implemented nondegradation policy and then the legislature must set that policy.*
- * *At some point faith must be placed in the BHES to make the right decisions within the broad statutory guidelines, but this does not mean a blind trust in the BHES.*
- * *A literal interpretation of the statute prohibits any new activity. If there will be any human activity, there will be impacts on water quality.*

The participants, by presenting their perspectives, allowed the Council the opportunity for extraordinary insight into the nondegradation issue. Various Council members remarked that it was one of the best panel discussions in their memory. (A summary transcript of the panel discussion is available from the EQC.)

At the Council's next meeting in October, the members agreed that they would be unable to reach on this issue before

consensus the 1993 legislative session and therefore they would not consider preparing Council-sponsored legislation. The Council suggested that the issue of water quality nondegradation be reevaluated during the 1993-94 interim.

Legislative Action

During the 1993 Session

Reflective of the continuing controversy related to the issue, there were eight bill draft requests dealing with nondegradation submitted for the 1993 session. Of these, three were introduced and two, Senate Bill 401 and Senate Joint Resolution 29, were passed and approved. Excerpts from both pieces of legislation are listed below.

Senate Bill 401

Chapter 595, Laws of 1993 (SB 401), initially drafted at the request of the DHES, changes existing water quality nondegradation laws as follows: (For the complete text of SB 401, see **Appendix I**.)

*How does
SB 401
change
existing
water quality
nondegra-
dation laws?*

- * defines "high-quality waters" as state waters whose quality for a parameter is better than standards;
- * defines "degradation" as a change in water quality that lowers the quality of high-quality water for a parameter;
- * provides an exemption to the definition of degradation for changes determined by the BHES to be nonsignificant;
- * establishes criteria and a requirement for the BHES to adopt rules to determine activities or classes of activities that result in nonsignificant changes to high-quality waters;
- * modifies the nondegradation administrative process by placing the initial responsibility for granting an authorization

to degrade high-quality state waters with the DHES and provides an appeal of that decision to the BHES;

* requires the least degrading water quality protection practices that are technically, environmentally, and economically feasible, to be fully implemented by the applicant prior to and during the proposed activity;

* defines a "mixing zone" as an area where water quality standards may be exceeded; and

* establishes criteria for and requires the BHES to adopt rules governing the use of mixing zones.

Senate Joint Resolution 29

Senate Joint Resolution 29, Laws of 1993, requests the Council to give priority to a study of the nondegradation issue. According to SJR 29, the study should include a review of the following: (For the complete text of SJR 29, please see **Appendix 2.**)

What was the Environmental Quality Council asked to study under SJR 29?

(a) the definitions of "nondegradation" and "high-quality waters";

(b) the social and economic development factors and the public interest in maintaining high-quality waters;

(c) the procedures for the review of proposed exemptions from the nondegradation provisions;

(d) the designation of mixing zones;

(e) the appropriateness of the application of nondegradation provisions to all point and non-point sources of pollution to both ground water and surface water;

(f) the environmental, economic, and social effects of allowing any degradation or specific levels of degradation to high-quality ground waters and surface waters;

(g) the relationship between the nondegradation policy provisions contained in Montana water quality laws and the various interpretations of applicable sections of the Montana Constitution;
(h) the capabilities of and the cost to state agencies to implement the nondegradation policy and to assess the resources that will be needed to implement the policy equitably for all segments of society;
(i) the social and economic costs of nondegradation compliance or noncompliance to individuals and entities in various industries and endeavors that would be affected;
(j) the potential utilization, in response to exceptions from nondegradation provisions, of mitigation measures to improve overall water quality in the state, in the source, or in a specific affected portion of the source; and
(k) the identification of possible statutory and regulatory changes that would help clarify the nondegradation policy and provide for a more effective and efficient implementation and enforcement of the policy.

The Council was further requested to consult with federal, state, and local officials, industries, citizens, and other persons or groups with expertise or interest in water quality protection and to report its findings and recommendations to the 54th Legislature.

SJR 29 Study Development

The Council decided that of the 11 issues identified for study in SJR 29, only four deserved additional attention during the period allocated for the study. The Council decided that the other issues were either moot because they had been definitively addressed by SB 401, or they were unripe for further study because the rules implementing SB 401 had not been adopted and the new nondegradation policy formulated under this bill had yet to be implemented. The four issues from

SJR 29 selected for further study are listed below. A summary transcript of the Council discussion regarding issue selection is included as **Appendix 3**.

(b) the social and economic development factors and the public interest in maintaining high-quality waters;

(e) the appropriateness of the application of nondegradation provisions to all point and non-point sources of pollution to both ground water and surface water;

(g) the relationship between the nondegradation policy provisions contained in Montana water quality laws and the various interpretations of applicable sections of the Montana Constitution;

(j) the potential utilization, in response to exceptions from nondegradation provisions, of mitigation measures to improve overall water quality in the state, in the source, or in a specific affected portion of the source.

DHES Rulemaking and the SJR 29 Study

How did the Department of Health and Environmental Sciences' rulemaking process under SB 401 fit in with the EQC nondegradation study required under SJR 29?

Closely linked to the SJR 29 study was the contemporaneous nondegradation rulemaking process required by SB 401.

SB 401 stated:²

Consistent with the provisions of 75-5-302 through 75-5-307 and 80-15-201, the (BHES) shall: . . .

(4) adopt rules governing the granting of mixing zones, requiring that mixing zones granted by the department be specifically identified, and requiring that mixing zones have:

(a) the smallest practicable size;

(b) a minimum practicable effect on water uses; and

² Codified at section 75-5-301, MCA.

(c) definable boundaries;

(5) adopt rules implementing the nondegradation policy established in 75-5-303, including but not limited to rules that:

(a) provide a procedure for department review and authorization of degradation;

(b) establish criteria for the following:

(i) determining important economic or social development; and

(ii) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality; and

(c) establish criteria for determining whether a proposed activity or class of activities will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

(i) equates significance with the potential for harm to human health or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the degradation will occur; and

(iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent; and

(6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute guidelines for granting or denying applications for authorization to degrade high-quality waters under the policy established in 75-5-303(2) and (3).

The DHES started its SB 401 nondegradation rulemaking process soon after the bill was approved by the Governor and the department continued the process through the Council's SJR 29 study. Understanding that the new nondegradation policy would be fleshed out through the administrative rules implementing that legislation, the Council was very interested in the DHES rulemaking process. While the DHES stated they would accept and appreciate any assistance offered by the Council or its staff in the rule adoption process, both the agency and the Council understood the importance of the separation of powers doctrine. Therefore, the Council decided that its best role would be to continue its study concurrent with the agency's rulemaking, monitor the rulemaking process, and comment on specific rules where it thought appropriate.

NOTE: Many of the Council's formal comments to the agency discussed in this report are actually comments on proposed rules implementing the new nondegradation policy. Also, although the EQC made no final recommendations as a result of this study, the Council made several recommendations through the course of SJR 29 when responding to the DHES proposed rules. These recommendations are highlighted throughout the text of this report.

Water Policy Committee Involvement

How was the Water Policy Committee involved in the SJR 29 nondegradation study?

The Water Policy Committee (WPC), an eight member statutory interim committee established to advise the legislature on the adequacy of the state's water policy and of developments that affect Montana's water resources, recognizing its unique statutory mandate regarding important water issues, expressed an interest in looking at water quality issues during the 1993-94 interim. The WPC decided that the most efficient use of WPC, EQC, and staff resources, would be for the WPC to participate in the EQC nondegradation interim study. The WPC therefore offered its assistance for the study, and the EQC accepted.

The EQC then formed a ten person subcommittee to further study identified nondegradation issues. The

subcommittee consisted of six EQC members and four WPC members, with all final policy decisions being made by the full EQC.

The joint **EQC/WPC** SJR 29 water quality nondegradation subcommittee consisted of:

EQC

Sen. Lorents Grosfield (Co-Chair)
Sen. Steve Doherty (Co-Chair)
Mr. Bob Boeh
Mr. Glenn Marx
Ms. Jeanne-Marie Souvigney
Mr. Greg Tollefson

WPC

Rep. Vernon Keller
Sen. Don Bianchi
Rep. Angela Russell
Sen. Bernie Swift

WPC Alternates

Sen. Bob Hockett
Rep. Russell Fagg

The Council then directed the subcommittee to develop a detailed study plan for Council review and approval. Specifically, the Council directed the subcommittee to define an appropriate study scope; develop reasonable, specific study goals; and develop a study framework that would maximize public involvement.

Public Involvement in the Study Development

How was the public involved in the SJR 29 study?

The Council and the subcommittee decided to conduct the study keeping the public involved through the development and use of an SJR 29 mailing list and regularly scheduled EQC meetings. The subcommittee, splitting into two working groups, met in Billings, Bozeman, Kalispell and Missoula to solicit public comment on specific nondegradation issues as well as comments on the best methods for developing the study scope, goals, and framework. Specifically, those who attended

meetings made recommendations on what groups should be involved in the study through the SJR 29 mailing list, suggested related topics in addition to those recommended for the study-- such as cumulative impacts and agency enforcement of environmental laws--and made **comments** on several of the aspects of the study, including exempting certain non-point sources of pollution through the use of best management practices (**BMPs**). A press release and a summary transcript of public comments are attached as Appendix **4**.

SJR 29 Framework

The subcommittee, after reviewing and incorporating public comment, developed specific study issues, goals and approaches. At its September 1993 meeting, the **full** Council reviewed the information from the subcommittee and agreed to the following study issues.

What issues were ultimately chosen for study under SJR 29?

Study Issue **#1**: (e) the appropriateness of the application of nondegradation provisions to all point and non-point sources of pollution to both ground water and surface water;

Study Issue **#2**: (b) the social and economic development factors and the public interest in maintaining high-quality waters;

Study Issue **#3**: (j) the potential utilization, in response to exceptions from nondegradation provisions, of mitigation measures to improve overall water quality in the state, in the sources, or in a specific affected portion of the source;

Study Issue **#4**: (g) the relationship between the nondegradation provisions contained in Montana water quality laws and the various interpretations of applicable sections of the Montana constitution;

Study Issue #5: DHES rulemaking process; and

Study Issue #6: Enforcement.

Each specific study goal and approach is outlined below, followed by a summary of Council and subcommittee action on that study issue.

SJR Study Issue #1.

SJR 29 Study Issue 1.

The study should include a review of

...

(e) the appropriateness of the application of nondegradation provisions to all point and non-point sources of pollution to both ground water and surface water....

Under SB 401, do the nondegradation provisions apply to all activities?

Work Plan Summary

The EQC realized that SB 401 is clearly applicable to all point and non-point sources of pollution and that the provisions of the bill made it a prohibited activity to degrade either ground or surface water without an authorization. However, the Council also understood that, under SB 401, the DHES must by rule identify certain activities that will be classified as nonsignificant, and thus exempt from the nondegradation requirements. The EQC analysis of study issue #1--application to point and non-point sources--therefore focused on the issue of nonsignificant activities. As part of its statutory duty, the Council monitored, analyzed and participated in the concurrent DHES rulemaking process as the DHES identified issues that would be considered nonsignificant.

1993-94 Council Activity

The Council, believing that it could best analyze this complex issue by hearing directly from knowledgeable and concerned individuals, scheduled a panel discussion featuring a diverse mix of interests. The purpose of the panel was to discuss the proposed DHES rules concerning nonsignificant activities and for the panelists to present their perspectives on the issue.

The panelists included representatives from the Montana Association of Realtors; Montana Wood Products Association; Montana Stockgrowers Association; Northern Plains Resource Council; Montana Environmental Information Center; the Clark Fork-Pend Oreille Coalition; and private attorney Mona Jamison.

Prior to the panel discussion, DHES staff provided participants with background information on the nondegradation issue and information on the SB **401** proposed rules on nonsignificant activities. Agency personnel stated that the basic premise behind the nondegradation provision was the legislative protection of high-quality waters unless society determines that changes are in the collective best interests. Staff also stated that the concept was complex in its implementation and had been inconsistently applied since its inception in **1972**. SB **401** was initiated to clear up the inconsistencies in the nondegradation provisions, and had several broad effects, one of which is to determine which activities should be considered insignificant and therefore exempt from the nondegradation provisions.

One of the participants commented on the extraordinary effort by the DHES to involve the public in the rulemaking process, but also stated that no other set of rules had such great implications for the citizens of the state. It was also stated that certain activities must be exempt (deemed nonsignificant) because the nondegradation process was time-consuming and expensive. Panelists expressed concern that the technical information in Rule IV which allows individuals to make self-determinations of nonsignificance may be difficult for the public

to understand. Panelists also expressed concern over the lack of public involvement in nonsignificance determinations.

In general, major issues discussed by the panel included the constitutional implications of the statutory nonsignificance language, the criteria for determining nonsignificance, self-determinations of nonsignificance, classification of activities as nonsignificant, and the impact to the resource and the economy of the proposed rules. A summary transcript of the discussion is attached as **Appendix 5**.

Subsequent to the panel discussion, the full Council assigned the issue of nonsignificant activities to the Joint **EQC/WPC** subcommittee which continued to discuss this issue at the next two meetings. The **subcommittee** developed recommendations regarding the significance issue for Council review. The full Council reviewed, modified, and accepted those recommendations for which the entire subcommittee reached consensus at its October, 1993 meeting and further discussed those issues debated by the subcommittee for which consensus was not reached. The issues further debated included whether or not activities in mixing zones should be considered nonsignificant and the cumulative effects of nonsignificance determinations. In addition the Council recommended sending a letter to the DHES commending them on the process used during the rulemaking procedures. A **complete** list of the subcommittee discussion points and recommendations and a summary transcript of full Council discussion is attached as **Appendix 6**.

Council Recommendations on the Issue of Nonsignificant Activities

The Council made formal recommendations to DHES Director Robinson on the following "significance" sub-issues: self determination, public involvement in DHES significance determinations, nonsignificant activities identification, DHES significance determination time frames, and mixing zone

rulemaking. Excerpts from the recommendations are provided below.³

Do the proposed rules providing for "self-determinations" constitute an unlawful delegation of authority to private citizens?

EQC December 1993 recommendations to DHES:

1. **"Self Determination"**

Issue -- Proposed rule IV(1) allows an individual, after considering the criteria in the proposed rules, to make a determination as to whether that individual's activities will cause significant degradation. If the degradation is determined not to be significant, no additional action regarding the statutory nondegradation requirements is necessary. The EQC expressed concern that the authority for these "self determinations" of significance could be an unlawful delegation of executive authority to private citizens.

Recommendation - The DHES should look at the potential for unlawful delegation of authority associated with "self determination" provisions of the proposed rules.

Results

The DHES analyzed the issues and reported back to the Council that, while they understood the Council's concerns, they did not believe that the proposed rule constituted an unlawful delegation of authority. Additionally, the interpretation of the new nondegradation policy by the DHES is such that the department must make the significance determination for any permit, license, or approval of an application. The department stated that this will make the number of "self-determinations" quite small.

³ Recommendations are excerpted from an EQC letter to DHES Director Bob Robinson dated December 7, 1993.

Will the public have the opportunity to comment on significance determinations?

2. Public Involvement In DHES Significance Determinations

Issue - Regardless of whether the DHES or an individual makes the significance determination, the proposed rules do not provide an opportunity for public comment on this determination. The Council was concerned that this lack of opportunity for public involvement may lead to increased legal action and avoidable degradation of the water resource.

Recommendation - The DHES should examine the potential for allowing public comment on DHES significance decisions. The DHES should analyze the adequacy of allowing for this public comment through the public comment process involved with other DHES permit decisions associated with the activity, or through the formal public comment process for the nondegradation rules themselves. It is not the intent of the Council that allowing for public comment unreasonably increase the time frame for a DHES significance determination.

Results

The DHES reported that they attempted to identify an efficient process for increased public involvement in self-determination decisions. However, each approach analyzed was logistically unworkable. The department hoped that public participation during the rulemaking itself would address part of this issue.

EQC December 1993 recommendations to the DHES, continued:

3. Nonsignificant Activities Identification

Issue - *While proposed rule IV(1) allows an individual to determine the significance of degradation caused by an activity, the only guidance in the rules is the statement that the individual should "measure the activity against the standards contained in (the) proposed rules." The Council was concerned that this guidance was inadequate and may put the individual at an unreasonable risk of violating the nondegradation requirements of the Water Quality Act.*

Recommendation - *The DHES should attempt to develop clear, concise language in proposed rule IV(1) that will allow the general public to make informed and reasonable significance determinations. For example, proposed rule IV(1) language could be supplemented by educational materials prepared by the DHES showing examples of those activities clearly suitable to self determination and those activities that should be determined by the DHES. Additionally, the DHES should consider incorporating a specific list of activities that either are or are not suitable for self determination into either the rule language or the educational materials.*

Does SB 401 proposed rule IV put an individual at an unreasonable risk of violating the nondegradation requirements of the Water Quality Act?

Results

The DHES clarified the language in the categorical exemption rules to better ensure public understanding of the types of activities that could be determined to have nonsignificant impacts. Additionally, the department stated that ongoing public education programs would also address this issue.

EQC December 1993 recommendations to the DHES, continued:

Will requests for significance determinations be acted on in a timely manner?

4. DHES Significance Determination Time Frame

Issue - *While the Council understands the difficulty in establishing a strict time frame for DHES significance determinations, the EQC is also concerned by the potential for unreasonable delays in this process. A lengthy time frame for DHES significance determinations will act as a disincentive to individuals requesting this service. This may lead to the use of the self determination authority in proposed rule VI in inappropriate situations.*

Recommendation - *The DHES should develop a mechanism to ensure that requests for significance determinations are acted on in a timely manner.*

Results

The DHES stated that they understood the Council's concerns and they will attempt to **ensure** a timely review process based on the available resources and demand for services. The department said it would have a better idea of the resources needed to implement the new nondegradation policy when the rules were adopted and applications were being processed.

How are the mixing zone and nonsignificant activities rules related?

As an addendum to the discussion on nonsignificant activities, the Council also addressed the issue of mixing zones. The Council decided to address this issue at this time because they believed they could not fully appreciate the importance of nonsignificant activities until they had a better understanding of the potential relationship between the nonsignificant activities and mixing zone rules. According to the DHES proposed rules, any discharge into a mixing zone would automatically be considered a nonsignificant activity.

Thus the mixing zone rules would greatly expand the category of "nonsignificant activities".

EQC December 1993 recommendations to the DHES, continued:

5. Mixing Zone Rulemaking

Issue - *Due to a lack of resources, the DHES has divided the rulemaking requirements in SB 401 into two separate efforts--one dealing with mixing zones and the other dealing with all the other nondegradation issues. The Council found it difficult to fully appreciate the impacts of certain proposed rules without a clearer idea of what the mixing zone rules would look like.*

Recommendation - *The Council understands the rationale for not including mixing zones rules in the nondegradation rules process. However, the DHES should strive for the adoption of mixing zone rules as soon as possible. Additionally, the EQC requests that the DHES keep the Council fully apprised on the progress of the mixing zone rulemaking process.*

Results

The DHES reviewed the "dual track" nondegradation and mixing zone rulemaking process and decided that it would combine the proposed rules into one package.

EQC December 1993 recommendations to the DHES,
continued:

Will the
Montana
Environmental Policy
Act apply to
determinations of nonsignificance?

6. Other Related Issues

Additionally, the Council briefly addressed the interaction between DHES significance determinations and the requirements of the Montana Environmental Policy Act. The Council encourages the DHES to continue working with the EQC staff on this issue.

Results

DHES and EQC staff met throughout the interim on this issue. DHES' interpretation of MEPA and the DHES rules implementing MEPA does not require an environmental review for an action that it determines will not cause significant degradation. Any other DHES action, e.g., permits, licenses, or other authority to act, will be subject to an independent analysis of MEPA applicability.

SJR Study Issue #2

SJR 29 Study Issue 2.

The study should include a review of

...

(b) the social and economic development factors and the public interest in maintaining high-quality waters....

Work Plan Summary

The Council decided on five study goals for the issue of social and economic development factors. The first three goals dealt with analyzing the factors issued in the DHES proposed rules, the factors used by the federal government in the Clean Water Act and the analysis required under **MEPA**. Goal number four examined the issue of state liability in allowing the degradation of state waters and goal number five examined the relationship between the nondegradation provisions and other sections of the water quality laws.

STUDY ISSUE 2: GOAL 1. The Council analyzed the social and economic factors identified by the DHES in the **draft** nondegradation rules. The purpose of the analysis was to determine whether the EQC felt the proposed factors were an appropriate and sufficient basis for a decision to authorize degradation.

STUDY ISSUE 2: GOAL 2. The Council identified and analyzed the social and economic factors used by the federal government in Clean Water Act (CWA) decisions.

STUDY ISSUE 2: GOAL 3. The Council evaluated the social and economic impact analysis required under the Montana Environmental Policy Act (**MEPA**) to determine the usefulness and appropriateness of this approach and to ensure that duplication of effort is avoided.

1993-94 Council Activity

Subcommittee staff prepared and presented a report reviewing the different economic and social analysis used by the DHES, for both nondegradation decisions and under **MEPA**, and the federal government. After reviewing this information, the subcommittee found no conflicts or inconsistencies among the criteria but did express a concern regarding the great amount of discretion available to the DHES in reviewing the criteria.

The subcommittee, wishing to make its comments part of the Board of Health and Environmental Sciences record, submitted written comments to DHES Director Robinson in December, 1993. The full Council reviewed and endorsed these comments at its January, 1994 meeting. Excerpts from the recommendations are provided below.⁴

Joint subcommittee December 1993 recommendations to the DHES:

I. Additional Legislative Guidance

Issue: *The subcommittee expressed a concern that, regardless of the adequacy of the social and economic criteria identified in the proposed rules, the legislation itself (SB 401) may not provide sufficient guidance on how those criteria should be analyzed. The subcommittee noted that specific language in the SB 401 statement of intent may provide additional guidance to the DHES as it analyzes the identified social and economic review criteria.*

Recommendation: *The subcommittee recommends that the DHES carefully review and consider incorporating language from the SB 401 Statement of Intent relating to the proposed rules where appropriate to ensure that the DHES and the public understand the legislature's intent in amending Montana's nondegradation policy.*

Results

The DHES reviewed the SB 401 statement of intent language and incorporated portions of that language into its proposed rules.

⁴ Joint EQC/WPC Nondegradation subcommittee letter to DHES Director Robinson dated December 13, 1993.

Joint subcommittee December 1993 recommendations to the DHES, continued:

2. Public Involvement

Issue: *The subcommittee expressed a concern regarding adequate opportunity for public involvement in the nondegradation review process. This concern is similar to the one expressed by the full Council in its comments to the BHES dated December 7, 1993, but this recommendation is not limited to the "significance determination" issue.*

Recommendation: *The subcommittee recommends that the DHES analyze the entire nondegradation review process to ensure adequate opportunity for public involvement at each decision point.*

Results

The DHES restated its commitment to maximum public involvement in the nondegradation review process. This issue would continue to be studied after the rules are adopted and the new nondegradation policy is being implemented.

Is the state assuming liability by allowing authorizations to degrade high-quality waters?

STUDY ISSUE 2. - GOAL 4. The Council analyzed the potential increase in state liability resulting from authorizations to degrade high-quality waters to determine if the liability increase, if any, should be considered an economic development factor.

1993-94 Council Activity

Subcommittee staff researched and reported to the subcommittee regarding the current status of the liability issue. Additionally, appropriate department personnel were requested to present their perspectives on the issue.

The subcommittee recognized that there is some potential liability any time the state issues a permit or other authorization to act. However, the subcommittee, after reviewing information provided by staff and DHES personnel, decided that there was no increase in potential state liability under the new nondegradation statute.

Results

The subcommittee recommended no changes be made to the statute or policy at this time. The full Council concurred with this assessment and the recommendation.

STUDY ISSUE 2. * GOAL 5. The Council analyzed the relationship between the nondegradation statute and other sections of the water quality laws.

1993-94 Council Activity

The subcommittee requested a review of this issue by the DHES. The DHES was asked to focus on any inconsistencies or conflicts between other water quality laws and the nondegradation statute.

DHES personnel told the subcommittee that there were no obvious conflicts or inconsistencies between the nondegradation statute and other water quality laws. However, DHES personnel noted that the new statute had yet to be implemented and said they would be carefully reviewing the implementation of the statute to ensure maximum efficiency and effectiveness of all water quality laws.

Results

.The subcommittee, and subsequently, the full Council, accepted the DHES response and requested to be kept apprised of any developments regarding this issue.

SJR Study Issue #3

SJR 29 Study Issue 3

The study should include a review of:

...

(j) the potential utilization, in response to exceptions from nondegradation provisions, of mitigation measures to improve overall water quality in the state, in the source, or in a specific affected portion of the source....

Work Plan Summary

The Council analyzed the current use of mitigation by federal and state agencies. The analysis included the issues of: agency-industry bargaining power, mitigation enforcement, the distinction between mitigating point and non-point sources and the location of the mitigation in relation to the location of the nondegradation authorization.

1993-94 Council Activity

The EQC sponsored a panel discussion before the full Council to discuss this issue. Apart from the issues identified in the goal statement, specific questions for the panelists included the following: "Should the DHES be allowed to consider mitigation?" -- "Should the DHES be required to impose mitigation?" -- and "What are the implications, both legal and logistical, to the DHES requiring an applicant to go back and correct someone else's mistakes?"

Panelists included representatives from the appropriate state and federal agencies, the regulated community, and public interest groups with an interest in the nondegradation issue.

The panel discussion, scheduled for the January, **1994** EQC meeting, included: Bob Robinson, Director, DHES; John Wardell, Director, Montana Office, U.S. Environmental Protection Agency; Steve Gilbert, President, OEA Research, Helena; Bruce Parker, Environmental Director, Beal Mountain Mining, Anaconda; Ted Doney, Attorney, Doney, Crowley and Schontz, Helena; Tom France, Attorney, National Wildlife Federation, Missoula; and Dr. Abe Horpestad, Acting Chief, Water Quality Bureau, DHES. A summary transcript of the presentations and following discussion is attached as **Appendix 7.**

At the close of the three-hour panel discussion, broadly looking at the potential for using mitigation in nondegradation authorizations, the full Council assigned this issue to the Joint EQC/WPC subcommittee for closer analysis.

The Council identified seven specific sub-issues for analysis by the subcommittee. The sub-issues, presented below, are followed by examples of questions that are contained within the sub-issue. These questions are examples only and were prepared to facilitate subcommittee discussion.

What mitigation issues were discussed by the Council?

1. Mitigation definition -- Should the term mitigation be defined? If so, by whom and how?
2. Mitigation goals -- What are proper goals for a mitigation policy? Should the effect be neutral or should there be a net benefit to the resource as a result of the mitigation?
3. Scope of mitigation -- What should be considered under a mitigation policy? Should the state consider mitigation to other resources or should it limit mitigation to the resource in question?
4. Location of the mitigation -- Should mitigation be limited to the same watershed as the proposed project? Who will define "watershed" and how?

5. Voluntary or required mitigation -- Should the DHES be allowed to consider mitigation if proposed by the applicant, or should it require mitigation as a precondition for a nondegradation authorization?

6. Mitigation timing -- Should mitigation be required to be completed before the permit or authorization is granted, or should there be a strict completion schedule?

7. Mitigation enforcement -- Who will enforce mitigation requirements and how?

The subcommittee met in March and again in May, 1994 to discuss the mitigation issue. The meetings resulted in the following subcommittee recommendations to the full Council regarding the mitigation issue. The subcommittee offered the following recommendations as policy guidelines to be used by the DHES in processing nondegradation authorization applications.⁵

⁵ Staff memo from joint EQC/WPC nondegradation subcommittee to the full EQC dated May 6, 1994.

Should the term mitigation be defined? If so, by whom and how?

1. Mitigation Definition -- Should the term mitigation be defined? If so, by whom and how?

Discussion -- The subcommittee understands that the least degrading water quality protection practice that is technologically, environmentally, and economically feasible is required under the nondegradation statute. Therefore, for the purposes of subcommittee discussion, the term mitigation was not used to refer to anything that minimizes the applicant's actual water quality degradation. For example, in a nondegradation authorization application an industrial discharger proposes to discharge 10 ppm of chemical X, but then determines that it is technologically, environmentally, and economically feasible to only discharge 6 ppm. The reduction from 10 to 6 ppm is not mitigation because under the statute and the proposed rules the DHES must limit the discharger to 6 ppm.

The subcommittee used the term mitigation to refer to non-project related activities that impact not the technologically, environmentally, and economically feasibility determination but rather activities that impact, i.e., improve, water quality. The benefit from this mitigation is analyzed and weighed under the social and economic analysis required under the statute and proposed rules.

Recommendation -- The subcommittee understands and agrees with the DHES concept of mitigation to be used in the nondegradation process. Additionally, the subcommittee reviewed and endorses the broad definition of mitigation found in the DHES adopted model MEPA rules. The subcommittee does not believe it is necessary to define mitigation in the nondegradation rules at this time.

Joint subcommittee May 1993 recommendations to the DHES
continued:

Should the state consider mitigation to other resources or should it limit mitigation to the resource in question?

2. Scope of Mitigation -- What should be considered under a mitigation policy? Should the state consider mitigation to other resources or should it limit mitigation to the resource in question?

Discussion -- The subcommittee understands that the DHES must consider a broad range of mitigation proposals under the nondegradation statute and proposed rules. For example, an applicant proposing to discharge 10 ppm of Chemical X may wish to "tip the balance" of the social and economic development analysis by agreeing to provide the local government with a new fire truck. The DHES is required to consider the costs and benefits of the fire truck in the social and economic analysis.

The subcommittee does not want to limit DHES authority in this matter. However, the subcommittee believes that, in general, if mitigation is proposed through the water quality nondegradation process the mitigation should improve overall water quality.

Recommendation -- The subcommittee recommends the DHES encourage proposed mitigation that improves overall water quality.

Should mitigation be limited to the same watershed as the proposed project?

3. **Location of the Mitigation** -- Should mitigation be limited to the same watershed as the proposed project? Who will define "watershed" and how?

Discussion -- In addition to concerns noted above regarding mitigation proposals, the DHES must also consider mitigation proposed anywhere in the state. The subcommittee discussed the potential problems regarding "sacrifice areas" and the concept of state-owned water.

Again, the subcommittee does not want to limit DHES authority in this matter. However, the subcommittee believes that, in general, if mitigation is proposed through the water quality nondegradation process the mitigation should be located in the geographical area of the project.

Recommendation -- The subcommittee recommends the DHES encourage proposed mitigation that improves overall water quality in the area of the project.

Who will enforce mitigation requirements and how?

4. **Mitigation Enforcement** -- Who will enforce mitigation requirements and how?

Discussion -- The subcommittee understands that if mitigation is to be effectively used in the nondegradation process it must be enforceable.

Recommendation -- The subcommittee recommends that if mitigation is proposed and accepted through the nondegradation process the mitigation should be included in the authorization to degrade state waters. Therefore, noncompliance with the mitigation provisions of the authorization could result in authorization or permit revocation.

Should mitigation be required to be completed before the permit or authorization is granted?

5. Mitigation Timing -- Should mitigation be required to be completed before the permit or authorization is granted, or should there be a strict completion schedule?

Discussion -- The subcommittee discussed legal and logistical problems of requiring mitigation completion before an authorization is granted and decided that idea was impractical. However, the subcommittee believes that the DHES, the applicant, and the public, should clearly understand what mitigation is expected and when.

Recommendation -- The subcommittee recommends that if mitigation is proposed and accepted a schedule for mitigation completion be developed through the nondegradation application process. This mitigation schedule should be included as part of the authorization. This would provide the DHES, the applicant, and the public, an opportunity to be involved in schedule development and implementation.

Additionally, the Joint subcommittee identified the following two issues that it determined needed additional analysis.

Joint subcommittee May 7993 recommendations to the full Council:

Should the state establish an account where a nondegradation applicant could contribute funds to be used for statewide water quality improvement projects?

6. Mitigation Banking -- Should the state establish an account where a nondegradation applicant could contribute funds to be used for statewide water quality improvement projects.

Discussion -- This issue was not identified specifically by the EQC but arose out of discussions regarding mitigation timing and scope. The subcommittee identified the following sub-issues regarding the concept of mitigation banking:

- a. How would the DHES weigh or estimate the **benefits** of a contribution to the mitigation bank if it does not know on what water quality project the funds will be spent?
- b. Who will establish the water quality project priority list, and how?
- c. When will **MEPA** compliance be achieved?
- d. What are the liability issues for the contributor and the state?
- e. What is the potential for abuse of the bank through both agency "extortion" or applicant "bribery"?

Recommendation -- The subcommittee recommends that the EQC refer this issue back to the subcommittee for further study.

Joint subcommittee May 1993 recommendations to the full Council continued:

Should the state require a nondegradation applicant to perform mitigation that improves the overall water quality in the state?

7. Mandator Mitigation -- Should the state, recognizing its constitutional and statutory responsibility to improve water quality require a nondegradation applicant to perform mitigation that improves the overall water quality in Montana?

Discussion -- This issue evolved from the EQC identified issues of mandatory mitigation and mitigation goals, in other words, what should be the end result of Montana's mitigation policy. The subcommittee identified the following sub-issues regarding the concept of mandatory mitigation:

- a. How would the DHES evaluate mitigation proposals to ensure "overall improvement" of Montana's water quality?
- b. Should the requirement be parameter based? For example, if the applicant proposes to discharge 10 ppm chemical X, must it remove 11 ppm chemical X somewhere else?
- c. Understanding the constitutional provisions regarding degradation and a clean and healthful environment, should this requirement be placed on all environmental permits?
- d. How does the concept of mitigation banking relate to mandatory mitigation?
- e. Are there potential legal problems regarding takings, due process, equity, or liability issues?
- f. Are there unique impacts to small project developers resulting from mandatory mitigation?

Recommendation -- The subcommittee recommends that the EQC refer this issue back to the subcommittee for further study.

The full Council accepted the recommendations at its May meeting and referred the issues of mitigation banking and mandatory mitigation back to the subcommittee for further analysis.

The subcommittee report and summary transcript of Council discussion on mitigation banking and mandatory mitigation is attached as **Appendix 8**.

At its meeting in June 1994, the subcommittee continued its analysis of the two remaining mitigation issues; mitigation banking and mandatory mitigation, and presented the following conceptual mitigation policy to the full Council for discussion.⁶

Joint subcommittee June 1993 memo to the full Council:

At the risk of oversimplification, under current law and proposed DHES rules, an applicant for an authorization to degrade state waters must prove two things:

1. that the proposed development will utilize the least degrading water quality protection practice that is technologically, economically, and environmentally feasible; and

2. that the proposed development will result in a net benefit to society.

The subcommittee discussed the potential for imposing a third requirement. That is, after the applicant has proven the above two items, the applicant must then improve the overall water quality in Montana. This could be accomplished through either a monetary contribution to a water quality improvement fund or by undertaking a water quality improvement project of the same or higher cost.

The amount of the contribution could be based on the cost of the proposed development, the difference between the cost of the proposed development with and without the nondegradation authorization, the amount of projected profits resulting from the proposed development, or the amount and type of degradation resulting from the proposed development.

⁶ EQC Staff memo to the joint EQC/WPC nondegradation subcommittee dated June 14, 1994.

*Joint subcommittee June 1993 memo to the full Council
continued:*

The subcommittee would like to pay special attention to the following issues.

- 1. How would the DHES weigh or estimate the benefits of a contribution to the water quality improvement project fund if it does not know on what water quality project the funds will be spent?*
- 2. Who will establish the improvement project list, and how?*
- 3. What is the potential for abuse of the improvement project fund through both agency "extortion" or applicant "bribery"?*
- 4. How would the DHES evaluate mitigation proposals to ensure "overall improvement" of Montana's water quality?*
- 5. Should the requirement to improve overall water quality be parameter based? For example, if the applicant proposes to discharge 10 ppm chemical X, must it remove 11 ppm chemical X somewhere else?*
- 6. Are there potential legal problems regarding takings, due process, equity, or liability issues?*
- 7. Are there unique impacts to small project developers resulting from this requirement?*
- 8. Understanding the constitutional provisions regarding degradation and a clean and healthful environment, should this requirement be placed on all environmental permits.*

Results

After much discussion and public comment, the full Council decided that they would not reach consensus on the issues of mitigation banking and mandatory mitigation. The Council made no recommendation on the issue but thanked

the subcommittee for its work to bring the complex and controversial issue into sharper focus. A summary of the Council discussion of these issues is included as **Appendix 9**.

In addition to the discussion of mitigation issues at its May 1994 meeting, the subcommittee also brought forth for discussion the issues of cumulative impacts and the DHES proposed mixing zone rules. These two issues are examined below.

Other Nondegradation Issues - 1. Cumulative Impacts

As noted above, several subcommittee members also expressed concern regarding the unquantified impacts of self-determinations of nonsignificance. For example, a single self-determination of nonsignificance for a private septic system may in fact have minimal impacts--but 10 systems, all self-determined to be nonsignificant, could have a "significant" cumulative impact on the ground water resource.

The subcommittee began its analysis of this issue by identifying the types of activities subject to self-determination of nonsignificance. These activities were then prioritized according to their potential cumulative impacts. Finally, the subcommittee reviewed the current data collection procedures for the identified activities to determine if, and how, cumulative impacts from self-determinations could be quantified. Relevant agency personnel were invited to the meeting to assist the subcommittee in this analysis.

Subcommittee members were told by staff and DHES personnel that the vast majority of self determinations will center around the categorical exclusions in the rules. Most of these exclusions require some form of permit or other authorization from a state agency. The DHES also informed the subcommittee that the state is required to make a determination of significance for any activity it permits, reviews, or approves. Therefore, the only major source of self-determinations will be new or increased non-point sources of pollution. The major categories of self-determination then will include: changes in land use; timber harvests on private lands; the use of agricultural chemicals; and land farming of sewage.

Results

The subcommittee decided to make no recommendation on the issue of cumulative impacts of self-determination. However, the subcommittee did recognize a serious need for adequate water quality baseline data to ensure that the state can detect degradation when it occurs.

Other Nondegradation Issues - 2. Mixing Zone Rules

Subcommittee Co-Chairs Senators Doherty and Grosfield also requested that the Joint subcommittee look at the proposed DHES rules regarding mixing zones. Concerns were brought out regarding lack of definitions in the proposed mixing zone rules; less opportunity for public involvement than for the nondegradation rules; and different time frames for adopting the mixing zone and nondegradation rules.

These concerns were brought to the full Council which, after discussion, forwarded the following comments to the DHES.⁷

EQC March 1993 letter to the DHES:

Understanding the inextricable link between the Department of Health and Environmental Sciences (DHES) mixing zone policy and the proposed DHES rules implementing SB 401, the Environmental Quality Council (EQC) has begun an analysis of the Department's proposed mixing zone rules as part of its SJR 29 Nondegradation Study. While our analysis is not complete, it is apparent that there are many issues to be resolved regarding the proposed rules and their implementation. Some of these issues could bear heavily on municipalities and other discharge permit holders.

continued . . .

⁷ EQC letter to DHES Director Robinson dated March 10, 1994.

EQC March 1993 letter to the DHES:

The Council believes that the potential impacts of these proposed mixing zones have yet to be fully analyzed by the DHES and are not fully understood by the general public or affected discharge holders. As stated to members of your staff at the March 4, 1994 EQC meeting, the EQC strongly suggests that the DHES sponsor an informational meeting with discharge holders and other interested members of the public to answer questions and facilitate a dialogue between the DHES and members of the regulated community and general public. To allow reasoned comments on the proposed rules, we suggest that this meeting be held prior to the end of the mixing zone rule comment period.

Additionally, the EQC forwarded these comments to the BHES.⁸

EQC March 1993 letter to the BHES:

*The Council is concerned with the numerous undefined terms found in Water Quality Bureau Circular 8. *(see NOTE) The Council suggests the DHES consider adding a definition section to Circular 8 to provide up front definitions for some of the potentially subjective terms in the rules.*

continued. . .

NOTE: Water Quality Bureau Circular 8 defines and describes DHES proposed mixing zone rules.

⁸ EQC letter to Rib Gustafson, Chair, BHES, dated March 11, 1994.

More importantly, even with the assistance of DHES staff the subcommittee appointed to analyze this issue spent almost three hours on a detailed review of Circular 8 and yet did not get half way through the proposed rules. It became obvious to the Council that there are many issues that need to be examined and discussed before effective comments can be developed.

The Council therefore suggests that you extend the formal comment period beyond the March 18, 1994 Board meeting. This will allow the Council and other interested members of the public time to fully analyze these important proposed rules.

A summary transcript of the EQC discussion regarding the mixing zone rule issue is attached as Appendix 10.

Results

The DHES seriously considered the Council's comments and redrafted many sections of the mixing zone rules. Additionally, the DHES sponsored public meetings to discuss the new rules and the BHES extended the official comment period.

SJR 29 Study Issue #4

SJR 29 Study Issue 4.

The study should include a review of:

..

*(g) the relationship between the nondegradation policy provisions contained in Montana **water quality** laws and the various interpretations of applicable sections of the Montana constitution....*

Work Plan Summary

The EQC analyzed the issue of the relationship between the nondegradation provisions and the Montana constitution as defined by SJR 29 above.

1993-94 Council Activity

The full Council scheduled a panel discussion on this issue for its December, 1994 meeting. The purpose of the panel was to provide information and a public forum for discussion on the issues and not for the Council to make decisions. Panelists included Alan Joscelyn, private attorney, Helena; Grant Parker, private attorney, Missoula; and Professor John Horwich, University of Montana School of Law.

The panelists were asked to respond to the following:⁹

The Council would like you to present your views on the interaction between the new nondegradation policy and Montana's constitution, specifically Article IX. The purpose of the panel discussion is not to solve any particular "problem" associated with the nondegradation policy. Rather, the goal is to provide objective information to interested members of the public, EQC members, and other legislators.

Major issues discussed included the self-execution of specific constitutional language, the constitutionality of the new nondegradation policy, the difference between components of the environmental life support system and other natural resources, a discussion regarding the definition of "degrade" and "adequate remedies", and a general discussion regarding the legislature's role in implementing these provisions of the constitution. A summary transcript of the discussion is attached as **Appendix 11**.

⁹ EQC letter to the panelists dated December 12, 1994.

Results

The Council, understanding that there was no decision to be made at this point, thanked the panelists and said they would participate and follow the ensuing discussion during the 1995 legislative session.

SJR 29 Study Issue #5

SJR 29 Study Issue 5. *The DHES Rulemaking Process*

Work Plan Summary

The EQC analyzed the overall effectiveness of the DHES nondegradation rulemaking process. This analysis included the DHES use of informal statewide hearings and its response to public comment.

1993-94 Council Activity

The subcommittee reviewed public comment regarding the rules and solicited additional public comment regarding the rulemaking process. After reviewing this information, the subcommittee reported to the full EQC for Council discussion.

Additionally, the Council received continual updates on the DHES rulemaking process throughout the interim. Various Council members attended the informal statewide meetings regarding the proposed nondegradation rules or commented individually in writing.

Results

Formally, the Council made the following comments regarding the rulemaking process in general."

¹⁰ EQC letter to DHES Director Robinson dated December 7, 1993.

... (T)he Council appreciates the unusual use of informal statewide meetings associated with the proposed rules. The Council commends the DHES for its attempt to maximize the opportunity for public involvement thus far in the rulemaking process.

Additionally, the Council was pleased that the BHES and the DHES both considered and implemented its recommendation regarding increasing the opportunity for public comment in the mixing zone rulemaking process.

SJR 29 Study Issue #6

SJR 29 Study Issue 6, Enforcement

Work Plan Summary

The EQC analyzed the existing ability of the DHES Water Quality Division to adequately enforce the Water Quality Act including the nondegradation provisions of the act. This analysis included the issues of Water Quality Division responsibilities, staffing levels, and the resulting work load.

1993-94 Council Activity

Subcommittee staff conducted an ongoing analysis of this issue working closely with DHES staff and the Legislative Auditor's Office. The subcommittee reported to the EQC as appropriate.

One of the recurring themes throughout the interim was the issue of agency enforcement of environmental regulations. Specific issues included statewide hazardous waste enforcement, water quality act violations in Pondera County, and air quality issues in Billings.

Noting the public interest in enforcement expressed during its statewide meetings and understanding the crucial link between enforcement and protection of the resource and public

health, the subcommittee recommended, and the full Council endorsed, including an enforcement section in the SJR 29 Nondegradation Study. A summary transcript of the discussion regarding including enforcement in the study is attached as **Appendix 12.**

The Council first took an ad hoc approach to this study section by receiving reports regarding various specific enforcement issues from Council staff, members of the public, and agency personnel. However, the Council soon decided to take a more systematic approach to the issue of water quality act enforcement and forwarded the following information request to the DHES.¹¹ The agency's responses are listed where appropriate.¹²

EQC December 1993 information request to the DHES:

** During the past three years how many reports or complaints of possible water quality act violations have been reported to the DHES, including complaints in writing, through phone calls, and any other means?*

ANSWER: Although the data is not precise, the personnel operating within the Enforcement and Legal Support Section have received approximately 1,100 complaints via all routes of input from sources outside the DHES during the three year period calendar years 1991, 1992, and 1993. In addition, employees within other sections of the Water Quality Bureau have received near 100 complaints. Permit related data review and compliance monitoring have discovered in excess of 850 technical violations which may not necessarily require follow-up. The total is approximately 2,050 instances.

¹¹ EQC letter to Steven L. Pilcher, Administrator, Environmental Sciences Division, DHES dated December, 1994.

¹² Letter from Director Bob Robinson to Executive Director Deborah Schmidt dated January 28, 1994.

** How many of these complaints have been followed up by DHES personnel through an on-site inspection?*

ANSWER: Enforcement & Legal Support personnel available for field inspection have inspected all of the 1,100 complaints forwarded to them. Other personnel from the bureau have inspected 89 for a total of about 1,189 inspections.

**How many complaints have been followed-up in a manner other than an on-site inspection, and why and how were they addressed in different manner?*

ANSWER: A limited number of complaints can be addressed in a manner other than by an on-site inspection. In some cases, phone calls or discussion with local health officials or others provides additional information on the subject. Reasons for addressing these in a different manner include a determination of inaccuracy in substance, insufficient information, supervisory advice and other various reasons.

** Who decides, and how, if a complaint will be followed-up?*

ANSWER: In the great majority of instances, staff persons and the manager in the Enforcement & Legal Support Section, or the Regional office Manager alone or in consultation make the decision to schedule an on-site inspection. In a smaller number of instances, the Bureau Chief, Division Administrator, and/or Director's office staff provide input into the decision.

** How many complaints have resulted in the completion of a violation report form?*

ANSWER: The records show that about 29 Violation Report Forms (VRF) were prepared by the Enforcement & Legal Support Section during this period (19 violations of the Mt. Water Quality Act and 10 violations of Public Water Supply Laws or the Sanitation in Subdivision Act).

** What is the Department's "chain of command" when a violation report form is completed. In other words--How is a violation report form processed within the DHES?*

ANSWER: Within the Water Quality Bureau, the staff professional employees and the enforcement section employees and manager prepare the violation report form (VRF). This document summarizes the factual information relative to the alleged violation. It is generally initiated by the primary author and the Enforcement section manager. At this point, Enforcement and Legal Support Counsel is provided an opportunity to complete preliminary legal review, comment and sign. It is then presented, in order, to the Bureau Chief, Division Administrator, and Department Director (or their designee) for modification and/or approval. Each signature is necessary to further processing. When all signatures appear on the document, the VRF is returned to the Enforcement Section manager for administrative processing (logging, copying, etc.) and the complete document is submitted to the office of Chief Counsel for entry into the Department enforcement data base. The Chief counsel and program manager consult to assign the VRF to Enforcement program counsel for the initiation of legal action.

** During the past three years how many violation report forms have recommended the imposition of criminal or civil penalties?*

ANSWER: Thirteen VRF's which included a recommendation for the assessment of civil penalties have been **submitted** for supervisory review. Of those, two also included information alleging criminal activity by the named defendants or information apparently supporting criminal prosecution, along with a recommendation that the agency investigate the potential for criminal prosecution pursuant to applicable Montana environmental law.

** How many of these recommendations have been modified and by whom?*

ANSWER: Records show that seven of the thirteen VRF's were modified following review. These modifications were determined appropriate by the division administrator, chief legal counsel and department director

after considering the available evidence and the severity of the violation.

* * * * *

The Council also requested information regarding the Department's broader enforcement philosophy and the rationale for enforcement decisions.

In addition to soliciting information from the DHES on enforcement, the specific enforcement issues discussed by the Council included overall government credibility, agency responsibility and agency resource disparities, state primacy for environmental enforcement, the distinction between enforcement and compliance, consistency of state enforcement actions, the appropriate goals of an enforcement policy, citizen enforcement and the best method of analyzing these issues.

The Council directed the staff to prepare a more detailed outline of potential Council options for this issue. A summary transcript of the Council discussion regarding this issue from the March and May, 1994 EQC meetings is attached as **Appendix 13.**

The Council, devoting most of its June meeting to this issue, reviewed and discussed the issues outlined on the following page.

PROPOSED ENFORCEMENT DISCUSSION AGENDA

1. Introduction

II. What are the potential Goals for Today's Discussion?

A. Explanation of staff assumptions of what needs to be accomplished for today's meeting and whether those assumptions are correct.

B. Scope, Goals and Timeframe

111. Discussion of the Potential Scope of the Study

How Broad Should the Enforcement Study Be? Should the Study Focus on all the State's Environmental and Natural Resource Agencies? A Subset of the State's Environmental and Natural Resource Agencies? Only some Programs within one Agency? If so, which Agencies or Programs?

A. Discuss Enforcement's Historical Context

B. Discuss Enforcement Tools and Policies Outline

C. Review Enforcement Matrix and Inventory of State Programs and Policies

IV. Possible Study Goal Options

A. Option #1: Review and Understand Existing Policies of State Environmental and Natural Resource Programs and their Implementation.

1. What is the Enforcement Framework?

2. How is Enforcement Implemented?

3. What are the Goals of Montana's Enforcement Policies and are those Goals being Met?

B. Option #2: Develop a Consistent Enforcement Policy for the State and the Resources to Implement it.

1. How Should the State's Enforcement Framework be Redefined or its Implementation Retooled to Achieve Enforcement Goals?

2. What are the Resources Necessary and Obtainable to Match the Redefined Enforcement Goals?

C. Option #3: Assess whether Enforcement is Critical to Achieving Stated Statutory Environmental Goals.

1. Do current enforcement policies maintain and improve the quality of the environmental and public health of Montana citizen's?

2. Is enforcement necessary to protect human health and the environment?

3. What is the role of enforcement in achieving compliance?

4. What is "adequate" enforcement and do we have the resources for "adequate" enforcement?

D. Other Options

V. Timeframes

How long will this Study Take? In Part, this will be Determined by the Goals and Scope of the Study. Can this Study be Completed Before the Interim is Over or will it Last into the Next Interim?

VI. Next Steps

The Council discussed concerns regarding a possible study scope, EQC staff resources, and lack of specific information on overall enforcement programs or problems. A summary transcript of the Council discussion regarding these issues is attached as **Appendix 14**.

After a substantive and lengthy discussion, the Council decided to adopt options one (*Review and Understand Existing Policies of State Environmental and Natural Resource Programs and their Implementation*) and three (*Assess whether Enforcement is Critical to Achieving Stated Statutory Environmental Goals*) and assign them to the nondegradation subcommittee for further analysis and recommendations. The Council also directed the staff to prepare an inventory of agency enforcement policies and an outline of agency enforcement programs for review by the subcommittee.

The subcommittee, meeting in September, 1994, reviewed and discussed the following restated enforcement study goals as well as the additional information on agency enforcement programs attached as **Appendix 15**.

ENFORCEMENT STUDY

Issues Assigned to the nondegradation subcommittee for Further Analysis:

1. *Review and Understand Existing Policies of State Environmental and Natural Resource Programs and their Implementation.*

A. *What is the Existing Enforcement Framework?*

B. *How is Enforcement Implemented?*

C. *What are the Goals of Montana's Enforcement Policies and are those Goals being Met?*

2. *Assess whether Enforcement is Critical to Achieving Stated Statutory Environmental Goals.*

A. *Do current enforcement policies maintain and improve the quality of the environment and public health of Montana citizens?*

B. *Is enforcement necessary to protect human health and the environment?*

C. *What is the role of enforcement in achieving compliance?*

D. What is "adequate" enforcement and do we have the resources for "adequate" enforcement?

After a four hour discussion of these issues by the subcommittee and members of the public, the subcommittee made the following recommendation to the full Council.¹³

Joint subcommittee September 1994 memo to the full Council:

The Environmental Quality Council should conduct a study of the compliance and enforcement⁴ programs of the state's natural resource and environmental agencies. The study should be conducted during the 1995-96 interim and conclude with recommendations to the 1997 legislature. While the scope of the study may be narrowed at a later date, the initial scope of the study should be broad, and include enforcement and compliance programs in at least the following agencies: Department of State Lands; Department of Health and Environmental Sciences; Department of Agriculture; Department of Fish, Wildlife and Parks; and, Department of Natural Resources and Conservation.

continued. . .

¹³ Memo from the subcommittee to the full EQC dated September 29, 1994.

¹⁴ The term "enforcement" as used by the subcommittee, means more than penalties or other sanctions. The subcommittee agreed that "enforcement" includes the entire universe of activities undertaken by an agency to ensure compliance with its constitutional and statutory goals, including incentives, technical assistance, education, and other tools.

Joint subcommittee September 1994 memo to the full Council, continued:

The goals of the study should be to:

- 1. Review and understand the existing enforcement framework and how it is implemented.*
- 2. Identify the proper balance among sanctions, incentives, technical assistance, education, and other enforcement tools in a effective and efficient enforcement program.*
- 3. Analyze the constitutional and statutory goals of the various state natural resource and environmental agencies.*
- 4. Determine whether these goals are consistent and appropriate.*
- 5. Determine whether these goals are being met.*
- 6. If the goals are not being met, determine why not.*
- 7. Develop recommendations to address problems identified through the study.*

The vehicle for conducting the study should be either: 1) a recommendation from this Council to the next interim's Council or, 2) a study resolution submitted to the 1995 legislature.

Also at its September, 1994 meeting, the full Council met jointly with the Legislative Audit Committee to receive the Water Quality Division Performance Audit. The audit, available from the Office of the Legislative Auditor, focused to a large degree specifically on enforcement issues and included the following recommendation to the Council.

Recommendation#11

We recommend the Environmental Quality Council review the current water quality statutes to ensure consistency and continuity and recommend any necessary changes.

The EQC's Executive Director's preliminary response to the recommendation, said in part:¹⁵

. . . this recommendation does fall within the statutory responsibilities of the Environmental Quality Council staff as set forth in 75-1-301 through 324, MCA. The Environmental Quality Council has recently begun laying the groundwork for a comprehensive study of enforcement of and compliance with Montana's environmental regulatory statutes. The EQC has recognized that in a time of increasing mandates and increasingly limited state resources, a review of state policies concerning enforcement and compliance with environmental statutes is warranted. The review of current water quality statutes that the Report recommends could certainly dovetail with the EQC's enforcement/compliance study.

The full Council accepted both the Auditor's and the subcommittee's recommendations regarding future EQC involvement in the environmental enforcement issue. **Believing** that a project of this scope required some form of legislative mandate, the Council further requested that staff prepare a draft study resolution requesting the EQC to undertake an enforcement study during the 1995-96 interim. A copy of the draft resolution is attached as **Appendix 17**.

Results

At its December, 1994 meeting, the Council endorsed the draft study resolution as well as endorsing and agreeing to sponsor DHES draft bill proposals implementing specific Legislative Auditor recommendations regarding performance bonds, economic considerations in penalty assessments, and clarifying DHES available enforcement responses. Copies of these draft bills are attached as **Appendix 17**.

¹⁵ EQC Director's letter to the Legislative Auditor dated September 16, 1994.

Conclusion

The Council believes that the SJR 29 study was a thorough analysis of a complex issue. The interim study process, utilizing extensive public involvement, is an effective and efficient means of **establishing** appropriate public policy. While the potential goals of the SJR 29 study were limited due to the contemporaneous passage of SB 401, the Council believes that the nondegradation study was productive.

Increased public involvement, a clearer understanding of some of the unresolved issues associated with nondegradation, and increased cooperation between the Council, the Water Policy Committee and the Office of the Legislative Auditor are some of the benefits of the **SJR 29** study.

Additionally, the Council believes that the adopted BHES nondegradation rules are better for the Council's involvement in the rulemaking process.

Finally, the most important outcome of the study may not be realized until the completion of the enforcement study proposed for the 1995-96 interim.

APPENDIX 1

SENATE BILL NO. 401

AN ACT AMENDING THE WATER QUALITY LAWS; DEFINING "DEGRADATION" AND CERTAIN **OTHER** TERMS; TRANSFERRING AUTHORITY FROM THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES TO THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES TO AUTHORIZE DEGRADATION OF STATE WATERS; ALLOWING APPEAL OF THE DEPARTMENT'S FINAL DECISION TO THE BOARD; REQUIRING THE BOARD TO ADOPT RULES REGARDING **MIXING ZONES** AND THE **NONDEGRADATION** POLICY; CLARIFYING THAT IT IS UNLAWFUL TO CAUSE DEGRADATION OF STATE WATERS WITHOUT AUTHORIZATION; **ESTABLISHING FEES**; AMENDING SECTIONS 75-5-103, 75-5-301, 75-5-303, AND 75-5-605, **MCA**; AND PROVIDING AN APPLICABILITY DATE AND AN IMMEDIATE EFFECTIVE DATE.

STATEMENT OF INTENT

A statement of intent is required for this bill because the bill requires the board of health and environmental sciences to adopt administrative rules. The legislature clearly intends that the nondegradation policy protect and maintain existing quality of state waters from any loss in the quality of those waters. The nondegradation policy is intended to apply to any activity that has the potential to affect existing water quality and requires department review of all such activities to ensure that degradation does not occur.

In recognition that certain activities promote general welfare and may justify lower water quality in a particular water segment, the legislature intends that degradation be allowed in limited circumstances and under certain conditions. For example, if there is no alternative to a proposed project that does not result in degradation and the project is found to be in the best interests of the state, degradation may be allowed provided that water quality protection practices are implemented that limit degradation to the extent determined to be economically and technologically feasible.

To promote the goal of maintaining existing high-quality water, the board is to develop rules specifying the level of protection or treatment required if degradation is allowed. Rules are to be developed that provide procedures for department review of applications to degrade state waters, that provide guidance or standards for the level of treatment required, and that establish criteria that allow the department to weigh the social and economic benefit to the public of allowing the proposed project against the loss of water quality. It is the intent of the legislature that the department's decision involve public and governmental agencies' comment prior to a final decision.

It is further the intent of the legislature that the board develop rules that will provide guidance to the department in the use and creation of mixing zones. The rules are to ensure that water quality impacts from the use of mixing zones are minimized.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section A. Section 75-5-103, MCA, is amended to read:

"75-5-103. Definitions.' Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Board" means the board of health and environmental sciences provided for in 2-15-2104.

(2) "Contamination" means impairment of the quality of state waters by sewage, industrial wastes, or other wastes, creating a hazard to human health.

(3) "Council" means the water pollution control advisory council provided for in 2-15-2107.

~~(4)~~ **"Degradation"** means a change in water quality that lowers the quality of **high-quality** waters for a **parameter**. The term does not include those changes in water quality determined to be nonsignificant **pursuant to 75-5-301(5)(c)**.

~~(4)(5)~~ "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

~~(5)(6)~~ "Disposal system" means a system for disposing of sewage, industrial, or other wastes and includes sewage systems and treatment works.

~~(6)(7)~~ "Effluent standard" means ~~any a~~ restriction or prohibition on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged into state waters.

~~(8)~~ "Existing uses" means those uses actually attained in state waters on or after July 1, 1971, whether or not those uses are included in the water quality standards.

~~(9)~~ **"High-quality waters"** means state waters whose quality for a **parameter is** better than standards established **pursuant to 75-5-301**. All waters are high-quality water **unless** classified by the board within a classification for waters that are not suitable for **human consumption** or not suitable for growth and **propagation** of fish and **associated aquatic life**.

~~(7)(10)~~ "Industrial waste" means ~~any a~~ waste substance from the process of business or industry or from the development of any natural resource, together with any sewage that may be present.

~~(11)~~ **"Interested person"** means a **person** who has submitted oral or written **comments on the department's preliminary decision regarding degradation of state waters**, pursuant to 75-5-303. The term includes a **person** who has requested authorization **to degrade high-quality waters**.

~~(8)(12)~~ "Local department of health" means the staff, including health officers, employed by a county, city, city-county, or district board of health.

~~(13)~~ **"Mixing zone"** means an area established in a **permit** or final decision on **nondegradation** issued by the **department** where water quality standards may **be exceeded, subject** to conditions that are **imposed** by the **department** and that **are consistent** with the rules **adopted** by the board.

~~(9)(14)~~ "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state waters.

~~(10)(15)~~ "Owner or operator" means ~~any a~~ person who owns, leases, operates, controls, or supervises a point source.

~~(16)~~ **"Parameter"** means a **physical, biological, or chemical property** of state water when a ~~de~~ erty affects the quality of the state water.

~~(11)(17)~~ "Person" means the state, a political subdivision of the state, institution, firm, corporation, partnership, individual, or other entity and includes persons resident in Canada.

~~(12)(18)~~ "Point source" means ~~my a~~ discernible, confined, and discrete

conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

~~(13)~~**(19)** "Pollution" means contamination or other alteration of the physical, chemical, or biological properties of ~~any~~ state waters which exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or the discharge, seepage, drainage, infiltration, or flow of ~~any~~ liquid, gaseous, solid, radioactive, or other substance into ~~any~~ state water which will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife. A discharge, seepage, drainage, infiltration or flow which is authorized under the pollution discharge permit rules of the board is not pollution under this chapter.

~~(14)~~**(20)** "Sewage" means water-carried waste products from residences, public buildings, institutions, or other buildings, including discharge from human beings or animals, together with ground water infiltration and surface water present.

~~(15)~~**(21)** "Sewage system" means a device for collecting or conducting sewage, industrial wastes, or other wastes to an ultimate disposal point.

~~(16)~~**(22)** "Standard of performance" means a standard adopted by the board for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

~~(17)~~**(23)** "State waters" means ~~any a~~ body of water, irrigation system, or drainage system, either surface or underground; however, this subsection does not apply to irrigation waters where the waters are used up within the irrigation system and the waters are not returned to any other state waters.

~~(18)~~**(24)** "Treatment works" means works installed for treating or holding sewage, industrial wastes, or other wastes.

(25) "Water quality protection practices" means those activities, prohibitions, maintenance procedures, or other management practices applied to point and nonpoint Sources designed to protect, maintain, and improve the quality of state waters. Water quality protection practices include but are not limited to treatment requirements, Standards of performance, effluent standards, and operating procedures and practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material storage."

Section B. Section 75-5-301, MCA, is amended to read:

75-5-301. Classification and standards for state waters. Consistent with the provisions of 75-5-302 through 75-5-307 and 80-15-201, the board shall:

(1) establish and modify the classification of all waters in accordance with their present and future most beneficial uses;

(2) formulate standards of water purity and classification of water according to its most beneficial uses, giving consideration to the economics of waste treatment and prevention;

(3) review, from time to time at intervals of not more than 3 years, established classifications of waters and standards of water purity and **classification**;

~~(4) adopt rules governing the arantina of mixina zones, requiring that mixina zones granted by the deoartment be specifically identified, and requiring that mixina zones have:~~

(a) the smallest practicable size;

(b) a minimum practicable effect on water uses; and

(c) definable boundaries;

(5) adopt rules implementing the nondegradation policy established in 75-5-303, including but not limited to rules that:

(a) provide a procedure for department review and authorization of deauration;

(b) establish criteria for the following:

(i) determine important economic or social development; and

(ii) weigh the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality; and

(c) establish criteria for determining whether a proposed activity or class of activities will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

(i) equates significance with the potential for harm to human health or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the deauration will occur; and

(iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent; and

(6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute guidelines for granting or denying applications for authorization to deaure high-quality waters under the policy established in 75-5-303(2) and (3)."

Section C. Section 75-5-303, MCA, is amended to read:

"75-5-303. Nondegradation policy. ~~The board shall require:~~

~~(1) that any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of those waters; and~~

~~(2) any industrial, public, or private project or development which would constitute a new source of pollution or an increased source of pollution to high quality waters, referred to in subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality.~~ (1) Existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected.

(2) Unless authorized by the department under subsection (3), the quality of high-quality waters must be maintained.

(3) The department may not authorize deauration of high-quality waters unless it has been affirmatively demonstrated by a preponderance of evidence to the department that:

(a) deauration is necessary because there are no economically, environmentally, and technologically feasible alternatives to the proposed project that would result in no deauration;

(b) the proposed project will result in important economic or social development that exceeds the benefit to society of maintaining existing high-quality waters and exceeds the costs to society of allowing deauration of high-quality waters;

(c) existing and anticipated use of state waters will be fully protected: and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.

(4) The department shall issue a preliminary decision either denying or authorizing degradation and shall provide public notice and a 30-day comment period prior to issuing a final decision. The department's preliminary and final decisions must include:

(a) a statement of the basis for the decision: and

(b) a detailed description of all conditions applied to any authorization to degrade state waters, including, when applicable, monitoring requirements, required water protection practices, reporting requirements, effluent limits, designation of the mixing zones, the limits of degradation authorized, and methods of determining compliance with the authorization for degradation.

(5) An interested person wishing to challenge a final department decision may request a hearing before the board within 30 days of the final department decision. The contested case procedures of Title 2, chapter 4, Part 6, apply to a hearing under this section.

(6) Every 5 years, the department shall review authorizations to degrade state waters. To enable the department to adequately review authorizations as required under this section, the authorization holder shall revise the initial authorization application no sooner than 3½ years and no later than 4 years after the date of the authorization or the date of the latest department review. The specific revised information required must be determined by the department. If, based on the review, the department determines that the standards and objectives of 75-5-303 or the rules adopted pursuant to 75-5-303 are not being met, it shall revoke or modify the authorization. A decision by the department to revoke or modify an authorization may be appealed to the board."

Section D. Section 75-5-605, MCA, is amended to read:

"75-5-605. Prohibited activity. (1) It is unlawful to:

(a) cause pollution as defined in 75-5-103 of any state waters or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any state waters;

(b) violate any provision set forth in a permit or stipulation, including but not limited to limitations and conditions contained therein;

(c) cause degradation of state waters without authorization pursuant to 75-5-303;

~~(d)~~ (d) violate any order issued pursuant to this chapter; or

~~(e)~~ (e) violate any provision of this chapter.

(2) It is unlawful to carry on any of the following activities without a current permit from the department:

(a) construct, modify, or operate a disposal system which discharges into any state waters;

(b) construct or use any outlet for the discharge of sewage, industrial wastes, or other wastes into any state waters; or

(c) discharge sewage, industrial wastes, or other wastes into any state waters."

Section E. Rulemaking authority. The board shall adopt rules to implement 75-5-301 and 75-5-303.

Section F. Fees required for nondegradation application, monitoring, and enforcement. (1) Application fees for authorization to degrade state waters and fees for authorization review under 75-5-303(6) may not exceed the following:

- (a) \$2,500 for domestic sewage treatment plant discharges;
 - (b) \$5,000 for industrial discharges; and
 - (c) \$200 per lot for subdivisions **reviewed** under Title 76, chapter 4.
- (2) The minimum annual monitoring and enforcement fee for degradation authorizations is **\$250** and may not exceed \$2,500 per million gallons discharged per day.

Section G. Codification instruction. [Sections 5 and 61 are intended to be codified as an integral part of Title 75, chapter 5, part 3, and the provisions of Title 75, chapter 5, part 3, apply to [sections 5 and 61.

Section H. **Coordination** instruction. If House Bill No. 388 is passed and approved and if it requires the department of health and environmental sciences to impose and collect fees for authorizations to degrade state waters, then [section 6 of this act] is void.

Section I. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section J. Applicability. [This act] applies to all requests to degrade state waters filed with the department after [the effective date of this act].

Section K. Effective date. [This act] is effective on passage and approval.

APPENDIX 2

SJR 0029103

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA ~~DIRECTING REQUESTING THE~~ ENVIRONMENTAL QUALITY COUNCIL TO STUDY THE **NONDEGRADATION** PROVISIONS OF THE MONTANA WATER QUALITY LAWS AND THE MONTANA CONSTITUTION AND THE IMPLEMENTATION OF THOSE PROVISIONS AND LAWS; AND REQUIRING THE ENVIRONMENTAL QUALITY COUNCIL TO REPORT ITS FINDINGS AND RECOMMENDATIONS TO THE 54TH LEGISLATURE.

WHEREAS, the 53rd Legislature has considered two bills relating to nondegradation provisions of Montana's water quality laws, which bills have ~~generated~~ ATTEMPTED TO ADDRESS unresolved issues; and

WHEREAS, the implementation of the nondegradation provisions of the water quality laws involves complex issues of law, technology, and public policy; and

WHEREAS, the implementation of ~~the~~ EXCEPTIONS TO A STRICT INTERPRETATION OF A nondegradation provisions POLICY HAS BEEN CHARACTERIZED AS IMPACTING ALL ENVIRONMENTAL LIFE-SUPPORT SYSTEMS, INCLUDING BUT NOT LIMITED TO AIR, WATER, AND LAND, AND THEREFORE is of significant interest to all Montanans.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

- (1) That the Environmental Quality Council give priority to the study of the nondegradation provisions of the Montana water quality laws and the implementation of those provisions.
- (2) That the study include a review of:
 - (a) the definitions of "nondegradation" and "high-quality waters";
 - (b) the ~~balancing of~~ SOCIAL AND economic development FACTORS and the public interest in maintaining high-quality waters;
 - (c) the procedures for the review of proposed exemptions from the nondegradation provisions;
 - (d) the designation of **mixing** zones;
 - (e) the APPROPRIATENESS OF THE application of nondegradation provisions to all point and nonpoint sources of pollution to both ground water and surface water;
 - (f) the ENVIRONMENTAL, ECONOMIC, AND SOCIAL effects of allowing ANY DEGRADATION OR SPECIFIC LEVELS OF degradation to high-quality ground waters and surface waters;
 - (g) the relationship between the nondegradation policy provisions contained in Montana water quality laws and the VARIOUS INTERPRETATIONS OF APPLICABLE SECTIONS OF THE Montana Constitution;
 - (h) the capabilities of AND THE COST TO state agencies to implement the nondegradation policy and to assess the resources that will be needed to implement the

policy equitably for all segments of society; ~~and~~

~~(I) THE SOCIAL AND ECONOMIC COSTS OF NONDEGRADATION COMPLIANCE OR NONCOMPLIANCE TO INDIVIDUALS AND ENTITIES IN VARIOUS INDUSTRIES AND ENDEAVORS THAT WOULD BE AFFECTED;~~

~~(J) THE POTENTIAL UTILIZATION IN RESPONSE TO EXCEPTIONS FROM NONDEGRADATION PROVISIONS. OF MITIGATION ~~VE OVERALL~~ WATER QUALITY IN THE STATE, IN THE SOURCE, OR IN A SPECIFIC AFFECTED PORTION OF THE SOURCE: AND~~

~~(K) the identification of possible statutory and regulatory changes that would help clarify the nondegradation policy and provide for a more effective and efficient implementation **AND ENFORCEMENT** of the policy.~~

(3) That the Environmental Quality Council consult with federal, state, and local officials, industries, citizens, and other persons or groups with expertise or interest in water quality protection.

(4) That the Environmental Quality Council report its findings and recommendations to the 54th Legislature.

-End-

6/2/93

SJR 29 - Water Quality Nondegradation Study

MR. KAKUK reviewed the SJR 29 request to study the nondegradation issue. Using Exhibit 4, page 4, he said the **Legislature** asked the Council to study eleven identified issues. Staff prepared the goals found on page 7, only to focus the **Council's** discussion.

MR. KAKUK said **after the** Council decides on a study goal, the staff would develop a more detailed study plan. He said that the **Water** Policy Committee (WPC) had expressed a desire to become involved in the study at its first interim meeting in May.

SENATOR YELLOWTAIL asked REP. HAL HARPER, **Water Policy** Committee Chairman, for more information on the WPC request.

REP. HARPER said the WPC had **unanimous** interest in the issue of water quality nondegradation and it was clearly within the scope of responsibilities as outlined for the WPC in the statutes. He requested that the WPC be jointly involved in the EQC nondegradation study. He did not have a specific proposal, but the WPC had discussed forming a subcommittee to look at various issues this interim. He said the WPC did not want to become the lead **group** in the study but did believe the public interest would best be served by a joint **EQC/WPC** study. He also noted that staff resources may be maximized since the organizations share the same staff.

SENATOR YELLOWTAIL thanked REP. HARPER for the WPC's offer. He asked SENATOR GROSFIELD, who had served on the Water Policy Committee last interim, if he had any comments.

SENATOR GROSFIELD said there had been discussions in the past regarding which group should study which water issue. Also this last session, there was discussion regarding whether the WPC should be dissolved. He questioned how the **subcommittees** would work and how this had worked in the past.

SENATOR **YELLOWTAIL** said subcommittees had worked well for the Council in the past. He mentioned that subcommittees had been formed to look at the ground water, solid waste, and lakeshore issues.

SENATOR GROSFIELD suggested waiting until the rest of the work plan had been discussed before determining how, or even if, the **Council** would study a particular issue. He said it would be important that the Council receive **comments** from the entire state and from individuals with expertise on the nondegradation issue. He would not be comfortable if only a few council members were involved in the study. He would prefer full Council involvement in the issue.

The Council consensus was to examine all of the work plan and then proceed with REP. **HARPER's** suggestion.

SENATOR GROSFIELD asked if DAN FRASER, Chief of the Water Quality Bureau, DHES, could update the Council on the rulemaking process.

MR. FRASER said SB **401** directed the DHES to draft rules implementing the bill. The agency has been working on drafting new nondegradation rules since the fall of **1992**. DHES had involved both industry and public interest groups in the process. He used Exhibit 5 to discuss the draft rules. He said the intent was that the DHES would repeal the existing rules and replace them entirely with new rules. However, some portions of the new rules would be almost identical to the existing rules.

MR. FRASER said some of the more substantive issues included the definition of "**measurable**", "**baseline values**", and "**monthly average loads**". The determination of "**significance**" will also be important to nondegradation implementation. It was the intent of the DHES that they should spend their time on regulating activities that really meant something to water quality. Other issues included what the DHES would require before making a non-degradation decision, the DHES process to make those decisions, and establishing a class of activities that are determined to be non significant. He said the draft rules were very rough and were open to significant change. **He said** the DHES would schedule a series of public meetings around the state to receive

comments on the draft rules some time in late June or early July. These meetings would be informal and were not the formal public meetings required under the Montana Administrative Procedures Act.

SENATOR GROSFIELD asked when the DHES was planning to have the Board adopt the rules. MR. FRASER said the **goal was** to have rules ready for adoption at the **Board's** September 27, 1993 meeting. This would be the earliest date possible.

SENATOR GROSFIELD asked what the DHES was doing with nondegradation permits between the effective date of SB 401 and when the new rules are ready.

MR. FRASER said those projects were looked at to determine their significance using the criteria in SB 401. If they are not significant, the permit process goes forward as usual. If they are significant, the applicant is informed of that fact and told what additional information is needed under SB 401.

SENATOR GROSFIELD asked if a project has significant impacts to water quality, whether it would be put on hold until the rules were adopted.

MR. FRASER said no, but some applicants may wish to be put on hold until the rules were adopted to ensure that any agency decision could not be easily challenged. However, the DHES would attempt to make a nondegradation decision based on the criteria in SB 401 until the rules were adopted.

MS. SOWIGNEY asked what the process was if a project is determined to be non significant.

MR. FRASER said the project would still be subject to the normal permitting process. The specific process depends on the type of activity proposed.

REP. BIRD asked what happens if the DHES approves a nondegradation permit and then there is a conflict with the rules as adopted by the Board.

MR. FRASER **said the** DHES was concerned about that occurring and said the permit could probably be challenged in court. However, the department did not want to adopt a policy that would stop all development in the state, including obvious non significant activity, until the Board adopts the rules.

SENATOR YELLOWTAIL asked how the Council could assist the DHES in the rulemaking process.

MR. FRASER said the Council could review the draft **rules** and comment on the policy implications. If the Council could become

familiar with the technical problems associated with the nondegradation issue and review the rules in that context, it would be a great help.

SENATOR YELLOWTAIL asked if, apart from commenting as interested persons during the regular rulemaking process, there was anything else the Council could do.

MR. FRASER said he would appreciate as much EQC staff help as possible and that he would consider the question further.

REP. BIRD asked if the DHES was informing applicants about the potential problems with granting a nondegradation permit before the rules are adopted.

MR. FRASER said they have notified applicants of the problems when appropriate.

REP. COCCHIARELLA asked how the Water Policy Committee would interact with the study considering the DHES rulemaking time frame.

MR. KAKUK said that the WPC did not know of the DHES time frames.

REP. HARPER said he did not think that the study had to be totally focused on the DHES rules. The policy implications of **SB 401** and other legislation on water quality still needed to be addressed. He did not think that the study would be over when the rules were adopted.

SENATOR YELLOWTAIL asked when the next Water Policy Committee was scheduled. REP. HARPER said June 28, 1993.

MS. SCHMIDT asked if the September rule adoption goal was a best case scenario and considering the controversial nature of the issue, she asked if the DHES would be ready by then.

MR. FRASER agreed that it was a best case scenario.

MR. KAKUK noted that whatever the **Council's** role in the rule making process, the Council should keep in mind the importance of maintaining a separation of powers on this issue. The Council could not take on a role of decisionmaker regarding the rules.

MR. TOLLEFSON asked how **SJR 29** related to **SB 401** and whether there is a question regarding the compliance of **SB 401** to relevant federal requirements.

MR. KAKUK said that **SJR 29** was drafted after **SB 401** and some legislators may have viewed **SJR 29** as an alternative to **SB 401**.

The fact remains that both **SB 401** and **SJR 29** were passed and approved.

SENATOR YELLOWTAIL said that the adoption of rules would make a good deal of **SJR 29** moot.

MR. KAKUK agreed, but said the Council could play a role in the formation of those rules. This involvement would help to complete certain study issues identified in **SB 401**. He said the overall policy implications did not stop with the passage of the bill or even the adoption, of rules. Policy was also set by the implementation of both the s'tatute and the rules.

SENATOR YELLOWTAIL asked **MR. FRASER** to respond to the question regarding federal compliance.

MR. FRASER said the **DHES** had not received anything in writing yet from the **EPA** but had been told by the **EPA** that **SB 401** was the best and most stringent piece of legislation the **EPA** had seen on the **issue of** nondegradation.

Nondegradation

On the subject of nondegradation, SENATOR **YELLOWTAIL** thought it would take the DHES longer than anticipated to adopt nondegradation rules and suggested that the Council continue to address this issue. He said the first decision to be made was whether the **Council** should conduct the study.

SENATOR GROSFIELD said he agreed with the analysis as **stated** on page 7 of Exhibit 4. He **MOVED** that the Council undertake the study, but select goal 2 on page 7 of Exhibit 4, plus the mitigation issue item (j), and closely monitor the draft rulemaking process with potential comments from the Council at its next meeting.

MR. NOBLE agreed with the motion and suggested that the staff bring all the Council members up to speed on the issue at the next meeting.

MS. SOWIGNEY asked how much of the Council's discussion would be valuable if the DHES is already drafting the rules. She noted that even if the definition of nondegradation was decided in SB 401, the definition of "**significant**" was not and that is a crucial part of the definition of degradation. She saw real value in the study if the Council could provide assistance to the DHES in defining the term "**significant**".

SENATOR **YELLOWTAIL** agreed and said that reaching consensus might be difficult, but the Council could at least provide a forum for the different views.

MR. BOEH said he was unclear as to the exact nature of study goal 2. He asked what exactly the Council would be examining.

MR. KAKUK said item (b), page 6, Exhibit 4, for example, dealing with the "**social** and economic development factors" associated with nondegradation, was vaguely worded and the Council would need to provide additional direction or focus before addressing the issue.

SENATOR YELLOWTAIL said an option would be for the **Council** to form a subcommittee to look at exactly this type of question, to narrow the focus of the identified issues and bring them back to the full Council for approval.

REP. BIRD also expressed concerns regarding the "social and economic^{g1} impacts of the nondegradation issue.

SENATOR DOHERTY said one example of social and economic impacts of nondegradation involved the adverse impacts of reduced fishing opportunities due to lower water quality.

REP. COCCHIARELLA said she supported SENATOR **GROSFIELD's** motion as long as the Council accepted the Water Policy **Committee's** offer to become involved in the issue. She said the. WPC could provide assistance in narrowing the scope of the identified issues.

SENATOR DOHERTY agreed with MS. SOWIGNEY that the issue of "**significance**" was important and that the Council should provide a forum for discussion. It was possible that the Legislature made a mistake with the definition of nondegradation in SB 401 and he did not want to forestall the Council from looking at broader nondegradation issues in the future.

SENATOR YELLOWTAIL said the motion included looking at the rulemaking process in its entirety and he thought the definition of "**significant**" would be included.

The motion PASSED unanimously.

SENATOR YELLOWTAIL said the next Council decision involved the participation of the Water Policy Committee and whether the Council should form a subcommittee.

REP. COCCHIARELLA MOVED that the Council form a subcommittee and involve the Water Policy **Committee** in the study.

SENATOR GROSFIELD said it may be premature to address the motion at this time. For example, there is a questions as to whether the bull trout and water quality monitoring issues should be handled by the EQC or the Water Policy Committee. He said **it** was clear from the language of **SJR** 29 that the Council could involve the WPC but it was important to remain balanced. He also again noted that this was an important state-wide issue and it may be best for the full Council to stay involved.

MS. SCHMIDT said that in the past the subcommittees were responsible for the "**nuts and bolts**" of the **issues, including** setting study scope. It was always the full Council that made any policy decision. The subcommittees provided technical support and freed the Council from having to go through the

minute technical details associated with the issues. It was up to the full Council to determine the exact extent of the subcommittees duties and authorities. The intent was to use Council **member's** time more efficiently rather than to substitute the **subcommittee's** judgement for that of the full Council.

SENATOR DOHERTY **agreed** with MS. SCHMIDT and said that last interim's Energy Policy Study was a good example of the benefits of a subcommittee. He also commented on the benefits of using an outside party as a facilitator and asked if it would be possible to use the same process for this issue.

SENATOR YELLOWTAIL said that, based on the following discussion, the role for a subcommittee, if formed, would be to facilitate working sessions with the stakeholders', **to define** the exact study scope, and identify options for full Council consideration at its next meeting. After receiving full Council approval, the **subcommittee** would continue the working sessions to complete the more detailed work plan agreed on by the Council. The Council would receive policy options and or policy recommendations from the subcommittee when developed.

SENATOR YELLOWTAIL agreed with SENATOR GROSFIELD that the interim committees should not duplicate efforts, and as long as the Water Policy **Committee** was going to look at nondegradation, it should be part of the EQC study.

REP. BIRD asked what the differences were between what the EQC and the WPC studied.

MS. SCHMIDT said that historically the EQC has addressed water quality issues while the WPC addressed water quantity. This distinction is no longer viewed as valid and, as those issues merge as management objectives, there is a corresponding desire to study them together. A good example of this was **the** Water Policy **Committee's** Geothermal Study from last interim. That study, largely looking at water quality, grew out of an EQC bill from the 1991 session that was killed in Senate Natural Resource Committee out of concerns dealing mainly with water quantity issues. **Legislation** from **the State** Water Plan, that implemented an integration of water **quantity/quality** issues, addressed the geothermal issue as well. This is a good example of the blurring between the water **quantity/quality** issues.

REP. COCCHIARELLA's motion PASSED unanimously.

SENATOR YELLOWTAIL asked what the FTE commitment was for the nondegradation study. MS. SCHMIDT said approximately .5 FTE would be needed throughout the interim.

Goals: Possible Council goals, if it decides to accept the study request, fall into three broad categories.

Goal 1: Complete the study request as identified in **SJR 29**.

Discussion: It is apparent that strict compliance with **all** the provisions of **SJR 29** would be of questionable value. For example, **SJR 29** items (a), (c), (d), and (j), have all been dealt with to a large degree in **SB 401**. Additionally, a very strong argument **can** be made that an analysis of **SJR 29** items (f), (h), (i), and (k), is premature at this time given the extent of changes in the nondegradation statute under **SB 401** and given that the rules implementing the statute have not been drafted.

Goal 2: Complete the remaining relevant items as identified in **SJR 29**.

Discussion: Agreeing, for the sake of this memo, that the items identified under Goal 1 are either **moot** or unripe would leave items (b), (e), and (g) for Council **study**.² **While** these items may be relevant to the issue, they are rather broadly worded and would require Council discussion to establish specific study objectives.

Goal 3: Council involvement in the **BHES** rule adoption process.

Discussion: The **DHES** is currently drafting rules required under **SB 401** to implement the new provisions of the nondegradation statute. These draft rules will be submitted for comment and subject to public review as required under the Montana Administrative Policy Act before adoption by the **BHES**. Exactly where and how the Council became involved in the process would depend again on the specific study objectives.

The range of Council involvement in the rule adoption process extends from receiving periodic reports from **DHES** or Council staff regarding the rules adoption process; analyzing the **draft** rules and developing consensus Council comments that are formally transmitted to the **BHES** for their consideration; to engaging in or providing a public forum involving the interested stakeholders identified in **SB 401**.

Approach: A detailed study approach will be developed with the Council after selection of the appropriate goal.

² Some would argue that even item (e), dealing with the appropriateness of applying the nondegradation standard to all point and nonpoint pollution sources for both ground and surface water is dealt with under the **SB 401** requirement to establish rules that identify "nonsignificant changes" in water quality.

APPENDIX 4

FOR IMMEDIATE RELEASE
JULY 13, 1993

CONTACT: MICHAEL S. KAKUK
444-3742

Interested citizens will have an opportunity to express their views on water quality nondegradation issues to a Montana legislative subcommittee at a series of public meetings in July. The meetings are scheduled as follows:

Billings - 11:00 a.m., Tuesday, July 27, 1993 in third floor meeting room of the Billings Public Library, 510 North Broadway.

Bozeman - 6:00 p.m., Tuesday, July 27, 1993 in the large conference room of the Department of Fish, Wildlife, and Parks, Region 3 Headquarters, 1400 South 19th.

Kalispell - 11:00 a.m., Thursday, July 29, 1993 in the large conference room of the Department of Fish, Wildlife, and Parks, Region 1 Headquarters, 490 North Meridian.

Missoula - 6:00 p.m., Thursday, July 29, 1993 in the downstairs meeting room of the Missoula Public Library, 301 East Main.

The meetings are part of a one and one-half year legislatively mandated study of water quality nondegradation issues by the Environmental Quality Council with assistance from the Water Policy Committee. The purpose of the meetings is to solicit public comment on nondegradation issues as well as comments on study goals and a study framework. The Council will present its findings and recommendations to the legislature in 1995.

Water quality nondegradation requirements have always been controversial and recent changes in the water quality laws by the 1993 Legislature will impact residential development and the timber, mining, and agricultural industries.

For more information on this issue, please contact subcommittee staff: Michael S. Kakuk, EOC, Room 106, State Capitol, Helena, MT 59601.

END

August 3, 1993

TO: Subcommittee Members and Interested Persons
FROM: Michael S. Kakuk
RE: **SJR 29 Water Quality Nondegradation Study**

I am forwarding a summary of public comment received by the joint **EQC/WPC** nondegradation subcommittee at its meetings last week. I have attempted to capture the relevant points clearly and succinctly. If you feel that I have missed, or misstated, a position, please contact me. The correction will be addressed before the next full EQC meeting tentatively scheduled for Friday, September 17 in Helena.

By the end of August I will prepare and forward an options memo for subcommittee review. This memo will identify what staff sees as potential study goals and objectives as well as options for reaching those goals. The memo will be based on the public comments summarized in the attached minutes. If you feel I have missed a reasonable option, please contact me.

The subcommittee members will be asked to review the memo and to be prepared to discuss and take action on the options at the next subcommittee meeting on Thursday afternoon, September 16, 1993 in Helena. The subcommittee will select options and make recommendations to the full EQC at its meeting on September 17th. All decisions regarding subcommittee study recommendations will be made by the full EQC. Those subcommittee members who cannot attend the half-day meeting on the 16th can contribute via a telephone conference call, through the mail, or by proxy.

I will be out of state until August **18th**, if you have any questions regarding this issue before then, please contact the **EQC** Executive Director, Deborah B. Schmidt at 444-3742.

The Joint EQC/WPC Subcommittee on nondegradation held a series of 4 public meetings around Montana. This is a summary of testimony presented to the subcommittee at those meetings. This summary follows the agenda and groups comments under each agenda heading.

NOTE: Since the meetings were informal, members of the public speaking on the issues are not identified individually, rather public comment is simply noted with an asterisk (*).

Subcommittee membership and meeting locations were as follows:

Eastern Montana,
July 27, 1993,
Billings and Bozeman:

Western Montana
July 29, 1993
Kalispell and **Missoula**:

EQC

Sen. Grosfield (Chair)
Glenn Marx
Jeanne-Marie Souvigney

EQC

Sen. **Doherty** (Chair)
Bob **Boeh**
Greg Tollefson

WPC

Rep. **Keller**
Rep. Russell

WPC

Sen. **Bianchi**
Sen. Swift

WPC Alternates

Sen. **Hockett**
Rep. Fagg

MEETING INTRODUCTION

Staff provided a brief background on the EQC and the WPC, Exhibit 1, and previous involvement by the EQC on the nondegradation issue. Exhibit 2.

Staff summarized nondegradation implementation in Montana, SB 401, SJR 29, and the draft DHES rules.

Public Comment -

Billings

REP. RUSSELL asked if and how the federal government would comply with the state **nondegradation** requirements

MR. KAKUK said he would follow up on that question.

STUDY ISSUE REVIEW

The EQC identified the following four issues from SJR 29 for study by the subcommittee. The public was asked to provide a better focus for the study. The subcommittee was looking for public comment on appropriate study sideboards or parameters.

Issue 1.

(2) *The study should include a review of:*

...

(b) *the social and economic development factors and the public interest in maintaining high-Quality waters....*

MR. KAKUK said what the subcommittee was looking for under Issue 1 included the question: What should the subcommittee look at when reviewing the social and economic developments factors and how should the subcommittee review the public interest in maintaining high quality water?

Public Comment -

B i i

* The subcommittee should look at what the federal government now requires and what it will require under the reauthorization of the federal Clean Water Act (CWA). This must be kept in mind when considering the social, economic and environmental feasibility of a proposed project as required by SB 401.

* The social and economic developments factors are very difficult to consider in general. It is always easier to evaluate these issues when in the context of a specific project.

Bozeman

MR. MARX asked the staff for an example of a social or economic development factor.

MR. KAKUK noted the factors identified in **DHES** draft rule **VI(4)(b)** and said that the subcommittee was asking the public if these were appropriate and whether there were others that should **be** considered.

* The federal government has already defined "public interest" to some extent by saying you cannot degrade water that flows into a national park or a wilderness area. This would be a good place to start analyzing the public interest in maintaining high quality water and the EQC should ask the question - How do we extend this federal policy to outstanding **state** waters. This should include a **process** for citizen recommendations for listing outstanding state resource waters.

* The **DHES** should distinguish between jobs that are created in state from those created out of state. If most of the profits from a mine leave the state or the country, for example, that should **be** noted by the **DHES** and weighted accordingly. Also, the opportunity costs of jobs of other types lost by granting the nondegradation authorization should **be** considered. For example if a discharger is allowed to degrade a stream then

tourist dollars and guiding jobs could be lost.

* The subcommittee must remember that the DHES cannot allow degradation if existing uses are impaired.

* The social and economic development analysis should only include factors directly related to water use. It should not extend to other factors including, for example, non-water related impacts of the authorization on the community or out of state.

* The DHES should understand that it cannot make value judgements as to whether a specific type of growth or development in a community is positive or negative. An increase in jobs that completely changes the nature of a community may either be good or bad depending on your point of view.

Missoula

MR. BOEH asked how this analysis fit with the social and economic impact analysis required under the Montana Environmental Policy Act. **(MEPA)**

MR. KAKUK said that the MEPA social and economic impact analysis was required for both environmental impact statements and environmental assessments under the statute and agency rules respectively. He said the staff would look into this issue in more detail.

MR. TOLLEFSON said at some point the state would have to reach consensus on what social and economic factors should be considered in the nondegradation **process**. What impacts should be considered in deciding whether to allow degradation of Montana's high **quality** water?

SEN. BIANCHI expressed concern regarding the state's long-term liability if someone is injured as a result of a nondegradation authorization.

SEN. DOHERTY asked staff if the DHES has considered the potential state liability as a result of a **nondegradation** authorization.

MR. KAKUK said that the state apparently assumed the same liability every time it issued any permit, but he did not know if the DHES had specifically considered state liability and nondegradation.

SEN. SWIFT said some of the liability concerns could be addressed through the 5 year nondegradation authorization review process.

* The DHES, in its proposed rules, has made major improvements in identifying social and economic factors to be considered.

* The duration of the social and economic impacts must be considered by the **DHES**. For example, the **DHES** must **ask** if 20 years of increased employment is worth hundreds of years of water contamination.

* The state must consider its potential liability for an adverse impact that results from a nondegradation authorization as an economic factor.

* Montana's social and economic environment can be protected best by protecting Montana's high-quality water.

Issue 2.

(2) The study should include a review of:

*...
(e) the appropriateness of the application of non-degradation provisions to all point and nonpoint sources of pollution to both ground water and surface water....*

MR. KAKUK said that one of the questions the subcommittee was asking under this issue was: Were there activities that the public felt should be exempted from the nondegradation process?

Public Comment -

B i i

* **Nonpoint** source pollution is difficult to regulate because it is difficult to find all the sources and difficult to remedy when the sources are identified. Until the federal CWA, which is supposed to deal extensively with nonpoint sources, is reauthorized, it would be inappropriate for the **DHES** to assume a regulatory role in nonpoint source pollution. The voluntary best management practices (BMP) approach for the timber and agriculture industries is working well. The subcommittee should thoroughly review the appropriateness of applying nondegradation to nonpoint sources.

* The subcommittee should involve the SCS because they have a lot of knowledge regarding water **quality** protection and non-point pollution.

* Nondegradation implementation is very **difficult** because of the emotional response to water quality issues, the very technical issues involved, and the fact that the standards the **DHES** were enforcing were changing. It is important to **keep** in mind that reducing a minimal discharge could just transfer the environmental impact to another location or time. Montana industries are not against complying with nondegradation, but they do need to know what standards they have to meet. The technology does not exist to meet a total nondegradation requirement.

* The nondegradation policy should be clear, defined, practical, workable, and defensible so that both the **DHES** and the industry can stay out of court.

* Some western states use a "percentage of the standards" method to define nonsignificant changes in water quality. The **DHES** and the subcommittee should continue to look at that approach.

* If there is no proven technological benefit to a strict application of nondegradation, it should not be required. You should have a water quality impact that you want to avoid before you require nondegradation compliance. The reason for nondegradation must be based on good science.

Bozeman

* The only way **DHES** gets involved with nonpoint pollution and nondegradation would be if there was a some sort of water quality bureau **permit** or approval required. Since there is no permit required for nonpoint source activities - the **DHES** can not enforce nondegradation.

MR. KAKUK said that SB **401** now clearly made it a prohibited activity to degrade state water without an authorization. However, the **DHES** has to identify activities that are nonsignificant and therefore not subject to SB **401**.

* The **subcommittee** was going way beyond nondegradation issues in this' study.

* If one of the goals of SB 401 was to develop a workable nondegradation policy, then its impact on non-point source pollution was going to have to be limited. Non-point sources, to a large extent, were already covered, or soon would be, by other state and federal programs.

* The rules should require that if a permit is required at some point in the future for activities that currently do not require a permit, that activity should also be then regulated under SB **401** even if the **DHES** now defines it **as nonsignificant**.

* Will the Department of Fish, Wildlife, and **Parks** have a role in the nondegradation process similar to its role in the **310** stream bed permit process. If you have a **310** permit and a **303A** permit for temporary violations, you should be classified **as** nonsignificant and exempted from SB **401**.

Kalispell

* Non-point source pollution is a difficult problem and the best way to handle it is with the application of **BMP's** to all land uses.

Missoula

* Activities defined as nonsignificant should include the pollution that happens both inside and outside of a mixing zone. For example, the **DHES** should not be allowed to authorize pollution within a mixing zone and then say that the degradation **occurring** outside of the mixing **zone** is not **significant** and therefore exempt from the nondegradation requirements.

* This issue **has** been addressed **already** in SB 401. Nondegradation applies to **non-**point sources.

Issue 3.

(2) The study should include a review of:

...

(g) the relationship between the nondegradation policy provisions contained in Montana water quality laws and the various interpretations of applicable sections of the Montana Constitution

MR. KAKUK said the **EQC has** decided to sponsor a panel discussion at an EQC meeting some time early next year to discuss the constitutional implications of the nondegradation policy. The purpose of the panel would not be to answer all the constitutional questions involved in this issue, or even to reach EQC consensus on the issue, but rather to provide objective information on the issue to interested members of the public, EQC members, and legislators for the 1995 session. MR. KAKUK referred to an article to be published in the Public Lands Law Review regarding the nondegradation issue by UM - Law School Professor John Horwich as a good reference on the nondegradation constitutional issues.

Public Comment -

B i i

* The panel discussion is a good idea because the **DHES** draft rules appear to allow water quality violations without the application of nondegradation. This **has** to be looked at in depth by the subcommittee.

Missoula

* The Montana Constitution clearly anticipates the legislature allowing some level of degradation by its use of language referring to remedies for degradation and its use of the term unreasonable depletion and degradation of the resource.

Issue 4.

(2) *The study should include a review of:*

(j) *the potential utilization, in response to exceptions from nondegradation provisions, of mitigation measures to improve overall water quality in the state, in the source, or in a specific affected portion of the source....*

MR. KAKUK said that although the proposed DHES rules refer to mitigation, there was nothing in SB 401 that allowed them to impose or even consider mitigation during the nondegradation process. Should the DHES be allowed to consider mitigation, and if so, how?

Public Comment -

Billings

REP. RUSSELL asked what role political or **economic** power of various industries played in mitigation decisions by the departments.

MR. **KAKUK** said he would follow up on this question with the agencies.

* Enforcement of mitigation is very difficult and the ability of the agency to enforce mitigation must be considered in depth before they are allowed to use mitigation as a tool.

* Mitigation is really the backbone of the both federal and state environmental policy act implementation. It works and the DHES should consider mitigation when feasible.

Bozeman

* Since the EPA requires a nondegradation applicant to control both point and non-point sources upstream, mitigation is already authorized.

* The EQC should look closely at allowing the DHES to consider, but not require, mitigation in the nondegradation process.

Kalispell

SEN. DOHERTY questioned what requirements the DHES would impose on those activities they defined as nonsignificant. Would an applicant for an authorization to degrade have to prove that upstream BMP's were being applied even if there were no other requirements for their application. For example, if a point source discharger wanted a nondegradation

authorization, would he have to prove that an upstream timber harvest site was using BMP's, and if so, how.

MR. KAKUK said he would follow up on that question.

* Due to the uncertainty involved in estimating and controlling non-point source pollution, implementing mitigation for non-point sources would be difficult and the DHES should be discouraged from requiring mitigation.

* If the DHES did require BMP's for non-point sources, an audit similar to the current timber BMP audit process could be used to verify the application of those BMP's.

Missoula

SEN. SWIFT said he questioned the validity of the DHES requiring someone to go back and correct some other person's mistakes to get a nondegradation authorization.

* Mitigation that actually improves the overall water quality of a water course should be imposed for any nondegradation authorization.

* Mitigation may be a useful tool, as long as it was not mandatory and if the DHES could consider mitigation in other drainages.

STUDY FRAMEWORK

MR. KAKUK said the subcommittee was interested in hearing from the public on how best to frame the nondegradation study. Should they continue using the existing subcommittees, or should they form a nondegradation working group? Should they hire a third-party facilitator to help conduct the study? How many more public hearings were needed.

Public Comment -

Billings

REP. RUSSELL suggested that the universities be contacted to see if they could provide additional support and comment on the study. Additionally, the Native American tribes should be contacted for comment.

MR. **KAKUK** said he would follow up on those suggestions.

* The approach used today seemed to work, as long as the subcommittee remained flexible and informal.

- * The subcommittee should involve technical people **from** the agencies in the study.
- * Another meeting may not **be** needed until later on in the study. The subcommittee should do most of the study and **keep** the public involved through the mail.
- * When using the mail, it was important to provide sufficient lead time to allow the interested persons enough time to respond.
- * Future subcommittee meetings should be held at the same time the **DHES** holds their public hearings on the rules.

MR. KAKUK said that with the **DHES** time frame of rule adoption in November, concurrent meetings would **be** extremely difficult to coordinate. MR. **KAKUK** referred to the minutes from the June **EQC** meeting regarding additional **EQC** involvement in the **DHES rulemaking** process.

- * It is important to keep the entire **nondegradation** issue in focus as the subcommittee looks at the individual issues identified in the study.

Bozeman

- * The subcommittee should send out the rest of the information through the mail and then hold another meeting later in study so public comment will **be** more focused.

PUBLIC INVOLVEMENT

MR. KAKUK said the **subcommittee** was looking for a method to maximize the opportunity for public involvement understanding the limited **EQC/WPC** budgets.

Public Comment -

B i i

REP. RUSSELL suggested that the staff contact local media outlets and use public service announcements to spread the word about the study.

REP. FAGG suggested that subcommittee members contact local newspapers and radio and television stations and ask that they advertise the meetings.

- * Irrigation districts should **be** included on the study mailing list.

Bozeman

* More of the public **will** become involved if the subcommittee gives them specific information on what is proposed and what the subcommittee wants from the public.

* Resource Conservation and Development Districts should be included on the mailing list.

Kalispell

* The Flathead **Lakers** and the Flathead Basin Commission should be placed on the mailing list.

MR. KAKUK said the subcommittee would consider sending out a **questionnaire** to interested persons asking for written responses to specific questions when developed by the subcommittee.

GENERAL COMMENTS REGARDING NONDEGRADATION

Billings

REP. RUSSELL asked staff to review the written comments to the proposed DHES nondegradation rules and prepare a summary of the major issues.

REP. RUSSELL said that legislators have a responsibility to their constituents to understand as much as possible regarding these issues. She encouraged the public to contact their legislators to express their views on these issues. Additionally, as a Native American, she is very concerned about water quality issues.

* Why is nondegradation an issue now in Montana. The water quality **has** actually improved in the central part of the state. Is there a specific proposal to degrade Montana's water. The laws seem to be working well as they are, why were they changed.

MR. KAKUK noted that he could not speak for the DHES but it appeared that the initial DHES goal in proposing changes to the nondegradation law was to ensure that the DHES could implement whatever laws were on the **books** and protect and improve Montana's water quality. Some form of nondegradation policy is required by the federal government but the DHES felt that the old law was contradictory and difficult to implement. MR. KAKUK said the DHES had been **notified last** week of these meetings and invited to attend, but they could not send someone on that short notice.

* What discretion did the EQC have in designing a study and then deciding what to do with the study results? Could the EQC decide to sponsor legislation for the 1995 session as a result of the **SJR 29** study?

REP. FAGG said that the **EQC** had enough flexibility to do what it wants with the study as long as it reached consensus on the issue. The **EQC** was an excellent example of what you could accomplish by using a consensus based approach.

* The state should ensure that at every opportunity in the authorization process the applicant is discouraged from using the assimilative capacity of **montana's** high quality water. This is in accordance with the statement of intent of SB **401** to maintain the state's existing high quality water.

* Northern Plains Resources Council submitted written testimony on the SJR 29 nondegradation study. Exhibit 3.

* Montana Audubon Council expressed concern regarding the proposed DHES nondegradation rules. Exhibit 4.

* The proposed definition of outstanding resource waters should include **all** wild and scenic rivers, state wildlife management areas, state **parks**, state designated natural areas, nationally designated areas of critical environmental concern, and all proposed wilderness study areas. Additionally, there should be a citizen nomination **process** for inclusion to the outstanding resource water list.

Bozeman

* How does the current nondegradation policy take into account the cumulative impacts of our use of water for waste disposal. Eventually, enough nondegradation authorizations will degrade the water quality down to where existing uses are impaired or the water quality standards are reached. Neither of these results are acceptable.

* The DHES should receive the summary of these public meetings on this issue.

* The study, and the rulemaking process, must keep in step with the federal Clean Water Act reauthorization to ensure that no one is wasting their time.

Kalispell

* Plum Creek Co. submitted written testimony, Exhibit 5, suggesting that the EQC postpone or delay the study until it has a better idea of what is happening at the federal level with the federal **CWA** reauthorization and until the DHES adopts its nondegradation rules.

Missoula

* The subcommittee should look closely at the issue of enforcement in its nondegradation study.

* The subcommittee should be actively involved in the current DHES **rulemaking** process.

* The subcommittee should look closely at all the water quality laws and other related laws that impact the nondegradation issue. The EQC should not focus solely on **SB 401**.

* How is the DHES currently implementing the nondegradation policy without adopted rules.

* **SB 401** and the proposed rules do not adequately address the cumulative impacts of the activities the DHES is planning on defining as nonsignificant.

* The impact of current nondegradation authorizations on future society must be considered. If we use up all the assimilative capacity now, we have severely limited future generations in their water use.

* The subcommittee should allow the DHES to adopt their rules and not undertake a study that exceeds the **scope** of **SJR 29**.

* The intent of **SB 401** is to find the balance between protecting existing water quality and providing a decent economy for the citizens of Montana.

* How will the DHES implement **nondegradation** in water bodies where existing uses are already impaired?

MR. KAKUK said he would follow up on the relevant questions.

APPENDIX 5

ENVIRONMENTAL QUALITY COUNCIL MEETING MINUTES OCTOBER 28 AND 29, 1993

A meeting of the Environmental Quality Council was held on Thursday and Friday, October 28 and 29, 1993, beginning each day at 8:30 a.m. in the State Capitol. The meeting was called to order by Chairman SENATOR BILL YELLOWTAIL. Members present on Thursday were BOB BOEH, SENATOR STEVE DOHERTY, SENATOR LORENTS GROSFIELD, JERRY NOBLE, REP. SCOTT ORR, JEANNE-MARIE SOWIGNEY, and GREG TOLLEFSON. Absent on Thursday were REP. JODY BIRD, REP. VICKI COCCHIARELLA, REP. DICK KNOX, and SENATOR DAVE RYE. GLENN MARX, the Governor's representative, was present. All members were present Friday except SENATOR RYE. EQC staff attending were DEBORAH B. SCHMIDT, PAUL SIHLER, MICHAEL KAKUK, TODD EVERTS, and ELLEN ENGSTEDT.

The minutes of the previous meeting were approved.

SJR 29 NONDEGRADATION STUDY - NONSIGNIFICANT ACTIVITY PANEL

SENATOR YELLOWTAIL recognized and thanked SENATORS BIANCHI and SWIFT from the Joint EQC/WPC Nondegradation Subcommittee for their attendance.

MR. KAKUK, using Exhibit 1, said the first panel discussion in the EQC's SJR 29 Nondegradation Study addresses the issue of "nonsignificant activities". The Council earlier decided that before it addresses the issue of how the nondegradation process works, it should address the issue of what activities are not required to undergo nondegradation review because the DHES has determined that those activities are "nonsignificant" as required under SB 401.

MR. KAKUK said the EQC did not need to make a decision after the panel discussion. The Subcommittee would analyze the discussion at its afternoon meeting and if the subcommittee had recommendations, those would be presented to the full Council at its Friday meeting. He stressed that the public and panelists were invited and encouraged to attend and contribute to the Subcommittee's afternoon meeting.

KEVIN KEENAN, Enforcement Section Chief, Water Quality Bureau, DHES, updated the Council on the background of SB 401 and the development of the proposed administrative rules. MR. KEENAN said he participated on the DHES working group that developed the proposed rule on "nonsignificant activities". He said his goals for his presentations included a brief history of DHES nondegradation enforcement from 1971, a summary of what SB 401 accomplished, and a description of what was being proposed regarding the issue of nonsignificant activity, and why.

MR. KEENAN said the basic premise behind nondegradation was legislative protection of high quality waters against change unless society determines that the changes are in its collective best interests. He said the concept was frustratingly complex in its implementation. He said the implementation of nondegradation from 1972 to the present has been inconsistent.

MR. KEENAN stated that the DHES working groups looking at the nondegradation rules has been a very open and accessible process including two series of five public meetings around the state within five months. The DHES received many public comments, and not all comments were, or could be, included, but they all were considered. The DHES continues to meet with concerned individuals and groups regarding these issues. He said he did not know of any other rulemaking process that involved such a degree of public involvement and education.

MR. KEENAN used Exhibit 2 to briefly review the Water Quality Act. He said the overall responsibility of the DHES was to protect, maintain, and improve the quality of Montana's water. He said SB 401 had five broad effects: (1) it protects existing water uses; (2) water quality needed to protect those uses must be maintained; (3) high quality water must be maintained unless degradation is authorized by the DHES; (4) it established broad criteria for the DHES to allow degradation; and (5) it required the DHES to determine what activities should be considered nonsignificant and therefore exempted from the nondegradation requirements.

MR. KEENAN referred to Exhibit 3 and discussed the proposed rules.

Rule VII. He said this rule was broken down into three sections: (1) identifies the criteria for "nonsignificant" determinations; (2) allows the DHES to reconsider those decisions; and (3) allows an applicant to provide additional information to the DHES for its decisions.

Rule VIII. MR. KEENAN said this rule identifies activities or classes of activities that the DHES believes comply with the criteria identified in Rule VII. The activities in Rule VIII represent a low potential for harm and are in conformance with the guidance in SB 401. It is not intended to be an exclusive list. It is subject to change based on research, technology, legislation, or litigation.

Rule IV. MR. KEENAN said this rule describes how a "nonsignificant" determination is made by the DHES. He said this rule also allows for a citizen to make a self-determination regarding the "significance" of their activity.

MR. KEENAN finished by saying the nondegradation statute and rules only work in conjunction with all the other sections of the Water Quality Act.

SENATOR YELLOWTAIL said that considering the amount of information MR. KEENAN had presented, he would open the floor to questions from Council members for clarification. SENATOR YELLOWTAIL asked when the rules would be considered by the BHES for adoption.

MR. KEENAN said the DHES working groups would make the final changes to the proposed rules and present them to the BHES at its meeting on December 17, 1993.

SENATOR YELLOWTAIL asked if the BHES would take final action on the rules at that meeting.

CLAUDIA MASSMAN, DHES Water Quality Bureau attorney, said the BHES cannot take final action at that meeting due to a delay in certifying the rules with the Secretary of State. The BHES may be able to take final action near the end of December either through a telephone conference or another special meeting.

SENATOR DOHERTY asked for clarification regarding the "incidental leakage" language in Rule VIII (1)(i) and whether that would include incidental leakage of cyanide from a mining operation, for example.

MR. KEENAN said that language probably could be clarified but the intent is to acknowledge that, due to financial and technical concerns, many systems are designed to allow for some "incidental leakage". Leakage of cyanide would not be allowed under this rule because of the nature of the chemical and the fact that systems using cyanide are not designed to allow any leakage.

SENATOR DOHERTY asked about the "self-determination" language in Rule (1) and if any person can determine that their activity is "nonsignificant", could any other person challenge that self-determination.

MR. KEENAN said that the nonsignificant determination does not grant authority to proceed under any other rule than this one. If other permits are required under other statutes, those permits must still be obtained. Anytime a person believes that a provision of the Water Quality Act has been violated, including the nondegradation provisions, that person has the authority to report it to the DHES and obtain a copy of the inspection report from the DHES.

Following MR. KEENAN's presentation on the DHES role in the nondegradation issue, SENATOR YELLOWTAIL presented other panelists representing specific interests.

COLLIN BANGS, Montana Association of Realtors, said his organization was primarily concerned with the impact of SB 401 and the proposed rules on affordable housing in Montana. He said the price of housing in Montana had climbed dramatically and would continue to go up. A large reason for this increase is changing government regulations. While these regulations have good goals and each one adds only a small additional cost, the cumulative effect is large. Montana absolutely needs clean water, but if the DHES makes the subdivision review process too onerous for small developers, it will decrease the amount of affordable housing in the state. The real question should be how the state can protect its water without raising the cost of housing more than absolutely necessary.

He said he appreciated the ability to discuss his concerns with the DHES and appreciated their response, but he was still concerned with the ability of the DHES to change their minds regarding a "nonsignificant" determination as found in Rule 'VII (2). He also questioned the nitrogen standards in Rule VIII. This standard may not be appropriate for all areas in Montana.

DON ALLEN, Montana Wood Products Association, said the rules must be workable, enforceable, and affordable. He agreed with MR. KEENAN that SB 401 will affect every citizen in the state and he also agreed that the opportunity for public involvement had never been greater. However, he also said he has never seen another bill or set of rules that had the potential to impact Montanans to the extent SB 401 does. It is crucial that the final product adopted by the BHES reflect the great array of public comment regarding the rules.

Every one understands that clean water is an important part of the quality of life in Montana. The question is can a way be found to make things fit together so people can enjoy clean water and still be able to make a living. This was understood by the framers of the state Constitution. The Constitution clearly allows for some level of degradation to occur. Some activities need to be identified as "nonsignificant" in order to make SB 401 workable.

The wood products industry has taken the lead in establishing and implementing forestry best management practices (BMPS). Implementation of these BMPS should allow nonpoint activities to be determined "nonsignificant. If this does not work, the Legislature and the DHES will recognize that and make changes in the process. If standards are being met and uses are being protected, nonpoint sources should be exempt from SB 401.

While acknowledging the important role the EQC can play in the rulemaking process, MR. ALLEN recommended that the EQC allow the DHES to proceed with its rulemaking efforts. He also suggested that the EQC stay closely involved in the reauthorization of the federal Clean Water Act.

JOHN BLOOMQUIST, Montana Stockgrowers Association, said that agriculture's perspective on nondegradation centered on nonpoint source pollution. He said SB 401 was presented to the Legislature as a solution to an unworkable and confusing nondegradation standard. Montana is far ahead of other states and even the federal government in its nondegradation policy and it is important to ensure that the law remains workable.

The DHES nondegradation review process is expensive and time consuming so it is important that certain activities be exempted from the process through "nonsignificant" determinations. He referred to the watershed planning efforts in the proposed federal Clean Water Act as an example of why the DHES would have to exempt nonpoint sources that were complying with BMPS from the nondegradation review process. The DHES simply did not, and would not, have the resources to address all the nonpoint sources. The nonpoint source/BMP exemption was a legitimate use of the authority contained in SB 401.

MR. BLOOMQUIST questioned whether the technical information required under Rule IV was going to be understood by the general public. The nondegradation statute is needed, and categorical exemptions are needed to make it workable.

RICHARD PARKS, Northern Plains Resource Council, said he appreciated the work the DHES has put into the draft rules and the rulemaking process. The proposed rules are very close to what the DHES promised during the legislative session. He said a large concern involved the mixing zone issue. He did not see how the nondegradation rules could be understood without a clear definition and established criteria for mixing zones. The EQC should look at this issue closely.

MR. PARKS said the flip side of the previous statements that in order to make SB 401 workable some activities needed to be "nonsignificant" he would argue that in order to have SB 401 do any good, some activities have to be determined to be significant. The proposed rules link mixing zones and the "nonsignificant" determination in such a way where one cannot be really understood without the other.

MR. PARKS said the nitrogen standards in Rule VIII seem to indicate that the DHES does not care about nitrogen contamination of ground water, or the connected surface water, below 2.5 ppm. He suggested looking at a much lower number for the categorical exclusion e.g., 1 ppm. He also said that while the potential

public involvement in the nondegradation review process was pretty good, there did not seem to be any involvement for the public in the "nonsignificant" determinations. No public notice is given and no public comment allowed for. There should be some method for the public to be involved.

He was also concerned that the cost/benefit analysis would unfairly concentrate on the benefits of lowering water quality and ignore the difficult to measure benefits of maintaining that quality. This issue deserves additional study.

MR. PARKS also expressed concerns with the monitoring requirements, public involvement in the appeals process, and the potential exclusion of eastern Montana ground water from the definition of high-quality water.

JIM JENSEN, Montana Environmental Information Center, said that Professor Jack Stanford, Director Flathead Biological Station, testified in Great Falls regarding the federal Clean Water Act reauthorization. MR. JENSEN said that Professor Stanford and others were about to release a world wide study on the condition of fresh water. The conclusion was that the world will run out of fresh water a long time before it runs out of oil. Clean fresh water should be treated as a scarce resource that is more valuable than oil because it is in short supply.

MR. JENSEN said given that context, the DHES proposed rules fall considerably short of the goals outlined in the state Constitution, in the Water Quality Act, and even in SB 401 in achieving the kind of protection that water deserves. The underlying presumption should remain to protect existing water quality and that the state should move forward to improve water quality.

The key to achieving this goal is pollution prevention. The proposed rules do not move in this direction. The rules identify a whole range of categories of pollution that will be allowed by definition as "nonsignificant". MR. JENSEN said he could not find any authority in SB 401 for the DHES to exclude any activity from the nondegradation provision. He also echoed SENATOR DOHERTY's concerns regarding the "incidental leakage" language.

MR. JENSEN, using an EPA report, said they strongly believe that MR. BLOOMQUIST's argument in favor of the exclusion of agriculture from the nondegradation provisions is simply not borne out by the current status of research on the impacts of agriculture, grazing in riparian areas for example, on water quality.

MR. JENSEN said that, regarding the wood products industry, two of the most progressive timber operations in the state have recently been exposed as using some of the absolutely worst

timber practices on the Shields River. These are not historic examples but recent. These are examples of why the DHES should not allow for out right exemptions 'from the nondegradation provisions.

MR. JENSEN said that exemptions based on the size of a subdivision do not make any sense. There could be a large well designed subdivision in the right place that had minimal effects on water quality and a very small subdivision either poorly designed or located in a sensitive area that had dramatic water quality impacts. The sole determinant of the "nonsignificant" decisions should be the impact of the activity on water quality.

BRUCE FARLING, Clark Fork - Pend Oreille coalition, said it was too bad that this panel discussion was not held a year ago before SB 401 had passed. Some of the concerns expressed now would have been addressed. Still the EQC can play a crucial role in molding the rules and determining whether additional legislation may be necessary to correct mistakes that are being made now.

MR. FARLING said that certain representatives of the timber and agriculture industries that testified in favor of SB 401 are now saying that the rules will irreparably harm their industry. This is an exaggeration. The policy in the draft rules is clear. If reasonable land management practices are applied and no existing uses are impaired, the activities are exempt. It is in Rule VIII. This policy does not prevent, nor should it, someone questioning whether the practices are really applied and whether they are working. The same holds for the real estate industry. These rules will not dramatically impact affordable housing in Montana. MR. FARLING said that it is the real estate developers themselves who are the cause behind the so-called housing shortage in Montana. They promote Montana to wealth outsiders, using especially its clean water. This jacks up real estate values and tax assessments. He said that certain developers, or those associated with them, are arguing for a nondegradation exemption right up to the water quality standards.

Specifically regarding the "nonsignificant activity" rules MR. FARLING said some of those rules needed to be fundamentally readdressed. He agreed with MR. PARKS that the use of mixing zones in the nondegradation rules was impossible to evaluate. He said that some use of mixing zones may be appropriate but the inclusion of mixing zones in the nondegradation rules before the mixing zone rules have been developed shifted the debate from the issue of nondegradation to the issue of how big can a mixing zone be to allow avoidance of nondegradation review. If a discharge needs a mixing zone, it is significant and needs nondegradation review. He said that Stone container's pollution that used a nine mile mixing zone could be determined to be nonsignificant under these rules.

MR. FARLING said that mixing zones should not be allowed for toxic or bioaccumulative substances. The goal should be to eliminate these pollutants, not exempt them from review. He also said that the rules focus too much on exempting certain levels of nitrogen from review with too little information. The DHES does not know if all nitrogen contamination at a certain level has the same impacts in different situations.

MR. FARLING also expressed concern regarding the potential for numerous small @nonsignificant@ exemptions adding up to a very significant impact. He agreed with MR. BANGS that the rules should better define who does what and who pays for what. His main concern was who validates the information in the application for @nonsignificant@ determination and who pays for it. He thought the cost should be placed on the developers, but for small developers the state could share the costs. Cost sharing may provide incentives for efficient development on both sides.

MR. FARLING said there was a myth that Montana has a great deal of high-quality water and that therefore degradation here-and-there would not hurt. This is not true. The perception is that high-quality water equals pristine water. That is not correct. The definition for high-quality water in SB 401 is anything better than the standards for any one parameter. That means that a stream horribly polluted by heavy metals, but with turbidity conditions below the standards is high-quality water under SB 401.

MONA JAMISON, attorney, said the state Constitution provision relating to protection of the environment clearly disallows any degradation of the resources from the time that the constitution was adopted. She referred to statements in the Constitutional Convention notes and stated that the intent of the framers was to allow no degradation and to promote the enhancement of the existing environment.

MS. JAMISON agreed with MR. KEENAN that the underlying purpose of the Water Quality Act is to protect, maintain, and improve Montana's water quality, not to allow degradation as envisioned in SB 401 and the administrative rules. She said that the entire debate regarding water quality has shifted from nondegradation to an attempt to get out of the process by being called "nonsignificant".

She said that @nonsignificant@ should mean "not important" or "meaningless". The rules go far beyond this definition. She suggested that if anybody did not like the mandate in the Water Quality Act to protect, maintain, and improve the resource, they should change the Constitution.

MS. JAMISON said she was also concerned with the lack of public involvement in the "nonsignificant" determination process.

The constitution also called for public involvement in decisions such as these. She also agreed with other panelists that were concerned with the mixing zone issue. She questioned the authority of the DHES to allow private citizens the ability to make self-determinationⁿdecision regarding nonsignificance. She asked how the nondegradation process would interact with the Montana Environmental Policy Act (MEPA). This issue must be closely examined.

TERRY GROTHO, Director of Mine Services, Chen-Northern Inc., said the source of the discharge should not matter in the determination of nonsignificance. For example, if a sewage treatment plant uses land surface application, it could be considered nonsignificant under Rule VIII, yet if a mining company does the same thing, even with the same impacts, it will be considered significant. The focus of the rules should be on the nature of the discharge and the impacts, not the source.

Another concern was the storm water language in Rule VII. He asked how this rule interacted with the current storm water program.

Council Questions

SENATOR GROSFIELD suggested that the council concentrate on questioning those panelists who would not be attending the afternoon's subcommittee discussion.

SENATOR GROSFIELD asked MR. BLOOMQUIST about his concerns regarding the Rule IV(1) self-determination language. SENATOR GROSFIELD said this language was a significant change in the draft rules and without it, everybody would have to go to the DHES for a determination. He asked how that would work and what kind of activities would be suitable for self-determination.

MR. BLOOMQUIST said his concern was focussed on the ability of the general public to gather and analyze the information requested under Rule IV(2). He wondered whether individuals would really understand the impacts of their activities.

MS. SOWIGNEY asked if there was any way for the DHES to know that someone has actually determined that their activity is nonsignificant. MR. KEENAN said no.

MS. SOWIGNEY said then there was no way for the public to know that that activity is occurring in that vicinity.

MR. KEENAN said that most likely an activity would require some other permit and then that permitting process would be followed.

SENATOR BIANCHI asked if the DHES disagreed with MS. JAMISON regarding the DHES authority to delegate self-determination decisions.

MR. KEENAN said he believed the law applied to everyone and everyone was under the requirement to comply with the law. In a general sense all they did was to articulate in the rule what was already known - that everyone has the responsibility to be in compliance with the law. He did not think that they were delegating any additional responsibility. This rule was a response to the fact that the DHES did not have, and never would have, the resources to check every activity that would be covered under SB 401.

SENATOR BIANCHI said that he shares MR. BLOOMQUIST's concerns regarding the potential for someone to make an incorrect self-determination decision and then be found liable for a violation of the nondegradation statute.

MR. BLOOMQUIST said one of the potential benefits under the self-determination language would be that a person could go to the DHES and get information regarding the specific type of activity to ensure that they were in compliance. This language may actually relieve the public and the DHES of some potential liability.

MR. ALLEN agreed with MR. BLOOMQUIST. If someone decides that their activity is nonsignificant because they are using BMPS, and those BMPS are shown to be not working, the BMPS should be changed and not the nondegradation process.

MR. JENSEN said that BMPS are really not best management practices. They are minimum management practices. Additionally, there are not specific BMPS for all nonpoint activities. And until they are developed they should not be categorically excluded.

MR. TOLLEFSON said that he sees the self-determination language as essentially granting a permit to a citizen to act. He asked if this increases potential state liability. He was also concerned about the potential state liability resulting from the "reopening" language in Rule VII(2).

MR. KEENAN said he was not an attorney and could not adequately answer the liability questions., but as an enforcement professional, he did not agree that individuals should or will in all cases appropriately monitor their own behavior. However, from a practical perspective, it makes some sense that individuals should be encouraged and perhaps required to be knowledgeable about the impacts of their activities. He said the "reopening" clause was crucial to allow the DHES to react to new information. Without it, the DHES cannot comply with the

statutory requirements to protect, maintain, and improve water quality. The reopening language should be read in conjunction with Rule VII(3). This allows individuals to present information that would allow the DHES to determine something really is nonsignificant even though it is not identified as such in the rules.

MR. TOLLEFSON asked if, due to the reopening language, there would be an increase in state liability to the polluter.

MS. JAMISON said that apart from whether the DHES can legally allow individuals to make a nonsignificant self-determination the burden placed on the individual is unreasonable. The state is setting the individual up for a violation of the act. She questioned if it is reasonable to expect individuals to file a notice of nonsignificant self-determinations with the DHES. The resulting paperwork would be enormous, but how else could the system envisioned in the rules work.

MR. MARX asked if there was a comparison between the self-determination language and the requirement placed on hunters to know the hunting regulations. He asked what kind of work load could be expected if the DHES had to pass judgement on every nonsignificant decision. MR. KEENAN said it was difficult to estimate but the work load would be enormous.

MR. MARX asked if the DHES unstated policy is when in doubt, ask. If this is the case, then there should be a strong effort to respond to individuals in a timely manner. This will act as an additional incentive for people to come to the DHES with questions.

MR. JENSEN said the problem with MR. MARX' hunting comparison is that hunters have to get a permit that comes with the regulations. The self-determination process in the rules does not require a permit and the situation is much more complex.

SENATOR GROSFIELD asked how many people were currently in the enforcement bureau.

MR. KEENAN said the section he supervises has two attorneys, and four environmental specialists.

SENATOR GROSFIELD asked for a rough estimate of the staff required to process every potential activity without self-determination language.

MR. KEENAN said he did not expect his section would be doing any of the nonsignificant determinations regardless of the self-determination language.

ABE HORPESTAD, DHES, said that without self-determination language the number of requests would be so large as to be virtually meaningless in terms of needed staff.

SENATOR GROSFIELD asked MR. FARLING what type of activities should be exempted from the nondegradation process through a nonsignificance determination.

MR. FARLING said such activities might include moving livestock across a stream or driving a truck through a crossing. Everyone has a feel for what is insignificant but it would be difficult to draw up a list of all included activities.

SENATOR GROSFIELD asked if even those activities mentioned by MR. FARLING would need to request a DHES nonsignificance determination without self-determination language. MR. KEENAN said yes.

SENATOR GROSFIELD asked MS. JAMISON to comment on this issue. MS. JAMISON said the DHES could analyze these types of activities and include them in the list of nonsignificant activities. This would be a better approach than the current self-determination language.

SENATOR GROSFIELD asked how long that list would be.

MS. JAMISON said even if the list was ten pages long, it would still be worth it to relieve the DHES and the public of the burden now envisioned under the rules.

MR. TOLLEFSON asked for DHES comment on MR. GROTBOS' comments regarding the distinction between the discharge source and its impact.

MR. KEENAN said, referring to MS. JAMISON'S suggestion, that the difference between what she was proposing and what the DHES had envisioned was subtle. Conceptually, she was suggesting the same procedure. Referring to MR. GROTBOS' testimony, MR. KEENAN said he did not interpret the rule the same way MR. GROTBOS did. In his opinion, other nutrient containing wastes would have the potential to be classified as nonsignificant based on the impacts of the disposal. The issue will be examined again.

SENATOR DOHERTY asked about MEPA compliance and public involvement in the nondegradation process. MR. KEENAN said the rules state that the intent is to fully comply with MEPA. MS. MASSMAN said they were working with EQC staff on the specific issues.

SENATOR BIANCHI expressed concerns regarding the mixing zone issue. He asked how pollution within a mixing zone can be deemed nonsignificant when no one knows what a mixing zone is. He asked

also why the two issues are on different tracks and why the EQC is not looking at the mixing zone issue.

MR. KEENAN said the largest reason the DHES was doing one rule at a time was the lack of adequate resources. The people just are not there to address both nondegradation and mixing zones at the same time. When the nondegradation rules are complete, they will turn to mixing zones.

DR. HORPESTAD agreed with MR. KEENAN regarding the lack of resources. The DHES does have a rough draft of a ground water mixing zone rule and a working draft of surface mixing zone rules. Sometime in January they hope to get to the mixing zone rules.

MR. KAKUK said in response to SENATOR BIANCHI'S question regarding why the EQC was not looking at mixing zones that the EQC decided earlier that because the authority for mixing zones was now in the law and broad criteria had been legislatively set, the issue was largely moot. This does not preclude the EQC from looking at the issue or being involved in the mixing zone rulemaking process.

MR. BOEH asked MR. JENSEN, regardless what they are called, if a certain land management practice protects water quality is that practice adequate,

MR. JENSEN said yes, if they are required to be implemented and not discretionary.

SENATOR DOHERTY suggested that the DHES involve experts more closely when setting the nitrogen standards, He said that the Legislature cannot delegate authority to private citizens because it is unconstitutional, The self-determination language was almost a delegation of executive branch power to an individual and it is not allowed. He asked if the DHES had analyzed that issue.

MS. MASSMAN said they did not view it as a delegation. She agreed that the issue was complex but if an individual was uncertain, they should contact the DHES for assistance.

SENATOR GROSFIELD asked if the idea of developing a complete list of nonsignificant activities had been discussed by the DHES.

MR. KEENAN said yes the idea had been discussed as well as other ideas. Discussions had been had requiring an individual to file a declaration of nonsignificance after a self-determination. The specific issue of delegation was not analyzed but would be examined.

MR. PARKS said he viewed the self-determination language as an invitation for someone who knows their activity is significant to make a nonsignificance self-determination, proceed with their project, and when they get caught to make the argument that they already have an investment on the ground and the DHES should not shut them down. By this time the impacts have already occurred. The rules would be better off by just being silent on self-determinations.

SENATOR YELLOWTAIL asked if a determination of significance equated activity denial and if not, what was the process for activity approval.

MR. KEENAN said if an activity is not determined to be nonsignificant then it continues to proceed through the nondegradation process. The nonsignificance determination does not, by itself, grant or deny any permit. It is a classification tool. The rest of the nondegradation process is outlined in the draft rules.

SENATOR YELLOWTAIL asked if the DHES could give a rough idea of the time frame involved in completing the nondegradation process.

DR. HORPESTAD briefly reviewed the proposed nondegradation review process and said that MEPA compliance would take as long or longer than the actual nondegradation review. The DHES could probably make a nondegradation decision within a few months, not including the MEPA review. If the activity required an EIS, it could take much longer, possibly as long as a year.

MR. BANGS said he had heard that unless the project was large, e.g. a subdivision larger than 100 units or a municipal waste treatment plant, and the project was not judged nonsignificant, it should not go forward because of the cost and time delays.

SENATOR YELLOWTAIL asked DR. HORPESTAD if that was a reasonable interpretation of SB 401 and the draft rules. He asked what was a reasonable estimate for time and money for a small subdivider.

DR. HORPESTAD said SB 401 requires the application of best practical treatment. If the applicant can satisfy this requirement by building an upgraded septic system, the additional cost would add around \$3,000 to the cost of the home. Going through the nondegradation review process would take approximately 60 to 90 days after DHES has all the information needed to make a decision. Hopefully this would be parallel with other time frames.

MR. BANGS stressed that time frame was after the DHES had all of its required information. He said just getting all the information to the DHES may take six months.

SENATOR YELLOWTAIL asked from the initial application what would be the longest time before a decision would be reached.

DR. HORPESTAD said that would depend on how quickly the applicant responded with the information. He agreed that the DHES turn around for subdivision review has been bad. This is one of the reasons that the DHES now charges fees, so they can adequately fund the subdivision review section. The authority to charge fees is also present for the nondegradation review process.

MR. BANGS said the real estate developers have never complained about the DHES charging fees'for review. They understand that it is necessary, but they would like to see the state and the local government review process take place concurrently.

SENATOR BIANCHI asked if there was anything in statute that prevents the two review processes from happening concurrently.

.MR. BANGS said no it was just a policy and due partly to the fact the DHES got behind in its review.

MR. ALLEN said it was the requirements in Rule IV(2) that would slow the process down. If an activity is not determined to be "nonsignificant", a consultant will have to be hired to ensure that it is in compliance.

MR. JENSEN said the whole system, federal and state, was meant to be technology driven. As in air quality, the new requirements lead to new technology using the example of cleaner burning wood stoves that met the new standards. He said he expected new technology to be developed that will meet these standards.

SENATOR YELLOWTAIL opened the meeting to public comment. There was none. He said the discussion would continue in the afternoon with the Joint EQC/WPC Nondegradation Subcommittee and the Subcommittee would report to the full Council on Friday.

ADMINISTRATIVE MATTERS

SENATOR YELLOWTAIL'S Resignation

MS. SCHMIDT said questions have arisen regarding SENATOR YELLOWTAIL'S upcoming resignation due to his appointment as Regional Director with the Environmental Protection Agency.

APPENDIX 6

October 28, 1993

TO: SJR 29 Joint **EQC/WPC** Subcommittee Chairs, Senators Doherty and Grosfield
FROM: Staff
RE: Subcommittee Recommendation

Below is a summary of issues discussed and discussion results from the October 28, 1993 Subcommittee meeting on "Non-significant Activities". These issues will be presented to the full Council for discussion and action at the October 29, 1993, **EQC** meeting. I will prepare a final report after Council action.

1. Self-Determination -- Rule IV (1)

a. Public Involvement

Proposed Recommendation - The DHES should identify a method to allow for public comment when citizens make a self-determination of non-significance.

Result - No consensus reached.

b. Unlawful Delegation Issue

Proposed Recommendation - The DHES should look at the potential for unlawful delegation associated with self determination decisions.

Result - Consensus reached.

c. Cumulative Impacts

Proposed Recommendation - The DHES should attempt to identify a means to determine the cumulative impacts of self determination non-significance determinations.

Result - No consensus reached.

d. Self Determination Enforcement Issues

Proposed Recommendation - The DHES should analyze its ability to enforce voluntary implementation of reasonable land management practices when used as a basis for a self determination of non-significance.

Result - No consensus reached.

2. Public Involvement In DHES Nonsianificant Decisions

Proposed Recommendation - The DHES should examine the potential for allowing public comment on DHES nonsignificant decisions. The DHES should attempt to allow for public comment regarding the non-significance determination perhaps through the public comment process involved with other permit decisions associated with the activity, or through the formal public comment process for the nondegradation rules themselves. It is not the intent of the subcommittee that allowing for public comment unreasonably increase the DHES decision time frame.

Result - Consensus reached.

3. Mixina Zones and Non-sianificance

Proposed Recommendation - The DHES should not classify an activity that requires a mixing zone as nonsignificant.

Result - No consensus reached.

4. Nonsianificant Activities Identification

Proposed Recommendation - The DHES should attempt to develop clear, concise language in Rule IV(1) that will allow the general public to make informed and reasonable **non-**significance determinations. For example, this language could be supplemented by educational materials prepared by the DHES showing examples of those activities clearly suitable to self determination and those activities that should be determined by the DHES. Additionally, the DHES could consider incorporating a list of activities that either are or are not suitable for self determination into either the rule language or the educational materials.

Result - Consensus reached.

5. Interaction Between Non-sianificance Decisions and MFPA

Proposed Recommendation - The subcommittee understands that this issue will be further explored under SJR 29 Study **Issue 2**. The subcommittee encourages the DHES to continue working with the EQC staff on this issue.

Result - Consensus reached.

6. DHES Non-Significance Decision Time Frame

Proposed Recommendation - The DHES should develop a mechanism to ensure that requests for non-significance determinations are acted on in a timely manner.

Result - Consensus reached

7. Applicability Date Change

The subcommittee briefly discussed whether to make any recommendation regarding the change in applicability dates from **1971** to **1993**.

Result - No consensus reached.

8. Mixing Zone Rulemaking

Proposed Recommendation - The subcommittee understands the rationale for not including mixing zones rules in the nondegradation rules process. However, the DHES should strive for the adoption of mixing zone rules as soon as possible. Additionally, the DHES should keep the EOC fully apprised on the progress of the mixing zone rulemaking process.

Result - Consensus reached

9. EOC Commendation of DHES Rulemaking Process

Proposed Recommendation - The subcommittee understands that this issue will be examined in more detail under SJR **29** Study Issue **5** but it believes that the DHES should be commended for its attempt to maximize the opportunity for public involvement thus far in the rulemaking process.

Result - Consensus reached

There is a **lot** of contact with landowners to **acquire** permission to go onto the land and measure the water **levels** in wells located on the property using the standard operating procedures to be used on each well location.

MR. NOBLE asked approximately how many existing wells there are in Montana. **MR. PATTON** said **there** are 125,000 wells in the data base with that **number** representing 60 to 70 percent of the total wells in the state.

SJR 29 NONDEGRADATION STUDY

SENATOR GROSFIELD said the subcommittee had met the previous afternoon with most of the panelists from the morning discussion in attendance as well as Council and Water policy Committee **members**. About a dozen specific recommendations were discussed by the subcommittee. Consensus was reached on five of the issues and not on the rest. See Exhibit 10.

Issue 1 dealing with self-determination and (a) presents the question of whether there is any public involvement and whether DHES should develop a mechanism to allow some kind of involvement. No consensus was reached.

. Subsection (b) **posed** the question of whether the **self-determination** rule is an unlawful delegation of department **authority**. The department feels it is not an unlawful **delegation**, but the subcommittee felt it would be appropriate to ask the DHES to look more closely at the issue. Consensus was reached on the recommendation.

Subsection (c) dealt with cumulative impacts and how the DHES could determine any cumulative impact analysis when people are not coming to the department for determinations. No consensus was reached on a recommendation. The only way DHES might be able to address this issue would be through a statewide water quality monitoring plan.

No consensus was reached on subsection (d) either which was enforcement under self determination when a voluntary BMP is implemented.

Consensus was reached on Issue 2 which related to the public involvement in DHES non-significant determination ,decisions. The DHES was encouraged to develop a method for public involvement.

Issue 3 was the mixing zone and non-significance issue and no consensus was reached. The recommendation was that an activity that requires a mixing zone would not be non-significant.

Issue 4 resulted in consensus. The issue was that DHES should develop more concise language in order to help the applicant who goes to the department to deal with the non-significant determination. This rule needs to be more specific and rewritten to be more defined.

Issue 5 addressing the interaction between non-significance decisions and MEPA is part of the study and consensus was reached that DHES staff is encouraged to continue working with EQC staff on this issue.

Consensus was reached on Issue 6, the concept that non-significance decisions by the DHES need to be made in a timely manner. It was felt if the timeframe is too long, no one will come into the department, but if it is a reasonable timeframe, more people will come to the department for help in compliance.

Issue 7 relating to the applicability date and the change from 1971 in the first draft to 1993 in the current draft. The change was made because of comments received that indicated this would mean retroactive applicability of a statute. The current date is the date of passage of SB 401. No consensus was reached on this issue.

On the mixing zone rulemaking process, Issue 8, consensus was reached with the recommendation that the subcommittee does understand that there are two different processes being used by the DHES.

Consensus was reached on the recommendation of Issue 9 that the DHES be commended for the manner in which it has proposed these rules.

In the subcommittee meeting, the motion for acceptance of the subcommittee recommendations was made by MR. MARX, who is allowed to vote in subcommittee actions.

SENATOR GROSFIELD MOVED that the Council accept the subcommittee recommendations that were consensus items and that the Council make those recommendations to the DHES in its rulemaking process. Those consensus items included in the motion are 1(b), 2, 4, 6, and 8. The motion PASSED.

SENATOR GROSFIELD MOVED that Issue 9 be recommended by the full Council also. This would entail sending a letter to DHES commending it for the process used during this rulemaking procedure. The motion PASSED.

SENATOR YELLOWTAIL said the Council strives to operate on a consensus basis and he questioned whether motions and votes should be used on the remaining issues or did individual members wish to comment on their own.

SENATOR DOMERTY said Issue 3 relating to mixing zones and non-significance caused a great deal of discussion. The whole idea of nondegradation and the impetus for the legislation was because of the increased numbers of applications for exemption for the nondegradation statute.

Since the legislation has moved the people who had been applying for exemptions into a process, the state would have control and would maintain, protect, and enhance the high quality of Montana's waters. With the adoption of the definition of non-significance lies the **opportunity** of a loophole to be created. If an applicant is deemed to be non-significant, there is no need to apply for a nondegradation permit or exemption. The danger with the issue of non-significance rises when the discussion turns to mixing zones.

SENATOR DOHERTY expressed his dislike for mixing zones. However, they are legal at times. A mixing zone provides an opportunity to use dilution as a means of disposing of a material into water. In the mixing zone, water quality standards can be exceeded. He felt that when a mixing zone is needed, non-significance status does not apply. **If** the water quality standard must be exceeded in the mixing zone, that event should not be classified as non-significant. The definition of non-significance is very significant and has the potential for allowing a lot of pressure to be placed on the DHES to make that determination.

SENATOR DOHERTY said his proposal would be that within a mixing zone in which water quality standards would be exceeded that on its face is not a non-significant event.

SENATOR GROSFIELD asked how many of the allowed mixing zones would exceed water quality standards. MR. PILCHER said there obviously would be some where the concentration would exceed water quality standards for a short time, but some would not go above the standards but would degrade the water to some degree. He felt the idea was worth pursuing as middle ground.

SENATOR GROSFIELD asked if septic systems exceed water quality standards. MR. PILCHER said it would have to be determined on a case-by-case basis. In many areas of Montana the nitrate levels are up for a variety of reasons, so a septic tank and drain field at one of those locations could push the concentration over the acceptable levels.

SENATOR GROSFIELD said everyone seems to have an intuitive sense of what is non significance and what is **significant**. He raised the examples of cattle crossing the creek, a fisherman walking up a stream creating mixing zones with every step, or septic systems. He was concerned about triggering activities should be considered non-significant.

MR. TOLLEFSON felt the discussion was hampered by lack of knowledge of what the rules for mixing zones will say. He said most of the questions puzzling the council will probably be answered when those rules are addressed.

SENATOR DOHERTY said .the example of septic tanks was a very bad example because they are **defined** as non-significant and mixing zones would be anything that is not defined as non-significant. Under rule **8(g)** domestic sewage treatment systems are automatically non-significant changes in **water** quality. He said his attempt is to address those mixing zones that would be significant.

REP. ORR said he is concerned about both (f) and (g) because although it does say that they are non-significant, if the designated mixing zone does not exceed 5 parts per million. In subsection (f), the figure used is 2.5 parts per million of nitrogen. Federal regulations allow 10 milligrams per liter for babies and 20 for adults. Those figures were arrived at using a zero risk basis. Through what is termed best professional data, DHES has seen fit to use 2.5 and 5. Those figures can move activities from non-significant to significant. REP. ORR felt those figures are so low that a lot of 'septic tanks could be pushed into the significant level.

SENATOR YELLOWTAIL asked how this relates to mixing zones **in** general. He said if the levels get high, the activities become significant. REP. ORR said that will happen only because the standards have been arbitrarily set too low.

MR. PILCHER said in many cases even a minor action like the fisherman wading upstream could cause the surface water standards to be exceeded.

SENATOR YELLOWTAIL said there are serious mixing zones and then not serious mixing zones. There are mixing zones that will be identified by the rules as they pertain **to some** source of effluent. He said the rules would not address those mixing zones that are considered non-significant, but the major mixing zones would be addressed. 'MR. PILCHER agreed.

SENATOR DOHERTY said in answer to the concerns raised by REP. ORR, he hoped the department could scientifically defend the numbers used.

MR. KAKUK said a **proposed** recommendation could read that the DHES should analyze **the potential** for restricting the classification as non-significant of mixing zones to only mixing zones where the standards are not higher, specifically not including any other activities identified as non-significant in Rule VII or Rule VIII. The recommendation would be asking the DHES to analyze the potential for the stricter classification of

mixing zones as non-significance to only those **that do** not violate standards and do not involve any specific activities identified already as non-significant in the rules.

SENATOR YELLOWTAIL said the **principal** involved **is to** just ask the department to examine that question and to not make as specific a recommendation as **discussed** at the subcommittee meeting. SENATOR DOHERTY said **that** would be right and if the department **would use** a good faith effort and prove the idea will not work, he would accept it.

MR. NOBLE said he was uncomfortable with making a decision now because he is not on that subcommittee and did not feel he had as much information as he needed. He thought the subcommittee should address the issue again at its next meeting and bring more information back to the full **Council**.

SENATOR YELLOWTAIL said time has become a problem because the rulemaking process will probably be over before the next subcommittee meeting.

MS. SOWIGNEY said some type of clarification, from DHES on mixing zones because there has been very little information for the public to use.

REP. ORR asked if the discussion meant that if an activity is non-significant in the rules, the motion would not apply. SENATOR DOHERTY said that was the case.

REP. ORR reiterated his concern about the level at which the standards have been set in the rules because so many activities will then be deemed significant. In the case of septic tanks, it would add \$3,000 to the cost of construction of a house or in an existing system it would take \$3,000 to do a sand filter. He felt the subcommittee came up with no consensus for a reason.

SENATOR GROSFIELD asked for a department explanation of the risk factor. MR. PILCHER said department personnel have struggled with the rates. The issue at hand is nondegradation which is intended to minimize adverse changes to water quality versus those standards that are established to provide public health protection. **Some would** argue that degradation is allowed up to that level required by the standards, but the Water Quality Act states that only the BHES can provide an exemption to allow degradation except in cases of mixing zones. The whole reason for nondegradation is to minimize any activity that degrades the water. MR. PILCHER said some would argue that the standards are arbitrary as are most standards **that** are imposed in regulations.

MR. TOLLEFSON said another issue discussed by the subcommittee without reaching consensus was cumulative impacts. One of the concerns relating to the 2.5 standard was that of

cumulative impacts of activities. These issues point to the need of a statewide monitoring plan that would provide the information necessary to address impacts and make the decisions easier.

SENATOR YELLOWTAIL suggested that the subcommittee develop some **language for** a general policy statement regarding cumulative impacts and a monitoring plan.

SENATOR YELLOWTAIL said there has been a good discussion of the issues and thanked the department for its help. He suggested that the Council move on with its agenda.

MR. PILCHER said the DHES does not necessarily have to have a formal recommendation from the Council to go back and revisit the area of mixing zones. With **all** of the discussion over the two-day period, he said the subject will be examined **again**.

AGRICULTURAL CHEMICAL GROUND WATER MANAGEMENT PLAN

MR. EVERTS introduced DR. JEFF **JACOBSEN** of the MSU Extension Service and GEORGE ALGARD of the Montana Department **of** Agriculture who briefed the Council on the process used to develop the management **plan**.

MS. SCHMIDT said this item appears on the agenda because of previous Council involvement with a ground water management study during which legislative recommendations were made by the Council for improving the management of agricultural practices and ground water protection.

MR. **ALGARD** said the EPA in 1986 issued the national ground water strategy. The Montana Legislature acted in 1989 passed the Montana Agricultural Chemical Ground Water Protection Act for the department to use. It was specifically intended to provide ground water protection, especially drinking water, from agricultural chemicals and the act specifies pesticides and fertilizers. Several state agencies are responsible for providing programs that will help prevent the entry of agricultural chemicals into ground water and at the same time allowing the proper use of those chemicals that are valuable and necessary tool for the industry. See Exhibit 11.

MR. **ALGARD** said the general management plan is a **document** which will provide information to the general public and all interested parties on how Montana intends to protect its ground water in the future and what is presently happening. He said it is an educational plan that will provide assistance to agricultural producers, pesticide users, and to the general public.

While there are other programs dealing with ground water in the state, this plan relates specifically to pesticides and

APPENDIX 7

REP. COCCHIARELLA stressed the importance of conducting the business of the EQC in a bipartisan way and pledged to work for and with the consensus building process.

SENATOR GROSFIELD said he would prefer to use a system of voting that relied on an X or O for each candidate rather than having a handwritten name on a ballot. He felt it was a more appropriate manner of voting.

REP. BIRD agreed with SENATOR GROSFIELD.

SENATOR DOHERTY said a vote for MR. NOBLE would be by use of an X and a vote for REP. COCCHIARELLA would be an O. He asked SENATOR WELDON and REP. KNOX to collect and count the ballots.

The result of the election as announced by REP. KNOX was the election of MR. NOBLE as Chairman.

Nominations were then opened for election of a Vice Chair. SENATOR GROSFIELD nominated REP. COCCHIARELLA. REP. BIRD nominated SENATOR DOHERTY.

SENATOR DOHERTY thanked REP. BIRD for the nomination but declined because he felt the Vice Chair should be a House member.

The nominations were closed and a unanimous ballot was cast for REP. COCCHIARELLA.

Special Session Actions and Legislature

MS. SCHMIDT said the two bills relating to legislative reorganization failed during the special session. However, the legislative agency directors will meet a few times over the next few months to work on alternative proposals to be submitted to the 1995 Legislature. The EQC staff has been meeting to evaluate the requirements that have been assigned under Montana statute in an attempt to assess whether the staff is doing its job most efficiently and what could be done differently.

MR. KAKUK used Exhibit 1 to brief the council on bills passed and failed during the special session.

SJR 29 NONDEGRADATION STUDY - MITIGATION PANEL DISCUSSION

MR. KAKUK used Exhibit 2 to introduce the SJR 29 panelists.

BOB ROBINSON, Director, DHES, said SJR 29 requested that the EQC look at the mitigation issue as it relates to nondegradation. The resolution reflected real concerns regarding the effects of SB 401. Only one of the 10 issues identified in SJR 29 is really

prospective or in anticipation of future legislation or rules and that issue is mitigation.

MR. ROBINSON said he would take most of the credit or blame for the issue being raised in the 1993 regular session, but he also said he agreed with Jim Jensen who said before the session that the goal was to see improvement in **Montana's** overall water quality. Effective enforcement of the Water Quality Act including SB 401 should take care of water quality in the future, but there are existing problems where there is no viable responsible party. Abandoned mines are a good example of this problem. MR. ROBINSON said his idea was to link the authorization to degrade with mitigation. This would impact the social and economic analysis in nondegradation decisions. The cost of no discharge may make the project infeasible, but a portion of that cost, applied to other existing problems, could make a positive difference in overall water quality and still allow for the project to proceed. It would not have to be another project of the same nature.

MR. ROBINSON noted that 'industry does not want to be held hostage using mitigation and the public interest groups do not want to see mitigation as a way of buying an authorization to degrade. These issues should be addressed by the EQC, Other issues that should be addressed include where the mitigation should be applied, and whether companies are responsible after mitigation under other laws such as CERCLA.

SENATOR GROSFIELD asked if MR. ROBINSON was proposing any changes in statute regarding the use of mitigation in nondegradation decisions.

MR. ROBINSON said nothing was being proposed by the DHES at this point and he felt the EQC was the best place to begin a discussion on the mitigation issue. He believes the idea has some merit.

JOHN WARDELL, Director, U.S. EPA Montana Office, updated the Council on current EPA practices involving air quality mitigation. MR. WARDELL said tradeoffs, offsets or transfers are occurring, for example, in Billings regarding **SO2** issues. There is no more room left for additional **SO2** emission in Billings. A company, BGI, wanted to begin operations in Billings but could not without some other emissions being reduced. Exxon agreed to reduce its emissions to allow BGI to proceed. **SO2** levels in Billings are still in violation of federal levels and the EPA is drafting a response. If an area **is** not in compliance with federal standards, one of the issues EPA must consider is requiring offsets on a **2:1** ratio to reduce overall pollution levels.

MR. WARDELL also said the acid rain program under the federal Clean Air Act 1990 amendments uses a market based approach that provides incentives and flexible market oriented programs. The responsibility for compliance is transferred to the industry from the EPA. EPA handles the accounting, like a bank account, and the industry decides how to use the credits and debits. The overall goal is to reduce the acid rain emissions by 50 percent. If a company emits less pollution than it is authorized, it may sell the right to emit those pollutants to another company. This provides an incentive to emit less.

REP. BIRD asked how an incentive to reduce emissions is achieved under this approach.

MR. WARDELL said that any time a company can do better than required it can make more money by selling the pollution credit.

REP. BIRD asked if the state is paying people to reduce their emissions.

MR. WARDELL said he thought that was correct and that was probably good business. The alternative is to regulate on a command and control basis. This would provide less incentive for cleaning up problems.

SENATOR GROSFIELD asked if the federal government was planning on incorporating the market based approach into the Clean Water Act.

MR. WARDELL said he had not heard of any plans to expand the program. He had heard of concerns with the incentive program in that if Billings, for example, is below the federal standard, i.e. has better air than required, it may draw in more industry. The EPA will have to wait and see but the same sort of market based regulatory framework could be developed for water and hazardous waste programs.

SENATOR DOHERTY asked if any other states had developed this type of approach for water. MR. WARDELL said he had not heard of any.

STEVE GILBERT, president, OEA Research, said he had been working with biological baseline studies for over 20 years and specifically with mining studies for 15 years. He has inventoried thousands of miles of streams for both point and non-point pollution sources, both before and after problems had developed.

MR. GILBERT said mitigation is defined as abatement or diminution of a problem. Alternative mitigation as being

discussed by the panel does not fit within this definition. It is not possible to mitigate a pollution problem that does not yet exist. Additionally, not every degradation impact can be mitigated. Protecting a resource in exchange for degradation in another area is not mitigation. He said that, for example, wetlands mitigation through wetlands creation in another area is inappropriate. MR. GILBERT said that it is easier to not degrade than to mitigate a resulting problem. Mitigation is a band aid solution and therefore not really a solution at all.

BRUCE PARKER, Environmental **Director**, Beal **Mountain** Mining, said site specific review is important and a mitigation requirement should not be used as a club by agencies over the industry in order to get a permit. He said his company had questions regarding the use of mitigation in nondegradation decisions. For example, who would set up long term clean up goals and would the industry have the long term responsibilities following clean up. He also questioned what industries other than mining would be required to mitigate in order to get a nondegradation authorization.

SENATOR GROSFIELD asked if any mitigation was now occurring at Beal **Mountain**. MR. PARKER said yes that there were run off diversions to address nonpoint sediment problems.

SENATOR GROSFIELD asked if the problem was one caused by Beal Mountain. MR. PARKER said no, it was an historic problem.

SENATOR GROSFIELD asked if Beal **Mountain** was required to mitigate in its permit.

MR. PARKER said some mitigation is specified in the permit and other mitigation is just good management.

SENATOR BIANCHI asked why the industry would not be willing to accept the long term liability for a site if they have been allowed to degrade in exchange for cleaning up that site.

MR. PARKER said it would depend on the specific clean up site. Some abandoned mine sites are very difficult to adequately clean up. Other mitigation such as replacing an existing water delivery system would be less problematic.

SENATOR DOHERTY asked if Beal Mountain **has a** nondegradation authorization. MR. PARKER said his operation does not degrade the water resources and therefore does not need an exemption or authorization.

SENATOR DOHERTY expressed surprise at the fact that Beal Mountain Mining could profitably operate without degrading the water resource and also provide improved wildlife habitat. He

asked what they were doing right that other companies were not doing.

TAD DALE, Pegasus Gold, said he had worked at Beal Mountain and that most mitigation measures are common sense. However, Beal Mountain was against the wall with its nondegradation mitigation measures. He noted that degradation does not necessarily equal harm to a stream. Nondegradation must be reasonably applied to everyone.

MR. TOLLEFSON asked if considering mitigation was appropriate when looking at nondegradation authorization decisions.

MR. DALE said that mitigation should be considered but not required. It must depend on the specifics of the site and the operation.

TED DONEY, private attorney, Helena, said when he was the Director and Chief Legal Counsel with the DNRC they used mitigation under the Major Facility Siting Act even though there is no statutory authority regarding mitigation. He said he represents the BGI project in Billings and he was involved in mitigation in that situation.. The BGI mitigation will reduce overall SO₂ by 5 percent in Billings. He said he also has been involved in wetlands mitigation recently.

MR. DONEY agreed with MR. GILBERT as to the need to define mitigation. There are apparently two major definitions of the term mitigation. One definition is when there is an actual reduction of impacts of a proposed project and it is commonly called mitigation. The second definition is the off site mitigation of an existing problem. These definitions may both be applicable in a specific situation but this panel discussion appeared to center on the second definition.

MR. DONEY said NEPA recognizes mitigation as a tool and has since 1972. Also, the federal Clean Water Act wetlands sections do not mention mitigation under section 404 and yet federal agencies routinely require mitigation in wetlands issues. Federal courts have said CWA penalty sections authorize agencies to require mitigation. MEPA does not authorize mitigation but MEPA rules authorize the use of mitigation under the first definition. However, these rules also could be interpreted to include authorization under definition two. DHES has required mitigation under contract. This is mitigation that has nothing to do with the permits under decision. MR. DONEY said the reality is that the DHES can already use mitigation in nondegradation decisions. A developer could include off site mitigation to show DHES that important social and economic benefits would occur if the permit is granted.

MR. DONEY said he was in favor of mitigation **in** general but **it** was important to keep in mind the overall goal. **If** mitigation enhances the achievement of the goal, then the state should engage in mitigation. MR. DONEY said the state should utilize a sequencing framework as used in federal wetlands issues in these decisions. First, degradation should be avoided if possible. If not possible, the degradation should be minimized, and the last alternative is to discuss mitigation. He said **it** was important to focus on a "**functional**" replacement of a degraded resource.

MR. DONEY said the location of mitigation varies widely but **it** is usually located in the same watershed as the project. **How** watershed is defined remains a question. MR. DONEY said that mitigation banking has also been used. He said he would prefer keeping mitigation on the same resource and requiring actual on the ground impacts because this would make **it** easier to deal with. MR. DONEY said that mitigation should not be required as a condition to get a permit but considered by the agency in consultation with the developer.

MR. DONEY said he did not feel the issue of mitigation enforcement was too important. Developers want to complete their projects, and the mitigation measures are included in the permit or under contract. He said there are some potential liability problems by a developer cleaning up existing problems. Superfund or CERCLA sites should probably be avoided. However, the developer could put money into a fund to clean up CERCLA sites by the state. There is no question that if a developer agrees to clean up an existing site as part of a permit or under contract, that developer would be responsible for getting the job done.

SENATOR GROSFIELD asked if the last two steps MR. DONEY outlined as sequencing, minimizing, and mitigation were mutually exclusive. MR. DONEY said they could be but usually **it** was some combination of minimizing and mitigation.

SENATOR DOHERTY asked if anyone ever decides that the impacts of a proposed project, even with minimization and mitigation, as such that the project should be prohibited and does mitigation work for all situations.

MR. DONEY said he agreed with the other panelists that there are situations where mitigation is not going to work. The **U.S.** Army Corps Of Engineers has denied wetland permits even with mitigation. The EPA has also vetoed **U.S.** Army COE permits. The ability to deny a permit even with proposed mitigation should be retained by the agency.

MR. DALE asked if there were any examples of where mitigation would not work but the permit was granted anyway. MR.

DONEY said there were projects where planned mitigation did not work.

MR. GILBERT said the discussion of functional wetlands replacement requirement did not address how the function of a wetlands was measured. He said he had never seen any truly functional wetland replacements artificially created in Montana.

SENATOR BIANCHI asked if Montana should require more than a neutral impact through mitigation. In other words, should Montana require an overall benefit to the resource as a result of the mitigation.

MR. DONEY said he personally would not object to that requirement, but in general it should be left to agency discretion on a site specific basis.

TOM FRANCE, National Wildlife **Federation** attorney, said he appreciated the discussion, but he thought it was important to focus the discussion on nondegradation and the protection of high-quality waters. It must be stated that the overall goal of **Montana's** Water Quality Act and nondegradation is to protect existing high quality water. This must be noted first before it is possible to discuss mitigation. The Federation did not support SB 401 because it felt the Legislature had lost sight of this important overall goal.

MR. FRANCE said one of the problems with SB 401 was that it was largely a hypothetical discussion because the DHES had never really implemented the nondegradation provisions under the old law. Until there are some data on what the impacts of a strict nondegradation policy are, any talk of mitigation will continue to be hypothetical. MR. FRANCE said that cumulative impacts of mitigation must also be considered and this has been a significant problem with wetland mitigation and will also remain a problem with septic systems in subdivisions.

MR. FRANCE said it has been technological improvements that have allowed the mining industry to profitably mine **today's** ore bodies. This same advanced technology should also be used to make sure it is done without degrading the water resource. He said that any mitigation used in conjunction with a permit 'should be required to be completed before the permit is granted or under a strict time schedule to ensure that the mitigation is completed.

MR. FRANCE said any work on mitigation needs to recognize the implicit value of maintaining high quality water and place a high cost on any proposal to degrade those waters. He said he agrees with MR. DONEY regarding the location of proposed mitigation in the same watershed as the proposed project. He

suggested a sliding scale requiring additional mitigation for out-of-basin mitigation proposals. MR. FRANCE said that the best place for mitigation enforcement would be to include it as part of the permit conditions. This would allow for citizen enforcement of the mitigation.

JOHN MARSDEN, Phelps Dodge Mining, asked if MR. FRANCE meant a reduction in nutrient loading when he used the term mitigation.

MR. FRANCE said it was easier to think about mitigation in terms of acres of habitat but with water quality it was difficult to think about the exact formula that an agency would use to determine what a fair trade would be. This is another reason why he believes that mitigation and water quality is problematic.

MR. MARSDEN said that it must be remembered that a reduction in different constituents did not automatically mean an increase in water quality.

JIM JENSEN, Montana Environmental Information Center, asked if MR. FRANCE knew of any existing water quality problems caused by recent mining activity, where mitigation had not been applied and where the state may be left liable for clean up.

MR. FRANCE said the DHES had testified before the EQC a few years ago that every mine in Montana had violated water quality standards at some point. He said there may now be an example of a mine that has not had water quality problems but the industry certainly has had its share of on-going problems.

MR. GILBERT said water quality could not be looked at out of context. The water body must be looked at in terms of what that water body does and what its function is.

DR. ABE HORPESTAD, DHES, Water Quality Bureau, agreed that the term mitigation needs to be clearly defined. Objectives of the state Water Quality Act are to protect, maintain, and improve water quality. A straight neutral goal in mitigation would maintain but not improve water quality. SB 401 requires best treatment in place before even considering mitigation or a nondegradation authorization. It seems clear that mitigation can now be considered by the DHES through the social and economic analysis required under SB 401. This is similar to the total maximum daily loads and waste load allocations that are mandated by the federal government where standards are being violated. DR. HORPESTAD said he does not know exactly how these programs would work in Montana. He said that to him to mitigate means to restore.

REP. BIRD asked DON ALLEN, Montana Wood Products Association, about mitigation and the timber industry.

MR. ALLEN said under the current nondegradation statute and proposed rules the timber industry is exempted from the nondegradation provision if it uses the established timber Best Management Practices. This would fit under MR. DONEY's discussion of minimization. Additionally, the Streamside Management Zone law has built-in mitigation requirements.

MR. NOBLE asked DR. HORPESTAD to update the Council on the nondegradation rule adoption process.

DR. HORPESTAD said that over 125 written comments were received with over 400 discrete comments on the rules. Additionally, 235 pages of written transcript from the rules hearing itself needs to be reviewed. One result of the **comments** is that the DHES is preparing mixing zone rules and a draft should be out the first week of February. These mixing zone rules will be before the BHES at its March meeting in addition to changes to the nondegradation rules and the accompanying WQB7 list. The major change to this document will be a new category for standards that are less than the achievable or practical measuring level.

DR. HORPESTAD said that written responses to the comments, as required under the Montana Administrative Procedures Act, will be completed by the middle of February and the BHES will be able to act, if it chooses to do so, at a special meeting in April. DR. HORPESTAD suggested that the EQC wait to complete its analysis of the mitigation issue until the rules are adopted and the DHES has had a chance to implement the policy. If there are problems with the process involving mitigation, the EQC could look at the law at that point.

MS. SOWIGNEY asked if the DHES had made any policy decisions on the mitigation issues discussed by the panelists. For example, when would mitigation be used.

DR. HORPESTAD said no and the DHES had not defined mitigation either.

MS. SOWIGNEY asked if DR. HORPESTAD was asking the EQC to allow the DHES to utilize mitigation without any guidance on these issues.

DR. HORPESTAD said yes because he thought the authority was included under the social and economic analysis to consider mitigation on a voluntary basis.

MR. TOLLEFSON asked if DR. HORPESTAD thought the Joint EQC/WPC Subcommittee should look at the issue.

DR. HORPESTAD said he thought it would be best to wait until the rules are adopted and the policy is implemented.

MR. JENSEN noted that MR. ROBINSON had offered **to** prepare an economic analysis of the nondegradation rules for the BHES.

DR. HORPESTAD said that was correct but the details of the proposal are unclear.

MS. SOWIGNEY asked if the DHES received a lot of comments on the mitigation issue. DR. HORPESTAD said he did not remember getting any comments regarding the issue. However, that may be because mitigation was not mentioned in the rules.

MR. DONEY said he also had some questions regarding MR. ROBINSON's offer to prepare an economic analysis of the nondegradation rules and its effect under **MAPA**.

SENATOR DOHERTY asked if anyone was going to analyze the impacts of water quality degradation on public health. Adverse impacts to public health also had economic impacts.

SENATOR GROSFIELD asked if this discussion could be continued later in the meeting with DIRECTOR ROBINSON in attendance. The Council agreed.

DENNIS OLSON asked if nondegradation mitigation would be part of the permit and enforceable.

DR. HORPESTAD said any required mitigation would be part of the authorization. If a person did not live up to any part of the authorization condition, they were in violation of the Water Quality Act.

SENATOR GROSFIELD asked how the DHES was implementing the nondegradation provision without rules.

DR. HORPESTAD said that was still a concern and the DHES was doing the **best** it can by implementing the policy under the terms in the statute.

SENATOR GROSFIELD asked if the DHES was planning to have the mixing zone rules and the rest of the nondegradation rules adopted at the same time. DR. HORPESTAD said that was the plan.

MR. JENSEN asked the EQC to discuss the BHES economic analysis issue with MR. ROBINSON and inform him of the serious legal issues involved with allowing the BHES to consider information that is not part of the formal closed hearing testimony.

MR. NOBLE asked staff for a review of the issues discussed during the meeting.

MR. KAKUK said the issues seemed to be centered around the following: definitions; the goal of mitigation; what should be mitigated; where should the mitigation take place; should the DHES be allowed to consider or should it require mitigation; should mitigation be required to be completed before the permit; and, mitigation enforcement.

MR. TOLLEFSON MOVED that the Joint **EQC/WPC** SJR 29 Subcommittee continue the analysis of the above issues and any other issues that arise and report back to the full EQC at its next meeting.

MR. NOBLE asked the Subcommittee Co-Chairs Senators DOHERTY and GROSFIELD for **comment** on the motion.

SENATOR GROSFIELD said he did not have a problem with the Subcommittee looking at the issues in more detail. If DR. HORPESTAD was correct and some issues were unripe for study, the Subcommittee could make that determination. SENATOR DOHERTY agreed.

'The motion PASSED unanimously.

With MR. ROBINSON back in attendance, the question of economic impact was again raised. MR. ROBINSON explained the answer that had been given to a member of the Board of Health regarding the economic impact of certain phases of the nondegradation rules. At the BHES meeting on January 21, Dr. Schreffler asked what the economic impact of implementation of the nondegradation rules would be. MR. ROBINSON had told Dr. Schreffler that department personnel would attempt to do some analysis of the issue.

In discussions with his staff following the board meeting, MR. ROBINSON said the issue was how to provide that information without being in a position of giving additional information to the BHES regarding the rules and not having public involvement.

MR. ROBINSON said the information will be used in answering some of the 413 questions asked of DHES concerning the rules because a number of those questions related to the economic impacts. He said the information given will relate to costs impacting subdivisions or individual lots.

SENATOR GROSFIELD asked if this is the same information that would have been given out answering questions on the rules even without the question from Dr. Schreffler. MR. ROBINSON said DHES will have to do some additional analysis to provide the answers

to some of the questions received from the public and that analyses should have been conducted anyway. The additional analysis of some of the **public's** questions should provide the additional information to the **BHES**.

MR. TOLLEFSON asked whether it was incumbent upon the DHES under **MEPA** to provide not only social and economic, but also health impacts analyses also during the rulemaking process.

MR. ROBINSON said **MAPA** is the act that guides the department in the rulemaking process. The same questions concerning social and economic impacts could arise in a meeting with the Administrative Code Committee. Basically, the rules are established to provide guidance in the implementation of the statute. **MEPA** would definitely come into play if the department was doing an environmental assessment of a landfill or mine, but MR. ROBINSON said **MEPA** does not apply to the actual issuance of the rules.

MR. TOLLEFSON said it appeared there is the potential for incremental affects of the actions taken under the rules. MR. ROBINSON said the nondegradation rules would allow the nonsignificant activities to continue. The significant activities would trigger a nondegradation analysis and an application that would have to go through a **MEPA** process.

As an explanation, MR. EVERTS said each agency adopts its own set of **MEPA** rules and the agencies can interpret those rules however they see fit until, or if, someone challenges them on their interpretation. If DHES feels **MEPA** does not apply to rulemaking, that is their interpretation.

MR. EVERTS said when training agency personnel on **MEPA** implementation, it is the opinion of EQC staff that under rules and statute rulemaking does trigger a **MEPA** review.

MR. SIHLER said statute also says that legislation triggers **MEPA** review.

SENATOR DOHERTY asked if the DHES would answer any questions or provide any analyses that should only be done in a public hearing. MR. ROBINSON reiterated that DHES personnel is being careful not to violate **MAPA** and would not give additional information when the public has not had a chance to respond. If the department had done a full economic analysis of the implementation of nondegradation as an independent study, it would have violated **MAPA**. MR. ROBINSON said the answers and analysis will focus on questions from individuals relating to specific issues.

SENATOR DOHERTY said the BHES members had been receiving comments about the economic impacts of the rules and that those comments should be heard only during the hearings. SENATOR DOHERTY said the board should have been advised to take into consideration only comments received by it during the hearing process. MR. ROBINSON said that point was discussed by the board at its meeting and the advice was given by counsel that the members could not use information received in informal conversations as part of their decisionmaking process.

SJR 34 HAZARDOUS WASTE MANAGEMENT STUDY

MR. SIHLER used Exhibits 3 and 4 to outline the work plan used by the Hazardous Waste Management Working Group and its membership.

MR. TOLLEFSON noted that the working group had spent a considerable amount of time on the issue and wording of a definition of adequacy. He asked if progress was being made and if those on the working group felt it could complete its tasks.

MR. NOBLE said Gerald Mueller had been at each meeting to facilitate and members of the working group were feeling encouraged by the progress made to date. He said the group is defining the adequacy of the current laws which is a large issue for the study.

REGIONAL RENEWABLE ENERGY PROJECT (RREP)

HILLARY HAYDEN, Northwest Conservation Act Coalition staff member and coordinator of the Regional Renewable Energy Project, used Exhibit 5 to brief the Council on the project. MS. HAYDEN said the Coalition consists of environmental, consumer, and low income advocate groups and also includes utilities and renewable developers.

MS. HAYDEN said the project was developed in a proactive manner rather than a reactive mode. There were about 40 groups involved in the development of the project. There were three main goals for the RREP. The first was to educate the environmental community about the current energy picture, regional power planning, conservation, and renewable resources. The second goal was to increase the communication among the utility community, the developer community, and the environmental community. The third goal was to activate the community to get more involved in the decisions.

The project was managed by the Northwest Conservation Act Coalition and coordinated in the states by **one of** the members. The challenge the group felt it needed to meet was to face the indifference and, at times, the active resistance of the

APPENDIX 8

personally, and other **subcommittee** members expressed their appreciation for the efforts of DR. HORPESTAD.

Mitigation Report

SENATOR GROSFIELD used Exhibit 3 to explain subcommittee discussions and recommendations relating to mitigation issues. Included in the mitigation issues **is** a definition of mitigation, scope of mitigation, location **of** mitigation, enforcement, banking, and mandatory mitigation.

SENATOR GROSFIELD said the subcommittee agreed on the recommendations on the first five ,issues that it examined and felt the subcommittee had finished with them. However, the two issues of mitigation banking and mandatory mitigation have not been resolved.

MR. KAKUK said there was one sub issue that should have been included in the draft report under mandatory mitigation and that was what effect mitigation would have on a small project applicant. An example of small project would be septic systems.

SENATOR DOHERTY MOVED that the Council accept the first five issues as recommended by the subcommittee in the draft report, Exhibit 3. He said this would help the subcommittee because **it** would not have to revisit those areas again. The second half of SENATOR DOHERTY'S MOTION was that issues six and seven and the small project concern stay with the subcommittee for more discussion.

The motion PASSED.

MR. NOBLE asked that the subcommittee also further examine the issue raised by MR. TOLLEFSON on self determination and non **significant**.

SENATOR GROSFIELD said the **subcommittee** has also spent a great deal of time on mixing zone rules in addition to the **nondegradation rules**.

SENATOR GROSFIELD said the subcommittee wanted to spend more time on possible categorical exclusions for 'issues like composting toilets or other technologically feasible approaches for disposal of household wastes.

Water Quality Act Enforcement

MR. NOBLE said the Council has discussed the topic of enforcement several times relating to water quality and other areas, including hazardous waste. Enforcement issues are a concern to every Council member.



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May 6, 1994

TO: Environmental Quality Council

FROM: Joint EQC/WPC SJR 29 Subcommittee Co-Chairs Senators Doherty and Grosfield

RE: Subcommittee Report -- Mitigation

At its January 28, 1994 meeting, the Environmental Quality Council directed the Joint Subcommittee to complete a closer analysis of Study Issue 3. - Mitigation. The Subcommittee has met twice to discuss this issue and makes the following recommendations for full Council discussion. The Subcommittee thanks the DHES Water Quality Bureau and members of the public for their participation and assistance.

The EQC identified specific sub-issues for analysis by the Subcommittee. These sub-issues, followed by the Subcommittee recommendations, are presented below. The Subcommittee offers these recommendation as policy guidelines to be used by the DHES in processing nondegradation authorization applications.

1. Mitigation Definition -- Should the term mitigation be defined? If so, by whom and how?

Discussion -- The Subcommittee understands that the least degrading water quality protection practice that is technologically, environmentally, and economically feasible is required under the nondegradation statute. Therefore, for the purposes of Subcommittee discussion, the term mitigation was not used to refer to anything that minimizes the applicant's actual water quality degradation. For example, in a nondegradation authorization application an industrial discharger proposes to discharge 10 ppm of chemical X, but then determines that it is technologically, environmentally, and economically feasible to only discharge 6 ppm. The reduction from 10 to 6 ppm is not mitigation because under the statute and the proposed rules the DHES must limit the discharger to 6 ppm.

The Subcommittee used the term mitigation to refer to non-project related activities that impact not the technological, environmentally, and economically feasibility determination but rather activities that impact, i.e., improve, water quality. The benefit from this mitigation is analyzed and weighed under the social and economic analysis required under the statute and proposed rules.

Recommendation -- The Subcommittee understands and agrees with the DHES concept of mitigation to be used in the nondegradation process. Additionally, the Subcommittee reviewed and endorses the broad definition of mitigation found in the DHES adopted model MEPA rules. The Subcommittee does not believe it is necessary to define mitigation in the nondegradation rules at this time.

2. **Scope of Mitigation** -- What should be considered under a mitigation policy? Should the state consider mitigation to other resources or should it limit mitigation to the resource at question?

Discussion -- The Subcommittee understands that the DHES must consider a broad range of mitigation proposals under the nondegradation statute and proposed rules. For example, an applicant proposing to discharge 10 ppm of Chemical X may wish to "tip the balance" of the social and economic development analysis by agreeing to provide the local government with a new fire truck. The DHES is required to consider the costs and benefits of the fire truck in the social and economic analysis.

The Subcommittee does not want to limit DHES authority in this matter. However, the subcommittee believes that, in general, if mitigation is proposed through the water quality nondegradation process the mitigation should improve overall water quality.

Recommendation -- The Subcommittee recommends the DHES encourage proposed mitigation that improves overall water quality.

3. **Location of the Mitigation** -- Should mitigation be limited to the same watershed as the proposed project? Who will define "watershed" and how?

Discussion -- In addition to concerns noted above regarding mitigation proposals, the DHES must also consider mitigation proposed anywhere in the state. The Subcommittee discussed the potential problems regarding "sacrifice areas" and the concept of state owned water.

Again, the Subcommittee does not want to limit DHES authority in this matter. However, the subcommittee believes that, in general, if mitigation is proposed through the water quality nondegradation process the mitigation should be located in the geographical area of the project.

Recommendation -- The Subcommittee recommends the DHES encourage proposed mitigation that improves overall water quality in the area of the project.

4. Mitigation Enforcement -- Who will enforce mitigation requirements and how?

Discussion -- The Subcommittee understands that if mitigation is to be effectively used in the nondegradation process it must be enforceable.

Recommendation -- The Subcommittee recommends that if mitigation is proposed and accepted through the nondegradation process the mitigation should be included the authorization to degrade state waters. Therefore, noncompliance with the mitigation provisions of the authorization could result in authorization or permit revocation.

5. Mitigation Timing -- Should mitigation be required to be completed before the permit or authorization is granted, or should there be a strict completion schedule?

Discussion -- The Subcommittee discussed legal and logistical problems of requiring mitigation completion before an authorization is granted and decided that idea was impractical. However, the Subcommittee believes that the DHES, the applicant, and the public, should clearly understand what mitigation is expected and when.

Recommendation -- The Subcommittee recommends that if mitigation is proposed and accepted a schedule for mitigation completion be developed through the nondegradation application process. This mitigation schedule should be included as part of the authorization. This would provide the DHES, the applicant, and the public, an opportunity to be involved in schedule development and implementation.

6. Mitigation Banking -- Should the state establish an account where a nondegradation applicant could contribute funds to be used for state-wide water quality improvement projects.

Discussion -- This issue was not identified specifically by the EQC but arose out of discussions regarding mitigation timing and scope. The Subcommittee identified the following sub-issues regarding the concept of mitigation banking:

- a. How would the DHES weigh or estimate the benefits of a contribution to the mitigation bank if it does not know on what water quality project the funds will be spent?
- b. Who will establish the water quality project priority list, and how?
- c. When will MEPA compliance be achieved?
- d. What are the liability issues for the contributor and the state?
- e. What is the potential for abuse of the bank through both agency "extortion" or applicant "bribery"?

Recommendation -- The Subcommittee recommends that the EQC refer this issues back to the Subcommittee for further study.

7. **Mandatory Mitigation** -- Should the state, recognizing its constitutional and statutory responsibility to improve water quality require a nondegradation applicant to perform mitigation that improves the overall water quality in Montana?

Discussion -- This issue evolved from the EQC identified issues of mandatory mitigation and mitigation goals, in other words, what should be the end result of Montana's mitigation policy. The Subcommittee identified the following sub-issues regarding the concept of mandatory mitigation:

- a. How would the DHES evaluate mitigation proposals to ensure "overall improvement" of Montana's water quality?
- b. Should the requirement be parameter based? E.g., if the applicant proposes to discharge 10 ppm chemical X, must it remove 11 ppm chemical X somewhere else?
- c. Understanding the constitutional provisions regarding degradation and a clean and healthful environment, should this requirement be placed on all environmental permits.
- d. How does the concept of mitigation banking relate to mandatory mitigation?
- e. Are there potential legal problems regarding takings, due process, equity, or liability issues?
- f. Are there unique impacts to small project developers resulting from mandatory mitigation?

Recommendation -- The Subcommittee recommends that the EQC refer this issues back to the Subcommittee for further study.

6/20/94

neurological system and the brain stem which in turn cause other adverse effects.

SENATOR GROSFIELD said he would like to see the proposed legislation before the Council agreed to support it. MR. NOBLE asked MR. HOWE to let the Council know when the legislation is ready so time could be set aside to discuss it.

SJR 29 NONDEGRADATION STUDY

Proposed Rules

DR. ABE HORPESTAD said about 330 comment letters have been received and 130 have been reviewed. The comments reviewed have not been technical and mostly state either the rules are too stringent or too lenient. He did not foresee any major changes in concept that would result in those comments. However, there have been some good **comments** regarding specific language for purposes of clarity. The schedule still includes adoption of the rules by the Board of Health in July.

MR. MARX said Governor Racicot will receive a briefing from the DHES staff **on** the status of the proposed rules as well as any ideas the staff might have regarding those rules. This will provide another opportunity for the Board of Health to obtain more information in an **informal** setting. He said it will be structured with an opportunity for all impacted parties and interested persons to ask questions and offer suggestions, but is intended to provide information to the Governor on the rules.

SENATOR DOHERTY said during the rulemaking process the receipt of information by boards that regulate is a sensitive issue. As a quasi-judicial board, it is important that the members of the Board of Health remain impartial and careful as to how they receive information.

SENATOR GROSFIELD asked if it is being called a hearing or a briefing. MR. MARX said it is a briefing for the benefit of the Governor.

SENATOR GROSFIELD said rulemaking is not a contested case hearing and felt a briefing on the rules would be appropriate.

Subcommittee Report

SENATOR GROSFIELD said the Nondegradation Subcommittee has discussed the concept of cumulative impacts from self determinations of nonsignificance. DHES is considering authorizing permitting entities to make determinations of significance. He said the majority of these self determinations will revolve around categorical exclusions which nearly always involve some type of permit. There will be a checkoff for a

categorical exclusion on the permit by the agency issuing the permit. It is felt there are not many activities that will involve self determinations.

MR. KAKUK said with the proposed change in language in the proposed rules would require the state to make a determination of significance for anything it permits, reviews, or approves. The only thing that leaves for self determination of nonsignificance will be for new or increased non point sources of pollution that are not currently reviewed or approved by the state. The four major categories are changes in land use; timber harvests on private lands; use of agricultural chemicals; and, land farming of sewage.

SENATOR GROSFIELD said after the explanation given by DR. HORPESTAD to the subcommittee regarding the proposed change there was consensus to make no recommendation for further change.

The subcommittee did recognize the need for baseline data relating to the self determination issue and other issues as well. It is difficult for the state to know whether pollution is increasing or not because there is a lack of baseline data.

MR. TOLLEFSON said the lack of adequate baseline information on which to make many of the necessary judgements is a glaring flaw in the entire process. That information should have been acquired before the law went into effect. The issue of cumulative impacts is still a problem and how to address it has not been resolved even though those impacts are a potential threat to Montana's water quality in the future.

SENATOR GROSFIELD said the subcommittee discussed mitigation banking, but did not reach a recommendation consensus. There are concerns regarding this concept including the possibility of an agency using a mitigation banking program as extortion for industry and others fear that applicants could use mitigation banking as a means of buying pollution. There is a concern that the state could be left with more pollution than there would be if the concept was not used.

SENATOR GROSFIELD said the subcommittee also discussed whether the state should require mandatory mitigation before a nondegradation waiver would be granted because of the constitutional and statutory language. The idea would be that there would be a net improvement of water quality. SENATOR GROSFIELD used Exhibit 5 to explain mandatory mitigation.

MR. TOLLEFSON said if this concept were to be adopted, it would involve a complex process. However, he said it made sense to him that anyone who is seeking the privilege of degrading the high quality waters of the state should be fully willing to

undertake in some way to contribute funds that would be dedicated to the improvement of water quality.

SENATOR GROSFIELD said the memo (Exhibit 5) specifically asks the public to comment on this subject. He wanted to hear any comments before the Council decided anything on the topic.

DR. HORPESTAD said the statement in the memo relating to the difference between the cost of a proposed development with and without the nondegradation authorization is extremely difficult to determine.

SENATOR GROSFIELD said the idea is to determine what it would cost and not what might be feasible.

DR. HORPESTAD said it is fair to demand payment for degradation, but it does not seem fair to assess those costs against only new people. He felt everybody contributes to degradation in some manner and should be willing to contribute to correct the problems.

SENATOR BERNIE SWIFT said these efforts are aimed at mitigating any problems with the quality of water in Montana. He said if there is fulfillment of a requirement to mitigate by anyone who applies for a permit on a project, there should be no more requirements demanded.

PEGGY TRENK, Western Environmental Trade Association, said industries know that seeking nondegradation permits is very serious business. When the requirements under the law have been met, there should not be an additional fee assessed.

CONNIE COLE, **Pegasus** Gold, expressed concern that the state is already having trouble meeting requirements of EPA approved state water quality programs, including the total daily maximum load program. Part of the problem is a lack of statewide baseline water quality data. MS..COLE said most of the contributors to water quality pollution are non point sources. She raised the question of whether mitigation banking would actually address where the greatest water quality impacts are located.

LORNA FRANK, Montana Farm Bureau, agreed with previous speakers. By the time an applicant has completed the steps necessary to receive a permit, more mitigation measures are not needed.

GARY LANGLEY, Montana Mining Association, said whatever the mitigation measures are called, more cost is being added to doing business in Montana for a mining or exploration company. The mining industry in Montana competes on a world market. This means Montana mines are competing with mines in other states and

other countries. The more costs added to doing business means the mines in Montana are less competitive. These added costs are coming at a time when other countries are reducing their royalties and making their environmental laws less restrictive in order to attract American companies. The money spent on exploration in Montana in the past three or four years has gone from \$35 million per year to less than \$1 million now. If the state wants to encourage mining, it cannot develop policies like the one proposed.

MR. LANGLEY said mines in Montana go through a several year process in order to acquire a permit. When a mine requests a nondegradation waiver, it is not asking to break the law nor is it asking to break any water quality standards. The mineral industry already pays the Resource Indemnity Trust Tax which is based on the mineral industry and supposed to be used to take care of some of the problems created' by mining.

MR. LANGLEY said Congress is considering a federal royalty on hard-rock mining. If the royalty is reasonable enough, the industry will pay it and part of that money will be dedicated to mitigating past damage done by mining. If the royalty is too high, the industry will not be able to pay it, and will go out of business. There will then not be any money for that mitigation.

DON ALLEN, Montana Wood Products Association, said other industries have problems similar to those MR. LANGLEY expressed about mining. He said in terms of concept there is a lot of merit, but actual application is difficult. The potential for abuse is certainly real and could work both ways. The issues should be addressed during the permitting process.

MR. ALLEN said there are potential legal problems that could be involved in the takings, due process, and equity issues. He felt it is clear in the Constitution proceedings that the drafters were concerned about the issue of nondegradation and that they knew there would probably have to be some degradation, and therefore did not want to go too far.

MR. ALLEN suggested the **Council** wait to see how the rules work once they are in place. If there is some opportunity for mitigation to play a more prominent role in the process, the issue could be addressed again.

FLORENCE ORE, a member of the board of the Northern Plains Resource Council who lives in Pony, used Exhibit 6 for her testimony.

SENATOR GROSFIELD expressed concern with the concept of mitigation after the requirements of a permit have been met. He said another term would be to call it a water quality enhancement

tax. This is not a new concept because that is what the RIT tax is.

SENATOR DOHERTY asked some of the industry representatives if they felt there is any way to make the concept work.

MS. TRENK said when the mitigation idea first came up during the legislative session, it was discussed as part of the permit process and discussed as an opportunity for an applicant as a positive incentive. She said if mitigation can return to that idea as an incentive, there would be some opportunity for its use. However, the idea of mandatory mitigation is less attractive.

MR. ALLEN said it would be more acceptable if it was part of the permitting process and not another step. This would provide room for trade-offs and would maintain the highest possible water quality standards.

MR. KAKUK said the voluntary mitigation measures that can be proposed by an applicant for consideration by the department are in the rules. The social impacts must be considered by the DHES as proposed by the applicant.

MR. TOLLEFSON said the fact is that the waters of the state are being degraded. There will be more and more degradation, as growth occurs around those areas that have water. Everyone should be paying for the protection of the resource. Those who stand to benefit economically from adding to the degradation should be willing to some degree to maintain or improve water quality.

MR. NOBLE asked if the Council wished to continue to explore the issue of mitigation or decide on another option.

REP. KNOX said the issue could be discussed forever, but felt there are so many problems inherent with the concept that it is not possible for the Council to arrive at consensus. The issue was debated thoroughly in the last legislative session with SB 401.

REP. KNOX MOVED that the council drop the issue of mitigation.

REP. BIRD said both the issues of hazardous waste and nondegradation were debated thoroughly in the legislative session. She felt it is unnecessary to have a conference on the hazardous waste issues or to continue discussion on mitigation relating to nondegradation.

SENATOR GROSFIELD said the hazardous waste issues discussed during the session were very specific. However, in the

discussion of SB 401 the issues were general in nature. He supported the motion and said the rules should be allowed to work for awhile before more discussion on mitigation.

SENATOR DOHERTY said as a concept mitigation has some appeal. If there is consensus that the time for the issue is not right, there is no reason to continue the discussion.

However, SENATOR DOHERTY said there is an argument to be made that if the DHES incurs additional administrative costs as a result of attempting to issue a special permit, there is a legitimate cost that should be recovered.

The motion PASSED 7 - 3. REP. BIRD, REP. ORR, SENATOR DOHERTY, MR. BOEH, SENATOR GROSFIELD, MR. NOBLE, and REP. KNOX voted yes. MS. SOWIGNEY, SENATOR **WELDON**, and MR. TOLLEFSON voted no.

SENATOR GROSFIELD said the Nondegradation Subcommittee has completed its tasks as assigned in the work plan.

MR. KAKUK said the constitutional issues relating to nondegradation are still at issue, but that is a full Council issue.

MONTANA ENVIRONMENTAL POLICY ACT IMPLEMENTATION UPDATE -
ALTERNATIVE DEVELOPMENT

MR. EVERTS explained to the Council some of the alternatives in the environmental review process and some of the issues that agencies and the public are involved in. Alternatives have been called the heart and soul of environmental review. The purpose behind **MEPA** is to make informed decisions so the impacts are known. One way to understand the impacts is to examine alternatives.

Agencies are required to evaluate the no-action alternative with a baseline to use to compare several different scenarios complete with mitigation measures to make a project workable. The decisionmakers can utilize the information to make an informed decision on proceeding with a project and in what manner.

A reasonable alternative is one that is practical or feasible from a technological or economic standpoint and the use of basic common sense. When an agency is developing alternatives, it looks at the purpose of **MEPA** and what is the proposed action. This is developed by the agency with regard to its statutory obligations and mandates. A reasonable alternative is one that should relate to the agency's missions and goals. It also must address issues raised by the public that are significant or relevant.

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standpoint, failure to comply with the mitigation measures could impact the permit.

The **subcommittee** does agree with DHEs officials that the nondegradation statute should be allowed to function for a while before a lot of changes are made. The subcommittee at this point **is** not recommending statutory changes and feels comfortable with guidelines or letters to DHEs with its ideas relating to mitigation.

SENATOR GROSFIELD said the **subcommittee** is in need of more discussion on the mitigation issue and is not ready to make any **recommendations** to the full Council. Questions need to be addressed about the economic feasibility of mitigation, whether the applicant would develop 'the' mitigation plan, or whether the DHEs would develop a priority list for mitigation measures across the state. The issue of voluntary versus mandatory mitigation should be discussed. There is a concern expressed by industry about being held hostage by mandatory mitigation and some environmental groups are concerned that industry would purchase pollution through a voluntary approach.

SENATOR GROSFIELD said mitigation is not clearly or specifically authorized in the statutes for permitting. However, the authority does come through the **MEPA** model rules that most agencies have adopted.

MR. KAKUK said there is language in the nondegradation section of the Water Quality Act **that** allows the agency to balance social and economic benefits. The department feels it is that language that gives it authority in excess of the Water Quality Act and in addition to anything under **MEPA**.

Mixing Zone Rules

DR. ABE HORPESTAD said mixing zones were specifically authorized during the last legislative session. There were three requirements for the authorization of the mixing zone rules. EPA is also working toward mixing zone implementation. The mixing zone requirements as outlined in Exhibit 4 were developed using the three requirements in Montana law and **EPA's** suggested guidelines. The EPA has authority over **Montana's** program in terms of approval of any permits that are written. All of the **state's water quality** standards must be satisfactory to the EPA.

DR. HORPESTAD said if anything is discharged into a water body unless the body is identical, there will be an area where mixing occurs. EPA has been concerned with the general application of mixing zones because in the past the volume of the discharge and the volume of the receiving water has been computed to the total volume and determined how much of a pollutant can be in the discharge without causing a violation of the 'standards in

the receiving water after mixing. That concentration has been imposed as a discharge limitation in the permit and required the permittee to monitor the discharge to ensure compliance with that. While that is the simple way to reach the amount of pollutant, it does not necessarily protect aquatic life either in the mixing zone or that passing through the mixing zone. One of the requirements in the EPA guidelines is the ability of aquatic life to pass through a mixing zone. The EPA guidelines deal only with surface water.

DR. HORPESTAD said under the proposed rules a mixing zone permit can only be acquired from the DHES and there are 12 conditions under which a mixing zone will not be granted. There are also some general considerations that will be used each time a mixing zone permit is requested. The proposed rules by the state deal with ground water in addition to surface water so they are more extensive than the EPA guidelines.

The draft rules had been sent to about 600 people and had been noticed in eight newspapers. Only a few comments had been received, but many are anticipated before the public hearing. DR. HORPESTAD said there could be significant economic impacts on municipalities and industry because of these rules.

SENATOR GROSFIELD asked what was currently happening to the general nondegradation rules. DR. HORPESTAD said about 135 written comments had been received with 413 different concerns identified. DHES staff is working through the comments and sending responses with about 350 sent so far. There is a 250-page transcript from the hearing and staff is going through it to address the oral comments from the hearing. There will be a cost of \$35 per page to publish the responses.

Agency personnel is working on the economic analysis and impacts of costs relating to septic systems and municipal sewer treatment and what the proposed rules will do in that area.

MR. TOLLEFSON asked if there is a reason for the difference in the level of public involvement in the drafting of the two sets of rules other than timing. DR. HORPESTAD said the mixing zone rules need to be done in conjunction with the nondegradation rules, but that was not realized early enough in the process. The two sets should have been done at the same time, but there is a lack of resources that also prevented that from happening. Priorities have not been set for the staff because of the existing vacancy of the position of Bureau Chief.

MR. NOBLE asked if it will be difficult for subdivisions and industry to comply with the rules. DR. HORPESTAD said it probably would not be difficult, but it will be expensive.

SENATOR GROSFIELD said the potential impact of the mixing zone rules on cities and towns could be significant and those entities have not been represented at the subcommittee meetings. The subcommittee members felt it was important for DHES to hold a meeting with representatives of local government to discuss those possible impacts.

SENATOR GROSFIELD said the subcommittee recommendation was that a letter be sent from the Council to the DHES asking that an informational meeting with discharge permit holders, particularly local governments, be held so they understand these impacts.

SENATOR GROSFIELD said the mixing zone rules have many terms that are not defined. The subcommittee recommendation to the Council that it request the BHES to consider including a definition section in the rules.

MR. NOBLE asked if the DHES would object to extending the comment period.

BOB ROBINSON, DHES Director, said the decision would have to be made by the Board but an extension should not affect the final decisionmaking process.

MR. TOLLEFSON said the Council should formally ask rather than suggest that the comment period be extended. He said the issues are very complex and people need more time to understand them.

MR. TOLLEFSON MOVED that the EQC formally request an extension of the comment period on the proposed rules. The motion PASSED.

SENATOR GROSFIELD MOVED that the full EQC recommend to the BHES that a definition section be added to the mixing zone rules and that the DHES hold an informational meeting for permit discharge holders. The motion PASSED.

SENATOR GROSFIELD asked if there are legal problems with the BHES adopting one set of the proposed rules and not the other set. DR. HORPESTAD said it causes severe practical problems because if there is not a working definition of mixing zones, it would be impossible to practically apply the nondegradation rules.

MS. SOWIGNEY said it is frustrating because the mixing zone rules have been an issue since the bill passed the Legislature. Somewhere in the department there was a decision to wait on the mixing zone rules, but now DHES personnel say both sets of rules should have been done at the same time. The mixing zone rules are complicated and people do not understand them. She was concerned that both sets of rules were going to be adopted before the mixing zone rules had proper public scrutiny.

DR. HORPESTAD agreed with MS. SOWIGNEY, but said there is a lack of resources in the bureau to do all of the work.

MS. SOWIGNEY said if the mixing zone rules are adopted without proper review, there will be even more problems in the future for the department to face. There is a question as to whether the mixing zone rules process has complied with the Administrative Procedures Act.

SENATOR WELDON asked how many permit holders would be involved. DR. HORPESTAD said there are about 350 surface water discharge permits and about 40 ground water permits. About 200 of those holders are on the mailing list that received copies of both the mixing zone rules and the nondegradation rules.

DHES Enforcement Action Report

MR. KAKUK reviewed the EQC's involvement with the issue of enforcement of the Water Quality Act. He said it was addressed under Issue 6 of the SJR 29 Study Plan. The issue was first discussed this interim at the September 1993 EQC meeting, specifically dealing with the **Pondera** Colony hog operation.

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MR. ROBINSON referred to Exhibit 5 and said there were approximately 2,000 violation reports received by the DHES over the last three years. About half, or 1189, had been followed up by on-site inspections. He said he was surprised that only half had been inspected and said that staffing has a lot to do with it. Additionally, some reports are handled by other means such as county sanitarians and telephone contacts. He said he expects the role of county sanitarians in DHES enforcement actions to increase in the future.

MR. ROBINSON, referring to question 4 of Exhibit 5, "**who decides whether to follow up on a violation report**", said the first decision is usually at the enforcement section level, although at times someone higher up the chain may get the first call and make a decision to follow up. Roughly 29 of the reported violations have resulted in the completion of a Violation Report Form (VRF). He said that to put that figure into perspective, the emphasis within the DHES is on compliance - getting the people to understand they are in violation, getting them to change their actions without going to the enforcement step. Most people cooperate at that level although some more

APPENDIX 11

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EOC meeting 12120194

SJR 29 Water Quality Nondegradation Study

Panel Discussion -- Constitutional Issues

MR. KAKUK reviewed the SJR 29 Study and said that this was the final issue of the study. The Council was not being asked to make a decision regarding the constitutional issues involved with the new nondegradation policy. Rather the intent is to provide more information for the Council members, other members of the legislature, and the public. He said he had a number of bill drafts regarding the nondegradation issue so it was obvious that this issue was not over.

MR. KAKUK introduced the panelists: Professor John Horwich, University of Montana School of Law; Allen Joscelyn, private attorney in Helena, and Grant Parker, private attorney in Missoula. He said that all the panelists had experience in the issue of water quality in general and nondegradation in particular and had been involved in the issue during the 1993 session.

PROFESSOR HORWICH said he would attempt to set the stage for the ensuing discussion regarding the nondegradation policy and the constitution. He handed out and reviewed Exhibit __, an excerpt from the state constitution and nondegradation statutory language for reference.

Professor Horwich said the question presented is whether the new nondegradation policy is consistent with the constitution. Questions not up for discussion today include: Are the rules adopted by the BHES consistent with the statute? and; Does the state nondegradation policy fulfill the requirements under the Clean Water Act as enforced by EPA?

The first question regards self-execution. Does the constitution language at issue exhibit a clear limitation on the legislature or does it impose a clear enactment in itself. If it does, then that article is self-executing. If the language requires legislative action, then it does not mean anything until the legislature acts.

For the most part the relevant constitutional sections at issue today are problematic. It is not clear whether they are self-executing or not. For example article 9 section 1 says the legislature shall provide adequate remedies to prevent unreasonable depletion and degradation of natural resources. Is this a limit or does it clearly impose a requirement. Most constitutional scholars would say that this section does not give a citizen a right of action against the legislature for not complying with it. It has moral authority and the legislature should comply with it, but it would be difficult to make them do it. The constitution could say that the legislature shall pass no law allowing degradation, as it

does elsewhere, but it does not.

These are significant underlying questions Professor Horwich said. If the constitutional provisions are not self-executing, then we could all go home. But let's assume that they are self-executing for today's discussion.

The Constitution says that the state shall maintain a clean and healthful environment. So if the state allows for degradation that does not make a stream either unclean or unhealthful then it could be argued that is OK under the Constitution.

The notes from the constitutional convention support a strict interpretation of the language. Water degradation was to be prohibited. In fact the "environmental life support system", which includes at least air, land, and water, may not be degraded. But natural resources may be reasonably depleted or degraded. The constitutional drafters saw a distinction between "natural resources" and the "environmental life support system".

Another issue involves what constitutes degradation. It is not self evident from the constitution. It could mean that any increase in a parameter is degradation or it could mean pollution that interferes with an existing use or that adversely affects human health or the environment. It is not clear from the constitution or the convention notes. He said that the language referring to the legislature means to him that the legislature has some discretion, within limits, in defining the term.

Given this brief discussion, is the new nondegradation policy consistent with the constitution, again assuming that the language is self-executing. The statutory definition of degradation takes the scientific approach and is probably OK even by excluding nonsignificant activities from the term. The legislature probably has that authority. However, the state also allows degradation of water if certain criteria are met. This probably does not comply with the constitution. The constitution does not grant authority to create a distinction between reasonable and unreasonable degradation for **elements** of the environmental life support system. This is what the new nondegradation policy actually does. This flies in the face of the clear prohibition of environmental life support system degradation and is subject to constitutional challenge.

Mr. Parker said he has written a response in the Montana Law Review to Professor Horwich's article published in the same issue. Mr. Parker read from the constitutional convention notes, Exhibit __, saying that the drafters thought they had fixed the pollution problems with the language in the constitution. He said that did not happen.

He agreed with Professor Horwich that the drafters drew a clear distinction between the environmental life support system and natural resources. He said that the constitution was clear that it means what it says and is self-executing. The drafters drew a line and said no more degradation of the environmental life support system. It would be possible to permit a subdivision as long as the overall environmental life support system was improved. This was the preferred method of complying with the constitution.

Another approach, and the one taken by the 1993 legislature, was the definitional approach. The legislature simply said that certain types of pollution were not degradation.

He said he did not agree with that method and he was not sure what the courts would say about it. He thought the legislature did not have that much discretion.

The drafters could have drawn a distinction between reasonable and unreasonable degradation but they did not. They said no degradation of the environmental life support system. Mr. Parker asked if a court in Montana would hold that the article 9 section 2 was self-executing. He thought they would because it was clear the drafters understood that the language meant something.

Additionally, article 2 section 1 identifies certain inalienable rights. Most constitutional scholars find these rights also to be self-executing.

Mr. Joscelyn said the focus of his involvement with the issue had not been on a constitutional level, but on a project-by-project practical approach. This will influence his presentation. He has to make an assumption that the old and new nondegradation policies are constitutional. One of the reasons that he accepted the invitation was to learn more about the constitutional issues from the other panelists.

He said that it appeared that all the panelists agreed that the constitutional language could be interpreted to be an absolute prohibition on degradation of any kind to the environmental life support system. He said that they could also all agree that there is no way that society could reach that goal and still function. What does the language mean then Mr. Joscelyn asked. None of the panelists can adequately or definitively answer that question. Therefore, the question is how do we do the best we can with what we have.

Mr. Joscelyn said that the language the drafters should have used if they really meant what they appeared to be saying should have said that no more people will be allowed into Montana after that date. He said that what the framers tried to do was to set a very high standard. But they also knew that the courts and the legislature would use common sense in interpreting the terms. There really are no absolutes. The constitutional language, when looked at under a microscope, is filled with jagged edges. There is no simple, easy way to address all those issues.

Mr. Joscelyn said that the definition of degradation will change depending on the viewpoint of a specific species. What is degradation to one is enhancement to another. Whose viewpoint are you using to define degradation.

Constitutions give you guiding principals and must be interpreted using common sense.

MR. NOBLE opened the discussion to questions from the Council.

SENATOR DOHERTY asked if Mr. Joscelyn used the terms environmental life support system and natural resource interchangeably or did Mr. Joscelyn see a difference.

Mr. Joscelyn said that they clearly were different and he agreed with Professor Horwich on that point.

SENATOR DOHERTY asked Professor Horwich if the constitution said we could not

degrade the environmental life support system.

Professor Horwich said that was correct.

SENATOR DOHERTY asked if the legislature could define "degradation", "environmental life support system", and "adequate remedy", in anyway it wanted.

Professor Horwich said that the legislature's discretion is somewhat constrained but if the legislature does its homework the courts will grant deference to the legislature, but it is not guaranteed.

SENATOR DOHERTY asked what the supreme court would look at, what kind of evidence would someone put on to prove whether the remedy was adequate or not.

Professor Horwich said that it was clear that the state supreme court would make the call as to whether the law was constitutional. The evidence required would be difficult to produce to prove that the remedy was inadequate. He said that as long as the legislature does not act to define degradation or provide a remedy, there is not much of a chance to challenge that non-action, but once the legislature does step into the arena then the questions of adequacy etc become relevant.

Mr. Parker said that there were a number of ways of getting this issue to the courts. One would be to wait until you get a proper factual situation and wait for the state to implement the questionable policy and the challenge it. Another way would be to use the language of the constitution itself to bring the state law to court.

REP. KNOX asked Mr. Parker about his earlier hypothetical about the subdivision. How could a subdivision that was contributing nitrates into the ground water enhance the overall water quality of the basin.

Mr. Parker said that the constitution does not say that no more people are allowed into the state. It does **allow** pollution, but they drew a line at June 26, 1972 and said we will not allow any more degradation. Our resources are polluted enough. Mr. Parker said he grew up in Missoula and remembers the terrible state of the Clark Fork river. But pollution is allowable as long as it balances out and the overall effect is a cleaner resource. For the subdivision, it may be that a large scale treatment works will be built instead of many individual systems. There will still be nitrates in the ground water but less than before.

MR. BOEH asked how natural degradation, **e.g.**, a landslide in Glacier National Park or a wildfire, is handled under the constitution.

Mr. Joscelyn said he had no idea. He said he thought the constitution was focussed on man caused pollution as opposed to natural pollution. However, if natural pollution contaminates a stream, for example, to such an extent then that will limit human activities.

SEN. **GROSFIELD** asked if the environmental life support system components of air, land, and water could never be thought of as natural resources and therefore liable to reasonable

degradation.

Professor Horwich said that the drafters said that whatever else may be included in the environmental life support system it at least included air, land, and water. They obviously contemplated that the courts would interpret the term. He said that in his reading it was not clear to him that the terms were mutually exclusive. Air, land, and water may also be natural resources. The term environmental life support system, is not found in other environmental statutes.

Mr. Parker said that while never deciding that issue, the drafters did impose a higher standard of protection on those resources - air, land, and water.

SENATOR GROSFIELD asked if the environmental life support system was within the boundaries of Montana or within a particular watershed for example. Could you improve something in Miles City for example to take care of pollution in Missoula and say that you were improving overall the environmental life support system.

Mr. Parker said that was an issue that needed to be decided by the legislature or the courts. He would like to see it kept to a basin specific approach.

SENATOR GROSFIELD said Article 2 section 3 talks about inalienable rights, a right to a clean and healthful environmental and pursuing life's basic necessities, protecting property etc. Why is all the emphasis on the first clause when some of the other rights may in fact cause degradation of the environmental life support system. He said that technology had made great strides and now we were talking about measuring in parts per trillion. Don't you have to look at the whole thing in context with other provision of the constitution. Is there some internal inconsistency in that section.

Professor Horwich said that constitutions in particular are different from legislation. They are more guiding principals rather than legislation. Some people have argued that the order of the rights in article 2 section 3 is important and the fact that the right to a clean and healthful environment is first means that is most important. He also said that if the clean and healthful language is self-executing at all, is also different in that it does not say that in any particular instance you may not degrade. It may say that as part of the state maintaining a clean and healthful environment we can permit this project so long as over all we are improving the quality environment.

Mr. Parker said that it is a goal to maintain a clean and healthful environment but it is more than that. This state has that mandate in the constitution. It is the **law** of the land. He said he believes that when the drafters put that language in to maintain and improve the environment and prevent degradation it became a fundamental law in Montana. That is the responsibility of the legislature and the citizens to accomplish this.

SENATOR GROSFIELD said even if the degradation is one more part per billion.

Mr. Parker said that the drafters said that on the whole we will allow no more degradation. One of the reasons we have a healthy economy is because we have great reputation for a clean environment. The drafters said this is what we want Montana to be like. That

doesn't mean that we're not going to have any pollution in the state but they did draw a line and said no more. From here on we are going to get better.

MR. TOLLEFSON asked Mr. Joscelyn if social and economic considerations were included in the term environmental life support system.

Mr. Joscelyn said that he puzzled over the definitions and is not sure how far the term can be defined. The environmental life support system overlaps with the economic life support system. In fact they are the same for agriculture and other businesses. Someone could legitimately contend that what one person considers degradation another would see as enhancement. It was important to keep the overall picture in mind.

Mr. Parker said that it was clear that the air, land, and water were included in the term environmental life support system. If the legislature wanted to put something else in the box it could. But right now he did not think economic factors were not included.

REP. KNOX asked Professor Horwich about his initial distinction between the environmental life support system and natural resources and his subsequent response to SENATOR **GROSFIELD's** question about water being maybe both a component of environmental life support system and a natural resource. If water was in fact a natural resource then the legislation allowing some reasonable degradation of water under SB 401 was allowable.

Professor Horwich said while the terms are not mutually exclusive, it is clear that the stricter protection of the environmental life support system will trump the protection of natural resources. He said he did not think that the legislature could pick and chose and say for these purposes water is a part of the environmental life support system and for these purposes water is a natural resource. He did not know if some bodies of water could be classified as environmental life support system and some not or on what grounds.

REP. KNOX said that the discussion had left a lot of unanswered questions in his mind.

Professor Horwich said one thing all the panelists could agree on was that they did not know the answers to these questions. The answers could only come from the supreme court after they interpret what the constitution means in a particular case.

Mr. Parker said the legislature also has the responsibility to carry out the mandates of the constitution. He did not think the legislature should wait for a supreme court case to follow the clear constitution mandates.

SENATOR **GROSFIELD** asked if the environmental life support system referred only to human beings or did it include plants and animals. Did the constitution give any guidance on this.

Mr. Parker read from the constitutional convention notes and said that the drafters were clear that they avoided definitions to avoid being restrictive. The term *ells* is all encompassing including air, water, and land, and what ever interpretation is given by the legislature or the courts it is clear that they can not be degraded.

SENATOR GROSFIELD said that the drafters then authorized the legislature to define the term environmental life support system. In other words could the legislature say that the environmental life support system refers only to human beings and not fish.

Mr. Parker said that his interpretation was that the term environmental life support system did not say human life support system but the legislature could define which resources were included in it.

SENATOR GROSFIELD said that he thought that environmental life support system for humans and environmental life support system for amoeba were two entirely different concepts.

Professor Horwich said he agreed with Mr. Parker that the argument that the legislature could define out non-human life from the term would be difficult to carry. The courts have struck down legislative attempts to define terms in the constitution if they go too far. Here again, the legislature has a choice between acting first and defining the terms in which case the courts will give them substantial difference, or waiting until after the fact when the courts will define the terms for them.

Mr. Joscelyn said that SENATOR **GROSFIELD's** question of view point was interesting. The grazing issue was a good example of conflict between species and the definition of degradation.

SENATOR DOHERTY said that the constitution does not refer to amoeba but does place clear responsibilities of the people of this state.

Mr. Parker said that the drafters wanted to hand future Montanans a better Montana. That what they wanted to do was to improve the environment and this is the language they chose to do that with. This language is now our fundamental law.

Mr. Joscelyn said that companies have been cited for degrading a stream on the basis of changing algal growth so the issue is not esoteric.

SENATOR DOHERTY asked how he could be allowed to degrade the coal, which is a natural resource, without degrading the land and water which is part of the environmental life support system. The constitution obviously allows him to mine coal but it will not allow him to degrade the land or water.

Mr. Parker said the only answer he can see is to look at the bigger picture and say that the depletion of the coal resource will require the improvement of something else somewhere else.

SENATOR GROSFIELD said that all the panelists had said that using the term degradation was a little troublesome and it might have been better to use a different word in the nondegradation statutes. What word would they suggest.

Professor Horwich said that the constitution says you may not degrade the environmental life support system but the nondegradation statute say you may degrade under certain

circumstances. It may have been better if the statute had said "deterioration" instead of degradation.

SENATOR DOHERTY asked if changing the statute now would make any difference. Wouldn't the courts understand that this was merely camouflage.

Professor Horwich agreed and said that a cosmetic change would probably be inadequate.

MR. NOBLE opened the discussion to public comment.

DR. ABE HORPESTAD, DHES Water Quality Division, said that in his 22 years of experience, distinguishing the environmental life support system from anything else is clearly artificial. Everything is part of the environmental life support system. Everything is hooked together.

MR. NOBLE thanked the panelists and said that this issue would be discussed during the next session.

MR. KAKUK handed out and briefly reviewed the draft nondegradation report for Council review and comment. Exhibit ___ .

Outstanding Resource water

MR. KAKUK said that the BHES passed rules included in the nondegradation rules that allowed the state to identify outstanding state resource waters. Those rules have been challenged to the Administrative Code Committee as being in excess of statutory authority. The Code Committee has decided not to address this issue because of pending legislation requested by SENATOR GROSFIELD. This will remain an issue during the next session. He said there would be no action required by the council on this issue.

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MR., KAKUK said this was the only area in which everyone statewide agreed. All of the public comment indicates that the arguments need to be brought out for discussion.

The final issue was that of the effectiveness of the DHES rulemaking process. SENATOR GROSFIELD said the informal public hearing process that is being used is a different, innovative approach to rulemaking and has produced positive comments.

SJR 29 *Nondegradation Study*

X SENATOR DOHERTY said the **public** is concerned about the issue of enforcement and the subject keeps coming up at public forums.

MR. FRASER said enforcement is a difficult issue. Without addressing nondegradation, the Water Quality Bureau investigates between 400 and 500 complaints annually. The staff tries to do at least a one-time inspection of each complaint and the staff is rarely ever able to go back to determine whether the violator corrected the violation as ordered by the department. Water Quality Bureau personnel have so many high priority enforcement actions that there is a two-year backlog of formal actions that have received no action at all.

MR. FRASER said the question needs to be addressed of what action to take with sources that have been causing degradation since 1971 and whether they are in violation of the Water Quality Act. The Board of Health has issued very few authorizations and there are many sources that have degraded state waters.

MR. FRASER said the new rules will probably make thousands of people violators of the Water **Quality** Act and the DHES will be unable to take enforcement action. He said the Legislature may have to examine the Water Quality Act and make the **determination** as to which pre-existing sources need to be addressed in some manner.

SENATOR DOHERTY said it would be helpful if staff could prepare a chart of Water Quality Bureau personnel as was prepared for the hazardous waste programs.

SENATOR GROSFIELD asked what kind of enforcement there has been for those projects with authorizations from the Board of Health. MR. FRASER said for municipality authorizations conditions of the permit are used which also provide tools for enforcement.

SENATOR DOHERTY said if adding SB 401 to the **bureau's** duties causes any increase in workload, the issue needs to be addressed.

SENATOR GROSFIELD said the full **Council** will make all final decisions. If the Council adopts the Subcommittee recommendations for the study plan, there would be six issues. He felt the council needed to decide whether it wanted to comment

on the next set of draft rules. He did have a question as to whether there is adequate staff time to accomplish all of the tasks the Council would like to do.

MS. SCHMIDT said the Council would need to revisit the work plan at the end of the meeting and discuss changes before final adoption. At that point, it will be more clear as to what time constraints, if any, there are on the staff.

SENATOR GROSFIELD MOVED that the Council endorse the study plan as presented by the **Subcommittee**, including Issue 5, the effectiveness of the rulemaking process, and Issue 6, the report on WQB staffing and enforcement capability.

MR. TOLLEFSON said the issues as presented were done by **timeframe** reference rather than priority of importance. SENATOR GROSFIELD agreed saying the first four issues could be done one by one while issues 5 and 6 would be more ongoing.

MR. HAWKS said enforcement is the most important issue of the study. Unless proper enforcement can be implemented, all of the regulations and laws will not work. There are people who will violate the law knowing there is a lack of enforcement.

Further, MR. HAWKS said the DHES spent a year drafting a draft regulatory enforcement procedures manual. It is not being used even though there are many good procedures in it. He suggested the Council obtain a copy of the manual to determine whether there are good ideas in it that should be implemented by the DHES. Another idea MR. HAWKS felt should be used is the **concept** of the bad actor listing of violators of state and federal regulations.

MR. JENSEN re-enforced the comments from MR. HAWKS stating that the state spent a great deal of time and money developing the enforcement procedures manual. The DHES said the document would be available for public discussion and review. It was never made public and individuals asking for copies have been told it is not available.

The motion to adopt the study plan PASSED.

DR. HORPESTAD agreed with MS. SOWIGNEY, but said there is a lack of resources in the bureau to do all of the work.

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reluctantly than others. The VRFs identify the more serious problems where people are less willing to take care of the problem on their own.

MR. ROBINSON said he was not sure what the chain of command had been during the history of the DHES, but since he had been there the system was when a serious action required the completion of a VRF, it is signed off by the section supervisor all the way up to the director. He said one of the criticisms of the DHES when he got there was that sometimes the front office did not know what was happening in some high profile areas. So the policy that he enacted is if there is a violation, the supervisor, bureau chief, division administrator, and ultimately the director all sign off on the VRF. Not many VRFs have come through since he has been director.

MR. ROBINSON said 13 of the VRFs have resulted in penalties and seven of those had been modified throughout the process. Modifications occur at every step of the process which is why internal review is important. He said he learned while working at the Department of Justice that if an agency takes a criminal action, it was important to have all the evidence and a strong case. Courts do not look kindly on agencies when they are leaning on citizens so the case must be almost infallible.

MR. TOLLEFSON asked how many complaints have yet to be investigated. STEVE PILCHER asked if MR. TOLLEFSON wanted the number of complaints to be investigated or the number of investigations to be followed up on.

MR. TOLLEFSON said he would like the answer to both questions. MR. PILCHER said he did not have that figure but they would provide the information.

MR. TOLLEFSON asked what the time frame was between a complaint and an inspection. MR. ROBINSON said that was a function of staffing and the seriousness of the violation. Human health concerns tended to move rather quickly through the process.

KEVIN KEENAN said the target was three days between a complaint and a response, an inspection within two weeks of a complaint, and the completion of a VRF within six weeks if warranted. The enforcement section was meeting its target for response and inspections. The short fall between number of complaints filed and number of VRFs completed was a result of the number of complaints that come to the DHES by means other than phone calls, e.g., self monitoring, routine DHES inspections. Enforcement bureau inspections are completed on time but they are rarely able to do anything about them due to lack of resources. He had the resources to do about 400 inspections a year, but that was all. There would be no time for follow up.

SENATOR GROSFIELD asked if the Water Quality Act required the DHES to respond to every complaint.

MR. KEENAN said the basic intent of the Act was that every person had the right to apply to the DHES concerning a potential violation of the Act. The DHES then has the responsibility to fully investigate those concerns and make a written report. He interprets this language to mean that in most situations a full investigation of a complaint requires a field investigation.

SENATOR GROSFIELD asked what percentage of the 1100 complaints were real water quality concerns. He has heard that many complaints are frivolous in nature.

MR. KEENAN said more than nine times out of ten, regardless of the motivation for the call, a field investigation finds a violation. All of these violations are not the ruin of western civilization but they are violations of the law and they legitimately deserve attention and correction. He disputed data that would show that many of the complaints are frivolous. His experience does not support that claim.

SENATOR WELDON asked how complaints get to the enforcement section and whether there are referrals'from local governments. He assumed that most people would start by calling their county office with a complaint.

MR. KEENAN said that ten years ago they got 80 to 90 complaints a year. The DHES has advertised the fact that they will respond to complaints and this has resulted in an increase in complaints. They receive complaints from all levels of government including referrals from the federal EPA.

MS. SOWIGNEY asked for explanations of some of the terms used to describe the modifications of penalty assessments and whether the six or seven penalties apparently approved were collected and if so, what was the total dollar amount received by the state.

MR. ROBINSON asked MR. KEENAN to respond to the question of penalty amounts collected, but the DIRECTOR did note a pending settlement with the Butte Water Company for \$900,000 and a penalty against Noranda for about \$150,000.

MR. NOBLE asked MR. KEENAN about other penalties collected and their amounts.

MS. SOWIGNEY said she did not want specifics, but just a general idea of the amount of money collected over the past three years.

MR. KEENAN said almost none of the actions listed were filed by the DHES as civil complaints. He said the Green Meadow Country Club action was filed and settled without any monetary penalty. The Sleeping Buffalo action he believed had also been filed, but that was a hybrid water quality complaint and it was actually being handled by another bureau within the DHES.

MS. SOWIGNEY said that according to Exhibit 5 13 penalties, were recommended and seven were modified. That leaves six actions where the suggested penalty had been approved. She asked if the penalties had been assessed and collected.

MR. ROBINSON asked MR. KEENAN if those actions had been finalized.

MR. KEENAN said he had spent the morning with 50 fifth grade students at a local elementary school. He was impressed with their questions, e.g., why do people throw cigarette butts on the ground when they know they will not degrade and someone will have to pick them up. MR. KEENAN said there is great future in this state for preventing environmental damage because these kids at age eleven are thinking deeply about this issue but he did not think there was any future in his continued participation in this discussion. MR. KEENAN asked to be dismissed.

MR. NOBLE thanked MR. KEENAN.

MS. SOWIGNEY asked about the terms used in Exhibit 5 referring to penalty modifications.

MR. ROBINSON referred to the situation in Cascade. Due to the duration of the violation and the potential magnitude of the pollution to the Missouri River the penalty was about \$12,000,000. He questioned if \$12,000,000 was an appropriate penalty for the town of Cascade. He said that was the type of issue that caused the penalties to be modified. He said the same situation existed at Zortman-Landusky. He questioned whether the DHES should go back to the mid-1970s to assess per-day violations. The Department of Transportation was deleted as a defendant in another case because the general direction from the Governor's office is to get them into compliance so the administration does not sue itself. He also referred to Meadow Gold Dairy, Deerfield Colony, Noranda Minerals, Cenex Refinery, and Walker Subdivision as situations where modifications have been made to enforcement actions.

MR. TOLLEFSON asked if the new nondegradation rules would increase the DHES enforcement workload. He also asked if there was a role for increased public involvement in enforcement actions.

MR. ROBINSON said he believed there was always a need for the public to observe and report to the regulating authority. He said the 1993 Legislature provided additional staff in the Environmental Sciences Division. The DHES also received permit fee authority for nondegradation decisions. They will staff accordingly as the nondegradation program comes on line.

MR. ROBINSON said he could not promise to be on top of every nondegradation violation, just like they could not be on top of any other violation, but they will take care of the problems when they become aware of them.

MR. TOLLEFSON said then the DHES did not expect to be overwhelmed due to nondegradation enforcement.

MR. ROBINSON said the enforcement unit was already stretched to the limit. MR. KEENAN had continually expressed the fact that the amount of work and the amount of resources do not match. The DHES will do the best they can given the resources they have.

RICHARD PARKS, NPRC, said he was struck by the tremendous difference between about 2000 complaints, 1100 from the public, and 29 VRFs completed. Apparently a VRF must mean something other than what it means in a logical sense. He said he would think that a VRF would mean that an inspector went out and found a violation. If, as MR. KEENAN said, 90 percent of inspections reveal actual violations, he would expect 90 percent of the inspections to have VRFs completed. He said it appears that the DHES really means that out of 1100 inspections they have 29 indictments as opposed to reported violations. He asked for an investigation as to what constitutes this deficiency and why.

MR. PARKS said he understood that the objective is compliance, but it is very hard to get compliance when there is only an infinitesimal chance that anyone will ever be held accountable to comply by having a VRF completed. Additionally, there was another way of reading the "civil penalty amount of concern" phrase in Exhibit 5. He said it means "let's go ask the perpetrator what he can afford to pay without seriously crimping his activities", and this is where the penalty level is set. The penalty should be relative to the offense and the way to get people to comply is to make them very aware of the severity of the penalty.

MR. PARKS referred to the draft enforcement policy document prepared by the DHES that stated settlement negotiations prior to the filing of civil actions are a substantial complication to the DHES and ultimately an impediment to efficient resolution to the cases involved. MR. PARKS said the draft document goes on to say that in the absence of a rigid procedural framework, pre-filing negotiations quickly evolve into an opportunity for the defendant to refute the DHES's body of evidence, informally complete case

discovery, examine and criticize DHES personnel and policy, invoke political pressures, and delay indefinitely the actual filing of the complaint in court with promises of potential settlement. MR. PARKS said the conclusion was that the DHES must show a commitment to the judicial complaint filed. MR. PARKS asked if MR. ROBINSON has looked at the draft and if it was going to be implemented.

MR. ROBINSON said he has read the document and that it has been discussed. He said the Administrative Procedures Act gives the public an opportunity to challenge decisions made by a regulating agency. He said he agreed with the statement that the regulated community will challenge the appropriateness of enforcement actions and that is just part of the territory. That is why as he stated earlier he thinks it is important to build a case before taking an enforcement action. That is also why internal DHES review is important. It is important to have the director's support for an enforcement action. He asked MR. PILCHER to respond to the issue of the 29 VRFs completed in comparison to the number of complaints received.

MR. TOLLEFSON asked if MR. ROBINSON thought that the high quality waters of the state were adequately protected under the existing enforcement process and if the situation would change with the new nondegradation laws.

MR. ROBINSON said the state was adequately protecting the resource, but they could do a better job. He said the DHES was doing as good a job as they can, or pretty close, with the staff that they have. There were some improvements that they could make in the DHES overall, including the Water Quality Bureau, the enforcement section and the director's office. They are currently addressing some of those issues through the proposed restructuring plans that will speed up the lines of communications and better define the various roles of enforcement monitoring, licensing, permitting, and other activities. He did not think that the DHES was dropping the ball. He also said that the nondegradation process would eliminate a lot of instances where degradation was currently occurring. It would be rough at first but over time the situation would improve under the current nondegradation requirements.

REP. COCCHIARELLA asked if even with adequate staff and funding, political pressure could prevent adequate enforcement and whether MR. ROBINSON could prevent that from happening.

MR. ROBINSON said he did not think that good enforcement would be undone by politics. He thought people would attempt to influence the DHES position through political pressures. However, if the DHES has done its homework, politics will not influence the enforcement actions. Enforcement actions need to

be fair, swift, understandable by the regulated community, and firm.

REP. COCCHIARELLA asked if there was something that the EQC could do as a legislative body to ensure that politics did not get in the way of true enforcement of the Water Quality Act.

MR. ROBINSON said he did not think politics got in the way. Some people would like it to get in the way but since he has worked in state government most legislators will call in regard to a constituent's problem and if the DHES has done its work, most legislators will listen. There is always room for public representatives to have access to the DHES to discuss these issues. If the DHES is wrong, they will correct it and if they are right, they will stick to it.

REP. COCCHIARELLA said that representative government has decided to pass laws that need enforcement, but at the same time representative government has also chosen to cut budgets to make it difficult for public employees to do their work. Additionally, those under supported employees must also face political pressures and the end result is that the laws are not applied fairly and consistently to all citizens of the state.

MR. ROBINSON said he deals with those employees every day and they are first class professionals and do a good job. If there are processes in place so that the director's office can sign on, early on, then they will have support and they will not have to worry about being overruled.

MR. PILCHER addressed MR. PARKS' earlier question regarding VRF completion. He said the confusion probably comes from the terminology being used. Any correspondence regarding the roughly 1100 complaints would constitute a record of that violation, if there is one, by the DHES. The VRF summarizes the appropriate information including past violations and other general information on the violator. It is used in those cases that the program staff feel are of such significance that they need to be handled through an administrative order or a civil complaint. An administrative response can take many forms. Many of these complaints are resolved, compliance is achieved, at the time of inspection. Other times a letter, certified or otherwise, may resolve the issue.

MR. PILCHER said that unfortunately, MR. KEENAN has only a couple of people to do complaint investigation and two attorneys. The attorneys are spread very thin with other duties, including nondegradation and rule adoption responsibilities. They simply cannot take civil complaint enforcement actions on every complaint. It may not be appropriate. MR. KEENAN's job is to weigh the workload and to make a determination as to which of those violations require the type of actions associated with VRFs

that will accomplish the objective mentioned, deterrence and compliance. He said there are more violations that could be addressed through complaints seeking penalties but the resources have to be there to put together a good solid case. Enforcement, as most issues in the regulatory field, is more complicated than its has been in the past.

MR. PARKS said that it seems to him that a VRF should be completed at every violation.

MR. PILCHER said that every inspection had a written record of the situation prepared to justify the DHES enforcement action decision.

MR. NOBLE congratulated the DHES on their handling of an asbestos removal enforcement problem encountered by one of his constituents. He said the DHES', and especially MR. PILCHER's, action renewed his faith in government.

MR. TOLLEFSON asked why the Council is discussing this if there was not a problem with enforcement. He thought that there actually was a problem.

SENATOR GROSFIELD said the upcoming Legislative Auditor's comments may address the issue.

REP. COCCHIARELLA asked how many cases the attorneys were backlogged. MR. PILCHER said that information would be provided.

REP. COCCHIARELLA asked if MR. PILCHER would like the EQC to leave the meeting thinking that everything is "hunky dory" and that there is no problem with enforcement.

MR. PILCHER said he would run the risk of disagreeing a little bit with the Director. It was MR. PILCHER's professional opinion that there was work that had to be done in the enforcement area. Enforcement is probably one of the most difficult parts of any regulatory program. Enforcement is not as easy as it used to be. The DHES has wrestled with the draft enforcement document referred to by MR. PARKS for quite some time. There is a definite need to finalize that report so there is an enforcement procedures policy in place that will allow the DHES to better utilize the limited enforcement resources they have. It is a matter of finding the time to sit down and finalize the report. There are a lot of opinions as to what the enforcement policy should look like. The Director has stated that he has read the report but they just have not had time to finalize it, but it has to be done.

MR. PILCHER said it should be pretty apparent that there is additional work to be done in the area of enforcement response in water quality. A lot of that showed in MR. KEENAN's frustration.

It is difficult when that is the sole purpose of a job and the employee does not feel able to live up to the expectations of the public. The DHES needs to do a better job with the system that they have. They have adequate enforcement tools and it is just a matter of fine tuning the system. The DHES already has more than it can handle and nondegradation will add to their load.' He agreed with the Director that in the long term, nondegradation will change attitudes and more people will understand what constitutes a Water Quality Act violation. Increased education equals increased compliance. MR. PILCHER said that the DHES was going to be stretching its resources and felt there was a need for the EQC to discuss the issue.

JIM JENSEN, Montana Environmental Information Center, said the reason the EQC was talking about enforcement was because there is none. Some examples he used included the Doig ethanol plant in Ringling. That plant has been in violation many times and the violations have been reported in the newspaper and the plant continues to operate. MR. JENSEN said that an EIS was finally requested by a concerned rancher when the plant needed a permit amendment. The law is not being enforced.

MR. JENSEN said the politics MR. ROBINSON talked about are happening. MR. JENSEN said that MEIC was suing the DHES regarding a politics problem at the DHES. They violated the law at the Flathead County landfill. The landfill is in violation of the landfill statute. The technical staff at the DHES made a careful finding and told the landfill operator that they were not in compliance with the law. The operator met with MR. ROBINSON, and with no public involvement or notice of any kind, MR. ROBINSON recommended that they not be fined. MR. JENSEN said MR. ROBINSON said it was his opinion that everybody was wrong and the operator did not have to comply with the DHES order. MEIC does not take lawsuits lightly but if the public is going to be protected, if there is going to be any enforcement, groups like MEIC are going to have to go to court to make it happen.

MR. JENSEN said also there were problems with the ASARCO and ARCO voluntary cleanup program of the Upper Blackfoot pollution site mentioned earlier in the meeting. The State Superfund Section had for nearly two years involved the public in a very forthright and open discussion about enforcement against the companies for ongoing and chronic pollution of the Blackfoot River. The public and the companies were fully expecting the companies to be ordered into compliance, but then representatives from ARCO and ASARCO met with MR. ROBINSON and he reversed the decision. MR. JENSEN said this proposed order had been reached through public involvement, thoughtful analysis, and technically defensible research completed by a state agency that was within a week or so of issuing a unilateral cleanup order to the companies.

MR. JENSEN said MEIC was now forced to sue to ensure that the companies completed the cleanup because the public no longer has any confidence, and the state no longer has any authority, to make sure that the cleanup is done right. MR. JENSEN said that was why the EQC is talking about enforcement because enforcement in the DHES simply does not happen. It is so corrupted that people have to come to their elected representatives not to stop enforcement but to actually try to get the council and the Legislature in general to act as though enforcement mattered. MR. JENSEN said when the EQC hears that enforcement is fine or close to it they should not believe it because it is not true. The facts of specific situations will make it obvious.

MR. JENSEN said the most obvious case is the Zortman - Landusky mine suit that the DHES did file. MR. JENSEN said the DHES filed the suit on the last day, the 60th day after citizens filed notice to sue under the federal Clean Water Act. MR. JENSEN said the DHES was not going to enforce the law against Pegasus Gold so citizens had to make it happen. MR. JENSEN said that in district court testimony a DHES attorney told the Judge he was instructed one and one-half days before the 60th day deadline by either the director or his immediate supervisor that they were to file suit in order to prevent citizens from filing suit under federal law. These were violations that had gone on for years and both the DHES and the Department of State Lands (DSL) were fully aware of those violations. The DSL had affidavits on file showing the violations and no actions were taken. Every drainage in the area is polluted. MR. JENSEN said that it is time the EQC got beyond the question of whether there is a problem and start trying to solve that problem.

SENATOR GROSFIELD asked MR. JENSEN if assessing a penalty was more important than achieving compliance.

MR. JENSEN said strong enforcement is a good education tool. If a mine is closed, that will get people's attention very quickly.

MR. NOBLE asked if MR. ROBINSON would like to respond to MR. JENSEN's statement.

MR. ROBINSON said some of MR. JENSEN's statements were pretty serious allegations and not very well supported by the facts in most cases. Regarding the Upper Blackfoot case, the DHES was in the superfund process and it took them nearly a year to draft a unilateral order which would not necessarily have been accepted by ASARCO and ARCO. One of the things that the DHES did was to meet with the companies and tell them that there were two ways they could do this. One was to voluntarily clean up to the standards in the proposed order or they could do it under order and they would get to the same spot. The companies indicated that they would rather try voluntary action. The good thing

about that is that they started clean up last summer. MR. ROBINSON said under a unilateral order they may not be going for another year or two. Some tailings have already been removed and capped and the area will be revegetated this growing season. Additionally, MR. ROBINSON said the companies are proposing a state of the art retaining pond which will collect and treat addit effluent and prevent clean:water from entering the contaminated addit water.

MR. ROBINSON said there may not be another method to accomplish the task. What the DHES has done is to allow the companies to resolve the problem now rather than waiting two or three years. The state has not given up anything in the process. The full force and effect of the Superfund law can come back anytime the state is not satisfied with the work.

MR. TOLLEFSON asked why, if the problems have been evident for many years, the DHES only recently took affirmative action.

MR. ROBINSON said that was one of the problems with the Superfund process. It was a labyrinth and so tangled up with litigation that'all the effort goes into that end and very little goes on the ground. The DHES got the message loud and clear during the 1993 legislative session when told to take action, so the DHES is trying to make things happen. MR. ROBINSON said the state has not given up anything but what they have gained is three years in clean up work. The progress will be monitored and if it does not work, the companies get to go back and figure out how to make it work. There are no cook book answers to these complex clean up efforts. MR. ROBINSON also said that the companies are paying the cost of DHES oversight in the area, including an on-site inspector from MSU.

MR. TOLLEFSON said that a long history of bungling by the state Abandoned Mines program was also a problem. The Director agreed.

Regarding the Flathead Landfill, MR. ROBINSON said the state landfill standards were set by the federal government. These federal standards said that any landfill expansion between October 8, 1991 and October 8, 1993 had to be within the normal practices or current operating procedures of the landfill. The intent was to prohibit an expansion by placing a thin layer of garbage on the ground in order to expand the base of the landfill site to beat the liner requirements. MR. ROBINSON said the Flathead landfill operators had an idea that if they graded out the hill with the required 3:1 slopes, they could substantially increase their landfill area. So they placed some garbage into an eight-acre site to a compacted depth of five feet throughout the summer. The DHES issued a violation notice that did not go through the process and was not signed by the bureau chief, the division administrator or the director. MR. ROBINSON said they

ended up with some pretty angry responses from the landfill operators.

MR. ROBINSON said he invited the landfill operators to meet with him and after the meeting he met with DHES staff. They determined, by consensus, that they did not have enough for a successful violation action. He also decided that the expansion was in accordance with past practices so no violation was issued. MR. ROBINSON said a citizens group in the Flathead area filed suit against the DHES and MEIC jumped on that. DHES has met with MEIC and the attorney for the citizens group and he told them that he was willing to set his decision aside if they can show him where the landfill has violated the federal regulations.

MR. NOBLE asked if it was a county or private landfill. MR. ROBINSON said it was county owned.

MR. NOBLE asked if the citizens group was asking that the DHES fine the county. MR. ROBINSON said the citizens groups wanted the DHES to order the county to remove the five feet of garbage from the almost eight-acre site and put it back on the other side. Then they wanted the DHES to require them to comply with the new federal regulations.

MR. NOBLE asked what the landfill was doing to get into compliance. MR. ROBINSON said the DHES has asked the county to survey the site so there would be no question as to where the boundaries are.

Regarding the Doig ethanol operation, MR. ROBINSON agreed that has been an on-going problem. When he came into the DHES, MR. KEENAN was working with the operators but apparently the operators did not have the financial capability to correct the situation. A new partner has been brought into the operation and the DHES is working on a compliance plan.

MR. ROBINSON also agreed with MR. JENSEN that the determination to file suit against Zortman-Landusky was made on almost the last day. He said he made that decision over the prevailing sentiment in the DHES to not file and let the federal EPA take over. MR. ROBINSON said he had just spent the last four months talking to the Legislature about the importance of primacy and the importance of the state taking on responsibility for water quality enforcement and that the DHES ought to take the tough cases as well as the easy cases.

MR. ROBINSON said what it came down to was that when he realized, just before the deadline, that they had not filed and asked where they were on the case, he was told they were not going to file. MR. ROBINSON said that was a major policy decision that he was not aware of and he said the DHES was going to file and they did. DHES attorney Bob Thompson, after some

discussion, believed that the DHES could at least file the documents and get it done and keep the door open to amend the complaint which they did. MR. THOMPSON worked very hard to get the complaint filed and then spent considerable time amending the complaint. MR. ROBINSON said they did that because he made the decision that they were going to take the action and not just drop their responsibility and give it to the EPA.

REP. KNOX said the EQC had heard the allegations by MR. JENSEN regarding the failures of enforcement by state government and MR. JENSEN stated that if a mine was shut down that would be a message to the public that mines cannot act with impunity. REP. KNOX referred to the Blue Range Mine that was shut down in 1991. REP. KNOX said the mine was shut down for good reason. The shut down was painful but he supported the shut down of that mine because of the potential harm. The mitigation procedures and the cleanup have already taken place. REP. KNOX said that was a success story in Montana.

MR. NOBLE suggested that the Council members keep in mind the staff's question of where to go with the enforcement issue as they listen to the Legislative Auditor's report.

Legislative Auditor's Update

JIM NELSON, a performance audit manager with the Office of the Legislative Auditor, said his office performs financial audits and performance audits. Every agency is subject to a financial audit every two years. The performance audits are done as directed by the Legislative Audit Committee. One of the performance audits selected by the Committee was an audit of the Water Quality Bureau. In addition, the Legislature directed the office to do a performance audit of the Hard-Rock Bureau in the Department of State Lands.

Work done so far on the WQB audit has been to conduct a survey of all functions performed by the Bureau and the scope of the audit is being discussed. The scope is close to what the EQC discussion has been. Examination will be made of the process used to investigating violations on non-compliance issues through the resolution of those issues. That area will be examined because of the backlog of cases. There appears to be a lack of management information for tracking violations and for pinpointing where those violations are. By auditing that area the permitting process will also be examined as will various sections within the Bureau.

MR. NELSON said there is an attempt to narrow the scope as much as possible. Time frames for investigating complaints, number of violations, process used for handling violations are issues that will be examined. Policies and procedures used will be reviewed. Actions taken by the department will be examined to

ensure compliance with the Water Quality Act and the Public Water Supply Act. There will also be an attempt to evaluate legislative intent so that overall actions by the department reflect what was intended by the Legislature when it established the program.

Various files will be evaluated to determine where the violations are. The auditors will look at 100 percent of the formal legal files going back five years. A statistical random sample will be taken of many of the other division's files such as ground water permits, investigation files, and complaint files. There will be about 1,500 samples taken. There will also be on-site visits to verify the information in the files.

The standards established by the DHES for handling violations will be examined, including what criterion is used and the levels of action. The workload of staff will be examined as well as the structure of the agency.

MR. NELSON said the plan is to have the field work done by the end of summer and have a report ready in the fall. The report would be presented to the Legislative Audit Committee and it could be presented to the EQC also.

SENATOR GROSFIELD asked what the timing will be on the Hard-Rock Bureau performance audit. MR. NELSON said it will be similar to the Water Quality Bureau audit. He said both audits will examine some of the same files and are on a similar timeline. The Hard-Rock Bureau audit is a more broad scope, however.

MR. NOBLE asked Council members where the enforcement issue should go from this point. MR. TOLLEFSON suggested the subcommittee deal with that issue again and perhaps develop a recommendation for the Council later.

SENATOR GROSFIELD expressed concern that the EQC budget will not allow extra subcommittee meetings. He also said the timing of the subcommittee doing any more work on this issue while the Legislative Auditor is doing its performance audit could be a problem. What comes out of the audit could provide the Council with direction on the enforcement issue.

MR. NOBLE said if the nondegradation subcommittee is going to work on this issue, the Council needs to provide some direction.

MS. SCHMIDT said, from a budgetary standpoint, with as many subcommittee and working group meetings as are planned, it will be unnecessary for the full Council to meet until mid-May. Therefore, the travel costs will be covered. She said the audit appears not to be dealing with the enforcement workload after

adoption of the nondegradation rules and the subcommittee could address that issue.

MR. TOLLEFSON said it is important to keep the issue in mind and address it at some point.

Under public comment, RICHARD PARKS asked that the Council consider two issues that have been discussed in the past. The issues are bad actor regulations and bonding requirements. If an operator has a consistent history of violations, he should not be granted a permit in Montana. While there are bonding requirements in current law, MR. PARKS did not feel they go far enough.

FLORENCE ORE, a Pony resident, reiterated MR. PARKS' concerns regarding the two issues he raised. She said if those two provisions had been in place, the citizens of Pony and the Water Quality Bureau personnel would have been saved time and money. The mining operator had violations against him and still received permits to operate a mine and mill. The permit has since been revoked, but not before a great deal of damage had been done to the water quality and at great expense to Montana taxpayers.

ALAN ROLLO, Montana Wildlife Federation, agreed with the two previous speakers. If the laws were more stringent at the beginning of an operation, there would be less need to spend money on cleanup of projects that were not properly conducted. Citizen suits also provide an avenue to force proper cleanup activities.

DENNIS OLSON, Northern Plains Resource Council, said he is participating with a group called the New World Mine Task Force composed of people who are concerned about the mine development. A full meeting will be devoted to the issue of water bonding requirements and the materials could be given to the EQC to use. He urged participation at that meeting by EQC members and EQC staff.

MR. NOBLE said 'several attempts had been made in past legislative sessions to pass bills dealing with bad actor regulations and water bonding requirements, but they had not succeeded. He asked if staff had any information on those attempts.

MR. KAKUK said EQC staff had drafted those bills and had that information. However, rather than simply producing past bills, staff could research the philosophy behind those bills and provide some of the pros and cons about the workability of such legislation.

REP. COCCHIARELLA MOVED that the nondegradation subcommittee continue to work on the enforcement issues.

SENATOR GROSFIELD said the subcommittee is working on mitigation, mixing zones, and if the two issues of bad actor regulations and water bonding requirements are added along with more enforcement issues, the load starts to get heavy.

MR. BOEH asked if the Legislative Auditor could give periodic reports to the subcommittee on the progress of the audit. MR. NELSON said there is little information that can be distributed before the full report is written and released because the department must be given a chance to review the audit and respond.

MR. NELSON said there will be a scoping document and would be willing to discuss the contents of it with MR. KAKUK.

SENATOR GROSFIELD said the bad actor and bonding issues are not meant to only apply to nondegradation. The subcommittee's charge has been to deal only with nondegradation issues and including those two issues will broaden the scope of the subcommittee's work. He suggested the full Council deal with those two issues instead of the subcommittee.

REP. COCCHIARELLA WITHDREW her motion to allow for more Council discussion.

SENATOR WELDON said the hazardous waste working group is examining bad actor concepts for that issue also.

MR. NOBLE said the full Council probably should deal with enforcement issues as they relate to other study topics already underway.

REP. COCCHIARELLA said the enforcement issue is an, appropriate topic for EQC oversight and should receive reports from the DHES Director regarding progress on enforcement.

MS. SCHMIDT said the subcommittee system functions best when dealing with the details on the issues because of the structure that is used. However, in the case of the enforcement issue, it is important enough that the full Council should address it. It would appear that there should be a combination of effort on the issue.

MR. NOBLE said the enforcement issue should remain an issue on both subcommittees and the full EQC. The Council members agreed that the issue should come Before the Council again.

personally, and other subcommittee members expressed their appreciation for the efforts of DR. HORPESTAD.

Mitigation Report

SENATOR GROSFIELD used Exhibit 3 to explain subcommittee discussions and **recommendations** relating to mitigation issues. Included in the mitigation issues is a definition of mitigation, scope of mitigation, location of mitigation, enforcement, banking, and mandatory mitigation.

SENATOR GROSFIELD said the subcommittee agreed on the recommendations on the first five issues that it examined and felt the subcommittee had finished with them. However, the two issues of mitigation banking and mandatory mitigation have not been resolved.

MR. KAKUK said there was one sub issue that should have been included in the draft report under mandatory **mitigation** and that was what effect mitigation would have on a small project applicant. An example of small project would be septic systems.

SENATOR DOHERTY MOVED that the Council accept the first **five** issues as recommended by the subcommittee in the draft report, Exhibit 3. He said this would help the subcommittee because **it** would not have to revisit those areas again. The second half of SENATOR DOHERTY'S MOTION was that issues six and seven and **the** small project concern stay with the subcommittee **for** more discussion.

The motion PASSED.

MR. NOBLE asked that the subcommittee also further examine the issue raised by MR. TOLLEFSON on self determination and non significant.

.SENATOR GROSFIELD said **the subcommittee** has also spent a great deal of time on mixing zone rules in addition to the nondegradation rules.

SENATOR GROSFIELD said the subcommittee wanted to spend more time on possible categorical exclusions for issues like composting toilets or other technologically feasible approaches for disposal of household wastes.

Water Quality Act Enforcement

MR. NOBLE said the Council has discussed the topic of enforcement several times relating to water quality and other areas, including hazardous waste. Enforcement issues are a concern to every Council member.

MR. NOBLE said MS. SOWIGNEY wrote him a letter expressing concern that questions she had asked at previous meetings of DHES personnel had not been answered.

MR. NOBLE said an informal meeting was held with Vice Chair REP. COCCHIARELLA and the Nondegradation Subcommittee Co-Chairs, SENATOR DOHERTY and SENATOR GROSFIELD to see if there could be a better approach to receive needed information for DHES on various enforcement issues. Consensus was that constructive discussions needed to be held on enforcement.

REP. COCCHIARELLA said SENATOR GROSFIELD had set up the first informal meeting to discuss the issue of enforcement, but also to discuss the credibility of the EQC and its relationship with other agencies. The discussion was to identify what the problems are with the issue of enforcement, but they realized there is more to the problem than only that issue.

REP. COCCHIARELLA said it is a broader, larger problem in state government and is in more areas than just enforcement. She said the group decided it wanted to be constructive with the enforcement process as it currently exists and in relation to the performance audit being conducted. She said the EQC should be helping the process work more positively and should be ensuring that the environmental laws that pass the Legislature are working. The Council could delve into some policy issues related to enforcement and how the agencies could implement and enforce the laws that are in place.

SENATOR GROSFIELD said the agencies routinely are mandated to monitor and enforce laws that require many times the resources those agencies are given to do the job properly. If there is always a mismatch in the responsibility and the resources, it is impossible for an agency to do its job. He said it could be necessary in the future to tie the funding to legislation in a more realistic manner. As an example, SENATOR GROSFIELD said in the area of hazardous waste enforcement in the DHES the average length of time employees have been on the job is 14 months. This produces employees who are not very well trained because they are just not there long enough.

SENATOR GROSFIELD said the issue of state primacy also needs to be examined. There is a high cost to the state in order to enforce those areas that the state has primacy and maybe some of those areas should be turned back to the federal government. It is time to have a discussion relating to state primacy.

SENATOR GROSFIELD also identified the issue of whether enforcement should be to exact fines or to ensure compliance. He said the question of how much time and help is given someone before enough is enough and an action is taken to enforce should

be discussed. The question of consistency of enforcement policies in the different areas should also be addressed.

SENATOR GROSFIELD said the performance audit will answer some specific questions. However, he felt the Council could address some of the bigger policy questions and try to focus on those. There was agreement among those who had met that it would be a good idea to address some of those concerns.

SENATOR DOHERTY said it is very appropriate for the EQC to provide this type of oversight role. The questions of whether a piece of legislation is working or how it could work better are rarely asked. He also felt the Council should address the broader policy issues, including primacy and whether some laws will never be enforced because of the lack of resources. He said there might be innovative ways of addressing enforcement by placing all enforcement with the Attorney General's office.

SENATOR DOHERTY credited SENATOR GROSFIELD with the pursuit of the issue. He also said the DHES personnel had been cooperative and he hoped that would continue so with the efforts of everyone involved the process could work properly.

BOB ROBINSON, DHES Director, supported working with the EQC on these issues and said the department is struggling with what the posture should be in dealing with enforcement. There is not a clean, well-defined process as is the case in some agencies. He recognized that in order to maintain credibility, an agency needs to be consistent with its policies. He said they welcome the opportunity to work with the Council and staff and committed himself and his staff to the efforts. Further, he said he will ask for help from the county sanitarians who also are involved. with enforcement in the field.

MS. SOUVIGNEY said her letter referred to by MR. NOBLE was a follow-up on questions asked of DHES on enforcement by the EQC. She did not feel all of the questions were fully answered. The issue of limited resources did appear at both the meeting and in the written response from the DHES. Her concern was that the public thinks the laws are in place so they are being implemented and enforced and this is not always true.

MS. SOWIGNEY said it is impossible to fix anything until the problem is identified. It will be necessary to know the employee workloads and whether the employees understand the laws and how the laws should be implemented. If laws are being violated, there must be an incentive to stop it. There would eventually be a decrease in workload if everyone knew they had to comply with the laws and there was consistency in application.

REP. BIRD asked if only water quality enforcement would be discussed or if other areas will be addressed. MR. NOBLE said all areas of enforcement will be examined.

MS. SCHMIDT said the reason for bringing these issues to the attention of the full Council was for the purpose of discussion of what could be a very large undertaking that would go beyond this interim. Enforcement has been discussed at every meeting without resolution of what is happening and why.

REP. KNOX said these are very broad public policy questions and he supported the concept of examining enforcement issues with the understanding that those issues are part of a larger arena.

SENATOR WELDON said the Task Force to Renew State Government has a subcommittee that is dealing with the natural resource agencies and functions. The task force is looking at how the agencies are organized. He said he could report back to the EQC as to any changes that might be proposed. The structure of the executive branch could change and that should be kept in mind by the Council in its discussions.

REP. COCCHIARELLA said the group that had met informally included the Governor's office up front so the efforts would be made with cooperation of the legislative and executive branch. She said this was done also so all parties would be involved and the efforts would be constructive. She also said she felt there should be a general discussion on the policies and not necessarily examine one agency or bureau.

DON ALLEN encouraged the Council to use a positive and constructive approach. He said possibly changing the terminology from enforcement to compliance could have a more positive impact.

MR. TOLLEFSON said the Council should remember that the reason this issue is before it is water quality. Adequate information on which to base permits is crucial to water quality and compliance is also crucial.

SENATOR GROSFIELD said a question is whether the Council wants to become involved in these issues as early as its next meeting and to spend half a day discussing the issues. Another question would be whether the full EQC or the nondegradation subcommittee should spend time on these concerns.

SENATOR GROSFIELD said personally he felt the Council should be involved and he felt it should be the full Council, at least at a first meeting until the issues become more narrow.

REP. BIRD agreed that the enforcement issues should be discussed by the full Council.

MR. MARX said the issues discussed informally by some council members and DHES personnel were broad enough that they should be discussed by the full council. However, he said the council needed to realize how serious the issues are and how much time will be needed to examine them. He said if the Council is going to be involved, it needs to commit the time that will be necessary.

SENATOR GROSFIELD said the enforcement issues will not be directed only at the DHES and agreed with MR. MARX that it will need a serious time commitment by the council.

MR. NOBLE said enforcement in some manner has been discussed at every Council meeting and agreed it needs to be discussed.

There was consensus that at its next meeting the full Council would spend a half day discussing the issues surrounding enforcement policies by state government.

SJR 34 HAZARDOUS WASTE MANAGEMENT STUDY

MR. NOBLE said the working group is making progress and at its next meeting will discuss conditionally exempt small generators who do not produce more than 220 pounds of hazardous waste monthly. There will be individuals at the meeting who will discuss some of the problems with proper disposal of hazardous waste materials in rural areas.

MR. SIHLER used Exhibits 4 and 5 to brief the Council on the progress of the working group under the recommendations and study approaches it had set for itself. He also gave the Council an overview as to the progress made by the working group on its approach to determining the adequacy of the regulatory framework.

MR. SIHLER said the group is still working on a tracking system to be used in the disposal of hazardous waste. Under discussion is whether notice should be sent to the state when these materials are disposed. There are many exemptions under the hazardous waste framework largely because those activities are managed under a different statute.

The working group has discussed the report prepared by MR. SIHLER on staffing levels and funding in the Solid and Hazardous Waste program. The group has also received a report from the Air Quality Bureau on the same subject. Personnel from the two programs are working on a proposal to submit to the working group on what resources are needed to properly carry out the **assigned** tasks.

Presentations have been made at previous meetings on conditionally exempt generators and the issues will be discussed at the next meeting again.

APPENDIX 14

system which equitably meets the mobility needs of **Montana's** citizens and connects them to the **nation's** economy.

At its next meetings, the collaborative will revisit the goal statement and will discuss the various policy statements submitted by participants that would flesh out in greater detail the strategies for further developing the goal statement into policy.

NATURAL RESOURCE AND ENVIRONMENTAL AGENCY ENFORCEMENT

MS. SCHMIDT handed out a proposed enforcement discussion agenda, Exhibit 7, and discussed briefly why the Council is looking at the issue of regulatory enforcement. She said in the **Council's** work over the last interim and in other interims in the past the issue of the adequacy of enforcement of the **state's** environmental laws and how those laws are enforced has had a significant impact on the **Council's** thinking as it tries to formulate natural resource policy to recommend to the Legislature.

MS. SCHMIDT noted that in particular, during this interim the Council has had to deal with enforcement questions as they relate to the adequacy of the **state's** regulatory framework for managing hazardous waste, nondegradation, and **generally** water quality and mining. She said it has become clear that the issue of enforcement was coming up repeatedly in the **Council's** discussions and was apparent that perhaps not a lot of productive progress was being made to get to the bottom of the issue of what the state's enforcement policy was and whether it was working, whether it was adequate and how it needed to be retooled or rethought in an era of limits on government. She said it seems apparent after meeting with the Chair and Vice Chair and the Co-chairs of the Nondegradation Subcommittee that some new effort would be warranted. She noted that that issue was presented to the Council at the last meeting and the Council agreed that it was a good idea to step back and take a look at overall enforcement policy. The purpose of the discussion at this meeting is to arrive at some type of an agreement on the scope and goals of the study.

MS. SCHMIDT, referring to Exhibit 7, noted the proposed enforcement discussion agenda is the **staff's** best effort at how to begin discussion on this topic.

MR. SIHLER said staff after the last Council meeting contacted Council members to get a better understanding of what each of the Council **members'** expectations were **of** this study and where it might go. He said it became clear to staff that different people were thinking different things and looking at different possibilities of what directions the study might take., He noted that perhaps the best way to proceed at this meeting

would be to discuss what the scope of the study should be and what the Council would like to get out of it and how long it might take. The staff has made an assumption that there should be some discussion about what the goals are, what the scope of the study is, and how long the study might take before the Council can proceed in some orderly fashion into the substance of the study. He noted the proposed agenda was the staff's initial attempt to generate discussion.

In a review of the proposed enforcement agenda, MR. SIHLER said in terms of the study's scope, at least some of the discussion that the Council has had about enforcement has resulted from discussions about the Department of Health and Environmental Science's Water Quality Bureau (WQB) and the WQB audit. The Council must decide on the issue of "scope" of what it would like to look at in terms of the number of agencies and/or programs. He reviewed the potential study goals and noted that these were the staff's thoughts on what the Council might want to have as possible study goals. He noted there should be some discussion on the time-frame of the study because this study could be completed this interim or it could last longer.

MS. SCHMIDT asked if this proposed agenda met with the Council's approval and whether there was anything that the Council would like to do differently or add to the agenda at this point.

SENATOR GROSFIELD said it looked like a good start. MR. NOBLE said it was pretty hard to add anything to it.

MR. EVERTS summarized the historical context for environmental enforcement and noted that there is a lack of information on Montana's environmental enforcement history. Given Montana's non-documented enforcement history, he said that he would briefly focus on the history of enforcement at the federal level. He said federal environmental enforcement really did not start until the early 1970s. Before the 1970s, state and local governments were primarily the entities charged with enforcing environmental laws. The authority of local and state governments to enforce environmental laws evolved from their police power, which could be used to protect the public health, safety, and welfare. Local and state governments enforced these laws through common law actions such as public nuisance, negligence, and trespass. The public trust doctrine, water law, and strict liability were also utilized by state and local governments to enforce environmental laws.

There was strict federal regulation beginning with the enactment of the Clean Air Act of 1970, the Clean Water Act of 1972, the Federal Insecticide, Fungicide, Rodenticide Act of 1972, the Safe Drinking Water Act, the Toxic Substance Control Act, the Resource conservation and Recovery Act, the

Comprehensive Environmental Response Compensation Act (CERCLA). The culmination of the federal environmental effort was CERCLA in 1986. With all of this federal legislation, the federal enforcement role and federal influence over environmental enforcement expanded.

MR. EVERTS noted that basically these environmental laws have been in statute for twenty years. There has been a number of reauthorizations and amendments. He said that what could possibly have been done at the environmental statutory federal level has pretty much been done. The focus has shifted from what is on the statutory books to whether these laws are working and how should enforcement be ensured. A number of people and entities are looking at the issue of enforcement. State governments are examining their own enforcement policies and are trying to match them to the resources that they have and the priorities they have set. The trend has gone from putting these laws on the books and amending them, to taking a look at whether they are being enforced and if not, why not and where should policy makers be placing their priorities.

MR. SAGAL used Exhibit 8 to explain federal and state government agency enforcement, citizen and private enforcement, and self enforcement schemes. He noted that government enforcement is divided into civil penalties and criminal penalties. He said that under civil penalties at the federal level there are administrative penalties, judicially imposed civil penalties and field citations, all of which serve a specific purpose and seem to be applicable to different situations. Administrative penalties tend to be quicker and more efficient and generally vary in degree of severity and tend to establish an overall enforcement scheme. Judicially imposed civil penalties are case specific and are more costly than administrative penalties, but the penalties tend to be larger. He said the EPA looks at recalcitrant behavior of the violator, the seriousness of the violations, and the economic benefit of non-compliance in making judicial civil penalty assessments. He noted that courts have also awarded compensatory damages for loss of natural resources and have assessed investigation and litigation costs against defendants. Field citations tend to be easier to assess and implement; however, the penalties tend to be smaller. Field citations are being tried on the state and local level. The trend in environmental enforcement has been to give increased responsibility and oversight to state and local governments. In 1990, state and local governments spent almost \$55 billion on the environment.

MR. SAGAL discussed criminal penalties and said the current trend is to pursue criminal enforcement as a more effective deterrent than the civil penalties. As a result, more federal and state statutes have criminal penalty provisions and have generally increased criminal penalties for violations of the law.

He said there are two related and emerging trends in enforcement policy, but the general theme of both seems to be getting the most effective regulation for the amount of money being spent.

The first trend is strategic planning or multi-medica enforcement. This method tries to integrate a more holistic approach by consolidating all aspects of enforcement of all applicable statutes at one time and targeting enforcement efforts on a particular industry, geographic area, or segment of the population. The second trend is risk-based enforcement. Risk assessments used by agencies responsible for enforcement attempt to identify and quantify potential hazards in order to determine the degree of risk they pose for the public. The intent behind risk-based enforcement is to utilize enforcement resources in a more effective way by concentrating time and effort on the sources of pollution most likely to do the greatest harm to the public. He noted that there are other methods of enforcement that include tax credits, free market approaches, alternative dispute resolution, injunctive relief and court orders, administrative orders, company blacklisting, and education. He said there are other innovative enforcement models from other states and noted that New Jersey has a state environmental prosecutor.

MR. SAGAL said many federal and state statutes contain citizen suit provisions. He noted that citizen suit provisions tend to be accompanied by mandatory disclosure provisions because citizens need access to data in order to sue a polluting entity. He said there are other traditional or not so traditional legal causes of action including nuisance, negligence, public trust doctrine, and trespass.

MR. SAGAL said the last category of enforcement is "self enforcement". Environmental auditing is a form of self enforcement. The EPA defines environmental auditing to be a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. The threat of both civil and criminal liability has influenced industry to take the initiative to discover and correct possible violations of regulations before the regulator starts the penalty process.

MR. EVERTS explained the staff's inventory process of the state's enforcement provisions, Exhibit 9. The staff compiled 170 pages of enforcement provisions out of Montana's environmental and natural resource statutes. He also gave the Council copies of Index of Environmental Permits, noting that the Index would give the Council a good idea of the scope of the permitting activities and the types of enforcement activities that may be taking place in the state.

SENATOR GROSFIELD asked about the structure of the statutory enforcement inventory matrix that the staff compiled. He noted that the enforcement tool of mandamus, for example, was seldom utilized in statute.

MR. EVERTS said if an enforcement tool was not highlighted it meant that under that specific enforcement statute it was not specified or available. He noted that mandamus is a common law tool in which an individual can go into court and request a writ from the judge to require an agency to do what they are required by law to do. Where these enforcement tools are "checked off" in the enforcement matrix it means the specific enforcement tool is specified in statute. With mandamus the Legislature has integrated a common law concept into statute. However, regardless of whether it is in a given statute, it is still available for an individual to pursue in court.

SENATOR GROSFIELD asked about enforcement as it relates to streams and rivers in the state.

MR. EVERTS noted that the topic of streams and rivers is an example of statutorily integrating the concept of the public trust doctrine as an enforcement tool.

MR. NOBLE asked how many agencies are involved that have enforcement programs and the agency programs within agencies.

MR. EVERTS said that the number of state programs involved in environmental enforcement is roughly 22 to 24 programs. He noted that there is overlap between programs and agencies for enforcement.

MR. NOBLE asked if overlap between agencies meant that one agency could fine someone for a violation and another agency could fine that same person for the same violation.

MR. EVERTS said there is not any overlap between agencies and programs for multiple fines for the same violation. He noted that the Department of Health and Environmental Sciences (DHES) and the Department of Fish, Wildlife and Parks (DFWP) both have regulatory responsibility over recreational camp sites. DHES has jurisdiction over the water quality and health activities and DFWP has jurisdiction over the camp site use.

MR. KAKUK said there was a question regarding the distinction between mandamus authorized and citizen suit enforcement. He noted that in the Department of State Lands (DSL) Strip and Underground Mining statutes mandamus is authorized. He noted that the statute (82-4-142 MCA) has a catch title that says "Mandamus to compel enforcement^u" and there are two subsections. He said a resident of this state with knowledge that a requirement of this part is not being enforced may bring

the failure to enforce to the attention of the public officer employed by a written statement and if it is still not enforced, then the employee that is not enforcing it can be found in contempt of court. He said that remedy exists for anybody for any program at any time. When it is in statute like this, it probably makes it a little easier because it is clear that the Legislature wanted people to have that authority for that particular program.

MR. KAKUK said how a writ of mandamus differs from citizen enforcement is illustrated under the Coal and Uranium Reclamation statute (82-4-354, MCA). Under this statute not only is there the authority to request mandamus to compel enforcement but there is a provision that says that any person having an interest that is or may be adversely affected may commence a civil action on his own behalf to compel compliance with these statutes as long as they notify the department that if it does not take action in 60 days then the affected person will take action. That is the distinction in law between mandamus being authorized and citizen enforcement being authorized. Under the Strip and Underground Mining Statute if the state does not take action, the officer may be found in contempt of court. Under the Coal and Uranium Reclamation Statute if the officer does not take action, the citizen can go ahead and carry his or her own action out as basically a defacto private attorney general.

MR. NOBLE asked for the actual meaning of "mandamus".

MR. KAKUK said that "mandamus" is a Latin term meaning a person is taking an action to require the state to do its duty. If the court actually agrees with the writ, it means the court has found an instance where the state has a clear statutory duty and it is not performing and the court is going to require the state to perform its duty.

MR. MARX asked the staff whether when doing the compilation on this enforcement information anything was startling.

MR. KAKUK said there were some interesting things that the staff came across in compiling the inventory. The question came up as to whether the staff should make a distinction between felony and misdemeanor penalties for environmental statutes. A felony is defined in Montana as anything over one year in jail. For subdivisions if a person does not follow the procedures when selling to an out-of-state purchaser, he could be subject to two years in prison. The penalty for filing a false mining claim is up to five years in prison.

MR. SIHLER said when the staff was designing this inventory process, he was uncertain as to whether they would find each agency and each program had all the same authority and there was not much difference or whether there would be a lot of diversity

in terms of authority. There seems to be a reasonable amount of diversity.

MR. NOBLE asked MR. KAKUK whether it appeared that each of the penalties for each subject area was shotgunned into place as opposed to some type of systematic placement.

MR. KAKUK said the penalties were placed in the statutes through a piece-meal or shotgun approach. He noted that as water quality and air quality statutes were updated, they have gotten rid of the felony provisions, increased the civil penalties, made sure that each day is a separate offense, and added administrative enforcement authority. As the programs come up for modifications in the Legislature, they are coming more in line with each other. He noted there is an increase in enforcement consistency across DHES programs.

MR. SIHLER made the observation that from past legislative sessions the trend has been to either to get rid of criminal penalties and change them to civil penalties or add a civil penalty. The federal enforcement trend has been to move toward more criminal penalties.

SENATOR GROSFIELD noted that a number of the environmental enforcement provisions have each day as a separate violation. He asked whether this was a standard enforcement provision and whether it was typical in other states. He also asked whether there was a double jeopardy issue here.

SENATOR DOHERTY said double jeopardy only applies to criminal penalties.

MR. KAKUK said he did not know whether the provision of "each day constituting a separate violation" was utilized in other states, but was it is typical of the federal government enforcement scheme.

MR. SIHLER noted that the state's clean air act bill was passed this last session in response to the new federal clean air act and the "each day constituting as separate violation" provision was one of the components that the state was required to have in order to meet the federal requirements. He said most states are probably adopting that provision given the federal requirements.

MR. KAKUK said double jeopardy is being prosecuted or penalized twice for the same offense and what this law says is that this is one offense per day and a person is subject to one penalty for each day because each day is a separate violation.

SENATOR GROSFIELD said he understood how it worked but there have been cases where something will happen and the violator is

not even aware of it for several days and has already gotten five separate violations before he even knows he had a violation.

MR. KAKUK said that one of the things the EQC has heard from BOB ROBINSON, DHES Director, is that this provision provides some leverage or some bargaining room.

MR. NOBLE said some of the dollar penalties are so severe that the agencies would be hesitant to enforce those provisions. Twenty five thousand dollars per day for a mining operation may not be out-of-sight but \$25,000/day for a rancher with 200 acres might put them out of business. He said it seemed prohibitive.

MR. SIHLER asked the Council whether they needed additional information to decide on the scope and goals of the study.

MR. NOBLE said the Council was aware of the size of the project and asked whether this study could be completed before the interim is over or whether it would last into the next interim. He noted that this study could possibly last into the next two interims. He asked whether the Council was going to have enough time to do any significant study that will prepare future councils do carry on the task.

SENATOR DOHERTY noted that the Council had finished its efforts on the nondegradation subcommittee and those Council members might be committed to this issue. He said that the issue of enforcement is one that keeps coming back and one that is absolutely essential to be understood. He had four questions: (1) are there problems, (2) what are the problems, (3) can the Council understand why there are problems, and (4) can the EQC solve or fix the problems. He said there is some notion that there are some problems out there, but understanding all of the causes and understanding how to fix them or solve them is the big issue.

MR. NOBLE asked about the enforcement issues surrounding the Clover Leaf Dairy situation. He said he did not understand how a dairy that is producing milk and ice cream could be found not sterile.

MR. ROBINSON said there was no determination by any agency that anyone had to go out of business and that was a decision by the business owner. The DHES responsibilities are to identify if there are adulterated products on the market or if there is a product on the market that is a risk to human health, DHES has a responsibility to step in and take it off the market.

MR. NOBLE asked if what the DHES did in terms of requiring the milk product to be taken off the market was considered enforcement.

MR. ROBINSON said it was a part of the food and consumer safety enforcement program. He noted that DHES had previous dealings with this dairy operation under the safe drinking water program. He said this dairy produced gallons of drinking water for public consumption and the department documented levels of coliform in the drinking water and got them to voluntarily recall some of that water and subsequently issue an order to recall all of the water. The Center for Disease Control and the FDA inspected the plant for E.Coli Bacteria.

MR. NOBLE said from the point of view of a business person, it makes him mad because most businesses are striving very hard to do the right things and follow the laws. He asked if a product that some company produced injured somebody could the DHES fine that individual.

MR. ROBINSON noted that the penalties under the Food and Consumer Safety Act are not that stringent and the DHES does not have any administrative penalties or fines. In the dairy case it was a misdemeanor.

SENATOR GROSFIELD said that to some extent he would have to agree with SENATOR DOHERTY in that enforcement is a big issue. He asked what was meant by "self-enforcement" and whether it is broader than forestry BMPS. He said that the EPA definition of "self-enforcement" had a more extensive meaning beyond forestry BMPS.

MR. SAGAL said he did not think self-enforcement like environmental auditing would be mentioned in an environmental statute. Self-enforcement is something that industry has taken upon itself to initiate. The EPA has developed some guidelines.

SENATOR GROSFIELD asked whether the state had any similar guidelines on self-enforcement. MR. SAGAL said he did not know of any state guidelines. MR. SIHLER noted that the BMPS are not required in statute.

SENATOR GROSFIELD said there was a fourth area not detailed in MR. SAGAL's outline and that is the idea of enforcement as a club or a means to punish versus looking at enforcement a means to gain compliance. It is much easier to regulate an educated public.

MS. SCHMIDT said that option 3 in Exhibit 8 explores the relationship between enforcement and compliance.

MR. TOLLEFSON asked how the Council made the leap from water quality enforcement to "big picture" enforcement. He said he was still thinking about water. He understood that the fundamental questions the Council has may not be answered until the water quality audit is completed. He said this seemed like a big

project to produce in six months. He said he wanted to know how this project will affect actual water quality.

MR. NOBLE asked SENATOR DOHERTY what he envisioned the Council would be able to accomplish with this subject.

SENATOR DOHERTY said he did not think the Council could take on all the state's environmental and natural resource agencies, but could focus on one or two agencies and see whether there is anything that is universally applicable. If there is not, everything cannot be fixed with one ready made solution. He said focusing on water makes sense and focusing on some of the enforcement issues that have come before this Council also seemed like a good idea. He said if the EQC could figure out a way to enforce Montana's water quality laws consistently, uniformly, fairly, and understandably, the Council would have done an incredible stroke of work for a number of people.

MR. NOBLE asked whether focusing on one or two agencies would be fostering the shotgun approach. Some of the states are leaning toward or have a in-house enforcement structure. He felt an overview of the whole system might be better.

SENATOR DOHERTY said that a special enforcement division may make some sense. All of the natural resource and environmental state agencies have several attorneys working on enforcement and it may make sense to put them all in one place and it might make it easier to enforce the laws. However, it may not work either.

MS. SOWIGNEY said whether the Council does something broadly or with water quality it is not the enforcement that it is trying to focus on, it is compliance with the statutes. In order to do, it is necessary to look at what is the problem. She said there is a lack of understanding of what the problem is. In some of these agencies, there may be a lot of compliance with the existing statutes. It seems that with the audits coming in water quality and hard rock mining that is the place to start. She said that starting with enforcement does not seem to be the place to start whether the study is broad or narrowly focused. It should be determined if there is a high level of compliance now and whether education encourages compliance, or is there something else that is occurring that needs to be corrected or improved.

MR. ROBINSON said that it would help the agencies if the Council would look at the big picture and say what role from a policy perspective enforcement and compliance should take.

REP. COCCHIARELLA said the broad issues of enforcement apply to all agencies of state government. She said that what the Council decides to do is applicable in the sense that when legislation is considered, it has a compliance or enforcement

component in it that is needed for policy as a state. It goes beyond any one agency. She said looking at one particular agency could be a good way to confine it to an issue that can be dealt with then expand it to an overall philosophy of how the state addresses compliance and enforcement. The issue is that the state needs to change the laws so there are not compliance problems and so it is easier for everyone to comply with those rules.

REP. BIRD said licensing boards seem to work with the laws and attain compliance from those licensed in a variety of areas.

REP. COCCHIARELLA MOVED that the Council adopt option #3 Exhibit 7 on the enforcement agenda.

SENATOR GROSFIELD agreed with MS. SOWIGNEY that the emphasis here should be on compliance rather than just enforcement. He said that option 3 focuses only on enforcement.

MS. SOWIGNEY asked whether the Council could amend option 3 to include "assess level of compliance" and whether enforcement is critical.

MR. TOLLEFSON asked how the Council could do any of the study options without doing option #1 first. He said that the Council needs to know what the existing enforcement posture is before the Council can make a statement on what the policy should be.

MS. SOWIGNEY asked whether the DHES has a written enforcement policy. MR. ROBINSON said DHES has a draft enforcement policy that has yet to be adopted.

MS. SOWIGNEY asked the staff whether they had found policies in place for other agencies.

MR. EVERTS said that in compiling the enforcement's statute inventory there were some statutes that had general enforcement policy statements. He said he would feel uncomfortable in saying that the enforcement policies that were in statute were the "real" enforcement policy for that program. Staff did not look at the rules or search out any informal enforcement policies.

MR. SIHLER said most state agencies do not have a uniform enforcement policy. Agencies may have understandings or unwritten policies but staff did not find any formal written policies. He cautioned that the staff survey was preliminary in nature. Since staff could find no written policies the second option was to look at the statutes and that is what was prepared for this meeting.

REP. BIRD asked how the discussion of options would fit with the ongoing audit of the Water Quality Bureau and the Hard Rock Bureau. She said it was putting the cart before the horse to look at enforcement if the question is compliance.

MS. SCHMIDT said the Legislative Auditor's process will look at things like number of inspections, paperwork and record keeping, and whether the DHES is following legislative intent in implementing the law. It will probably not make any determinations about whether the resources are adequate to implement agency responsibilities nor will it make any recommendations regarding broad enforcement policies. The idea is rather than to wait for the auditor's report to be published, the Council and the administration could begin to address these public policy questions now.

REP. BIRD said she agreed with SENATOR DOHERTY's question about identifying the problem that needs to be fixed. The options presented are very global in nature. Members of the regulated community must be concerned about the nature of the problem. She said there does not appear to be a tidal wave of public opinion saying that something must be done.

SENATOR DOHERTY said he thought there was a tidal wave and it would hit the fan when the Auditor's report is published. The Council should identify and address the public policy issues that are not covered by the Auditor's report. There is a general understanding that the DHES is probably overworked and understaffed but the EQC should determine if there is something that can be done to actually make the laws work for both the regulated community and the citizens of Montana. When the report is published SENATOR DOHERTY would like to have something constructive so he could say how the issues in the report could be handled.

REP. BIRD said the questions SENATOR DOHERTY raised were very specific in nature, but the options presented were too amorphous to address them.

JIM JENSEN, MEIC, said it was instructive that the DHES under the Stephens' administration began a process to develop, for the state and the regulated community, a clear expectation of how the failure to comply with the law would be dealt with by the agency. Why this draft had not been adopted formally is a question that should be answered. The current administration has the opportunity to build on the work done so far and move forward very quickly without waiting for the Legislature. It is an executive decision on how to comply with the directives of the Legislature.

MR. JENSEN said he disagreed with MS. SCHMIDT and presumed there will be some notices of deficiency and some recommendations

on how to correct them. He said that if the Council cannot agree that there is an enforcement problem, they should drop this issue. He also said that the term "**self-enforcement**" does not make any sense to him. Enforcement infers something and they do not mean self-enforcement. Also he mentioned one general area that was not mentioned under the enforcement options and that was the true privatization of enforcement similar to enforcement under the federal False Claims Act. This enforcement is for profit and is called "**qui tam**" enforcement. Referring to the "**each** day a separate violation^N issue he said the reason for this is to act as an incentive for the violator to stop violating.

REP. ORR said options 3 and 1 could be combined and given to the Nondegradation Subcommittee to flesh out before the next full EQC meeting.

MR. TOLLEFSON said that made sense and a good way to start that would be to start with the draft enforcement document and use it as a spring board to see if there might be broader policy directions applicable to other agencies. This will avoid overlapping with the **Auditor's** report and be useful to address any problems identified in the report. He said that he did not want to lose sight of the focus on water resources.

MS. SOWIGNEY said that was a good idea and also said it would be valuable to find out if other agencies have similar formal or informal polices.

REP. COCCHIARELLA WITHDREW her motion and MOVED that the EQC adopt option 1 and 3 and give it to the Nondegradation Subcommittee for further analysis and bring a **recommendation** to the next Council meeting.

The motion PASSED unanimously.

ENVIRONMENTAL INDICATORS PROJECT

MR. KAKUK said in staff discussions **the** topic of environmental indicators has come up again. According to statute, the EQC Executive Director and staff are supposed to gather timely and authoritative information concerning the conditions and trends in the quality of the environment; review and appraise the various programs and activities of state agencies in light of the policies set forth in **MEPA** to make sure state agencies are complying with it; develop and recommend to the **Governor and** Legislature state policies that foster and promote the improvement of environmental quality; conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality; document and define changes in the natural environment, including the plant and animal systems, and accumulate necessary data and other information for a continuing analysis of these changes or trends

DNRC

Program	Criminal Penalty (Who Enforces Maximum Amount of Fine Maximum Amount of Jail Time)	Civil Penalty (Who Enforces Maximum Amount of Fine)	Administrative Penalty (Maximum Amount of Fine)	Injunction Authorized	Citizen Enforcement	Public Trust	Self Enforcement	Mandamus Authorized	Inspection/Monitoring A - Authorized R - Required	Other Sanctions
Water Well Contractors	Local \$500 6 Months			X					R	License Revocation
Surface Water Use	State	State \$1000/Day*							A	DNRC Petitions to District Court Permit Revocation
Ground Water Use	State \$25 - \$250								R	
Weather Modification			State						R	Permit Revocation
Irrigation Districts	State								A	Loss of Delivered Water
Dam Safety		State \$1000/Day*							R	Permit Revocation

* Each day of violation is a separate offense.

DNRC

Program
 Criminal Penalty (Who Enforces) Maximum Amount of Fine Maximum Amount of Jail Time
 Civil Penalty (Who Enforces) Maximum Amount of Fine
 Administrative Penalty (Maximum Amount of Fine)
 Injunction Authorized
 Citizen Enforcement
 Public Trust
 Self Enforcement
 Mandamus Authorized
 Inspection/Monitoring
 A - Authorized
 R - Required
 Other Sanctions

Program	Criminal Penalty (Who Enforces) Maximum Amount of Fine Maximum Amount of Jail Time	Civil Penalty (Who Enforces) Maximum Amount of Fine	Administrative Penalty (Maximum Amount of Fine)	Injunction Authorized	Citizen Enforcement	Public Trust	Self Enforcement	Mandamus Authorized	Inspection/Monitoring	A - Authorized	R - Required	Other Sanctions
Conservation Districts Land Use Regulations	\$100 10 Days											
Grazing Districts	\$10 - \$500											Trespass of livestock
Energy- Major Facilities	\$10,000/violation; 1 year	\$10,000		X				X	X			revocation of certificate
Oil and Gas	\$10,000/Day* 6 months	\$75 - 10,000/violation		X								

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A-130

DSL	Program	Criminal Penalty (Who Enforces Maximum Amount of Fine Maximum Amount of Jail Time)	Civil Penalty (Who Enforces Maximum Amount of Fine)	Administrative Penalty (Maximum Amount of Fine)	Injunction Penalty (Maximum Amount of Fine)	Citizen Authorized	Public Enforcement	Self Trust	Mandamus Enforcement	Inspection/Authorized A - Authorized R - Required	Other Sanctions
Geophysical Exploration	Local										2 Year Prohibition from Holding a Geophysical Permit Upon Conviction
Geophysical Exploration - False Mining Claims	Local \$5000 5 Years										
Prospecting - Land Owner Notification	State/Local										
Assaying of Ore	State/Local \$500 - \$1000										
Smelters	State/Local \$50 - \$100										
Ore Shippers	State/Local (Penalty Depends on Amount of Shipment)										
Coal Invoices (Enforced by DOC)	State/Local \$25-\$500 90 Days									R	6 Months Prohibition from Mining Involvement for 2nd Offense
Strip and Underground Mining	State \$500 - \$5000/ Day*	State \$100 - \$1000/ Day*		X				X		R	Permit Termination Loss of Bond

* Each day in violation is a separate offense.

A-131

Program	Criminal Penalty (Who Enforces) Maximum Amount of Fine Maximum Amount of Jail Time)	Civil Penalty (Who Enforces) Maximum Amount of Fine)	Administrative Penalty (Maximum Amount of Fine)	Injunction Authorized	Citizen Enforcement	Public Trust	Self Enforcement	Mandamus Authorized	Inspection/Monitoring A - Authorized R - Required	Other Sanctions	
DSL Coal and Uranium Reclamation	State/Local \$500 - \$10,000/Day* 1 Year	State \$100 - \$1000/Day*		X	X				X	R	BLC Reclamation Permit Termination Loss of Bond Water Replacement
Coal and Uranium Reclamation False Statement	State/Local \$10,000 1 Year										
Coal and Uranium Reclamation Interference	State/Local \$5000 1 Year										
Metal Mine Reclamation		State/Local \$100 - \$1000/Day*		X	X				X	R	BLC Reclamation Water Replacement Permit Termination Loss of Bond
Open Cut Mining		\$100 - \$1000/Day*		X						A	BLC Reclamation Permit Termination Loss of Bond

* Each day in violation is a separate offense.

DFWP

Program	Criminal Penalty (Who Enforces Maximum Amount of Fine Maximum Amount of Jail Time)	Civil Penalty (Who Enforces Maximum Amount of Fine)	Administrative Penalty (Maximum Amount of Fine)	Injunction Authorized	Citizen Enforcement	Public Trust	Self Enforcement	Mandamus Authorized	Inspection/Monitoring A - Authorized R - Required	Other Sanctions
Parks/Recreation	local	local		X					R	license cancellation
Campgrounds/trailer parks (DHES)	1st violation = \$50 - \$100 2nd violation = \$75 - 200 3rd violation = 90 days + \$200									
State Parks	6 months/ \$500									
Recreation	6 months/ \$50 - \$500									
Boating	6 months \$15 - \$500									
Snowmobiles	\$15 - \$500			X						
Off Highway Vehicles	\$50									
Caves	60 days	\$500 - \$2000								
Streams					X					

DHES	Program	Criminal Penalty (Who Enforces Maximum Amount of Fine Maximum Amount of Jail time)	Civil Penalty (Who Enforces Maximum Amount of Fine)	Administrative Penalty (Maximum Amount of Fine)	Injunction Penalty (Maximum Amount of Fine)	Citizen Authorized	Public Enforcement	Self Trust	Mandamus Enforcement	Inspection/Monitoring A - Authorized R - Required	other Sanctions
Subdivisions - Local Regulations	Local \$100 - \$500 3 Months									A	
Subdivisions - state Regulations	State \$1000	state \$1000/Day*								A	
Out-Of-State Subdivision Sales	state \$1000 - \$5000 2 Years'	State		X						A	
Water Quality	State \$25,000 1 Year	state \$25,000/Day*	State \$10,000/Day* \$100,000 Max	X						A	DHES clean Up clean Up Orders citizen Requests Double Penalty for second Criminal Offense Permit Revocation
Public Water Supply	State \$50 - \$5001 Day*	State \$10,000/Day*	state \$500/Day*							A	Permit Revocation
Cesspool, Septic Tanks, Privies	State/Local \$500									A	License Revocation
Water Treatment Plants	State									A	License Revocation

* Each day of violation is a separate offense.

OUTLINE OF ENFORCEMENT SCHEMES

1. GOVERNMENT AGENCY ENFORCEMENT

A. CIVIL PENALTIES

i. Federal

a. Administrative Penalties:

1. Tend to be quicker and more efficient than judicially imposed penalties.
2. Generally vary in degree, thereby establishing the general scope of an enforcement scheme.

b. Judicially imposed civil penalties:

1. More costly and time consuming for the regulator, but penalties tend to be larger.
2. Factors EPA takes into consideration in making judicial civil penalty assessments:
 - a. The recalcitrant behavior of the violator.
 - b. The seriousness of the violations from an environmental and public health standpoint.
 - c. The economic benefit that may have been obtained by the violator through non-compliance with applicable laws.
3. Courts have also awarded compensatory damages for loss of natural resources and have assessed investigation and litigation costs against the defendant.

c. Field Citations:

1. Characteristics: tend to be smaller penalties but are efficient and quick (These seem to act like environmental traffic tickets).
2. These penalties are being tried on the state and local level.

Eg. In Minnesota, State Pollution Control Agency employees and Dept. of Natural Resource officers are authorized to write field citations of up to \$2000 for illegal disposal of waste tires or lead acid batteries.

ii. State

- a. The trend in environmental enforcement has been to give increased responsibility and oversight to state and local governments, due to:

1. the increased number of environmental statutes and regulations in recent years, and therefore the increased number of regulated entities, and
2. the lack of financial resources to fund enforcement on the federal level.

Eg. SARA and Emergency Planning and Community Right to Know Act provide for state enforcement of federal environmental laws.

3. In 1990, state and local governments spent almost \$55 billion on the environment.

iii. Local

- a. Examples of federal statutes which provide for enforcement at the local level:
 - 1. Clean Water Act pre-treatment program
 - 2. Underground Storage Tank Treatment Program
 - 3. RCRA
 - 4. Local Emergency Planning Committees under EPCRA

iv. Municipal

- a. Eg: The city of Phoenix is adopting a civil penalty scheme through an industrial discharge permit ordinance..

B. CRIMINAL PENALTIES:

i. Federal:

- a. The current trend (in both federal and state realms) is to pursue criminal enforcement as a more effective deterrent than the pursuit of civil penalties.. As a result, more federal and state statutes have criminal penalty provisions and have generally increased criminal penalties for violations of the law.
 - 1. Examples of laws with criminal penalty provisions:
 - a. RCRA
 - b. Clean Air Act
 - c. Clean Water Act

d. *Environmental Crimes Act (which has yet to be passed by Congress): provides for enhanced felony penalties for violations of more than twenty federal environmental statutes if the violator knowingly or recklessly caused a risk of imminent death or serious bodily injury to a human or a risk of an environmental catastrophe through repeat violations.

(This acts like an habitual offender statute for environmental crimes.)

b. In the executive realm,

DOJ and EPA are the primary enforcement bodies for environmental criminal law.

1. FBI is active to some degree as well.

c. There are issues regarding the level of criminal intent that must be shown in order to convict a defendant of violating environmental laws.

1. Federal courts have ruled that actual knowledge of both the applicable statute or the violating activity is not necessary to convict an officer or employee of a corporate violator for environmental crimes.

a. This notion of "constructive knowledge of corporate officers given their position of responsibility within the corporation is

known as the "responsible corporate officer doctrine."

2. Some statutes also establish criminal culpability for "reckless" as well as "intentional" pollution.

ii. State/Local

- a. State and local governments all over the country have created environmental crime divisions within their existing government structures.

1. Eg. Solano County, California has a District Attorney Environmental Crime Unit (DAECU) which recently pursued Shell Oil for a spill near San Francisco.

C. EMERGING TRENDS IN ENFORCEMENT POLICY

i. Strategic Planning/Multi-Media Enforcement:

- a. This method has developed as a way to combat the cost of enforcing the large number of environmental regulations, and because it is realized that pollution tends not to remain contained in one medium (ie. air, water, etc.).
- b. Strategic Planning tries to integrate a more "holistic" approach by consolidating all aspects of enforcement of all applicable statutes at one time and targeting enforcement efforts on a particular industry, geographic area, or segment of the population.

ii. Risk-based enforcement:

- a. Risk assessments used by agencies responsible for enforcement attempt to identify and quantify potential hazards in order to determine the degree of risk they pose for the public.
- b. The agency will utilize these risk assessments in making enforcement decisions.
- c. The intention behind risk based enforcement is to utilize enforcement resources in a more effective way by concentrating time and effort on the sources of pollution most likely to do the greatest harm to the public.

D. OTHER METHODS OF ENFORCEMENT

- i. Tax credits
- ii. Free market approach
- iii. Alternative dispute resolution:
 - a. It is a useful way to bring multiple parties with divergent interests together to seek resolution of problems.
 - b. Tends to avoid the protracted costs of litigation given limited available resources.
 - c. EPA has been looking into alternative dispute resolution lately.
- iv. Injunctive relief and court orders
- v. Administrative orders
- vi. Company "Blacklisting": EPA can bar non-compliant

sources from contracting with the federal government.

Eg. There are contractor listing provisions in CAA and CWA.

vii. Education:

Eg. Extension Service at Montana State University publishes and distributes literature to aid small businesses in complying with environmental regulations such as "The Small Business Handbook for Managing Hazardous Wastes^m.

E. INNOVATIVE ENFORCEMENT MODELS FROM OTHER STATES

i. New Jersey's Office of the State Environmental Prosecutor:

a. N.J.'s Problem: was that lots of resources were being spent for enforcement that was relatively ineffective because of lack of coordination and communication between the various agencies responsible for enforcing all the environmental laws on the books.

b. N.J. 's Goal:

1. to improve communication and coordination between regulatory agencies,
2. to provide for a comprehensive enforcement scheme that was less fragmented, and
3. to ensure that resources were being committed in the best possible way to achieve successful enforcement.

c. N.J.'s Solution: Establishment of the Office of the State Environmental Prosecutor

1. Essentially a management mechanism intended to oversee and facilitate the state enforcement effort.
2. Office is part of the Department of Law and Public Safety and consists of the State Prosecutor (appointed by Governor and State Attorney General) and several assistant prosecutors who oversee day to day enforcement operations.'
3. The Office's responsibility is to coordinate the state's resources (both state and local) in order to create a more comprehensive and cost-effective management scheme, and to prosecute "priority" cases.

2. CITIZEN ENFORCEMENT ("PRIVATE ATTORNEY GENERALS"^{us})

A. CITIZEN SUIT PROVISIONS:

- i. Many federal and state environmental statutes contain citizen suit provisions.
- ii. Tend to be accompanied by mandatory disclosure provisions because citizens need access to data in order to sue a polluting entity.

Eg. Clean Water Act requires discharger to file a discharge monitoring report (DMR) which can be used by a citizen plaintiff to form a suit.

B. OTHER TRADITIONAL (OR NOT SO TRADITIONAL) LEGAL CAUSES OF

ACTION

i. Nuisance

- a. Private nuisance
- b. Public nuisance

ii. Negligence

iii. Negligence per se:

1. Allows a plaintiff to show negligence just by proving there was a violation of an established law without having to also show the traditional aspects of negligence such as breach of duty or an 'unreasonable standard of care.

iv. Public trust doctrine (traditionally limited to seashores):

1. Recognition that some types of natural resources are held in trust by government for the benefit of the public.
2. This doctrine has been expanded to non-navigable waters and instream flows, among other natural resources.

Eg. Michigan has statutorily expanded the public trust doctrine to include other natural resources.

v. Trespass

3. SELF ENFORCEMENT

A. ENVIRONMENTAL AUDITING:

- i. EPA definition: "systematic, documented, periodic and

objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements^M.

- ii. The threat of both civil and criminal liability has influenced industry to take the initiative to discover and correct possible violations of regulations before the regulator starts the penalty process.

1 INTRODUCTION BY Grosfield Knox Chickavilla SENATE BILL NO. 204 Density

2 BY REQUEST OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
3
4 Weldon

5 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING EXISTING ENFORCEMENT AUTHORITY UNDER THE
6 PUBLIC WATER SUPPLY LAWS; REQUIRING THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL
7 SCIENCES TO CONSIDER ESTABLISHED CRITERIA WHEN SEEKING CIVIL OR ADMINISTRATIVE
8 PENALTIES; AND AMENDING SECTIONS 75-6-109 AND 75-6-114, MCA."

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11
12 NEW SECTION. Section 1. Enforcement response. (1) Whenever, on the basis of information
13 available to the department, the **department finds** that a person is in violation of this part, a rule adopted
14 under this part, or a condition, requirement of an approval, or order issued pursuant to this part, the
15 department shall initiate an enforcement response, which may include any of the following actions:

- 16 (a) issuance of a letter notifying the person of the violation and requiring compliance;
- 17 (b) issuance of an order requiring the person to correct the violation pursuant to 75-6-104 and
- 18 75-6-109;
- 19 (c) bringing a judicial action as authorized by 75-6-111; or
- 20 (d) seeking administrative or judicial penalties as provided under 75-6-109, 75-6-113, and
- 21 75-6-114.

22 (2) The provisions of this part do not limit the authority of the department to bring a judicial action,
23 which may include the assessment of penalties, prior to initiating an administrative action authorized by this
24 part.

25
26 Section 2. Section 75-6-109, MCA, is amended to read:

27 ***75-6-109.** Administrative enforcement. (1) If the department believes that a violation of this part,
28 a rule adopted under this part, or a condition of approval issued under this part has occurred, it may serve
29 written notice of the violation, by certified mail, on the alleged violator or ~~his~~ the violator's agent. The
30 notice must specify the provision of this part, the rule, or the condition of approval alleged to have been

1 violated and the facts alleged to constitute a violation. The notice must include an order to take necessary
 2 corrective action within a reasonable period of time, which must be stated in the order. Service by mail is
 3 complete on the date of filing.

4 (2) If the alleged violator does not request a hearing before the board within 30 days of the date
 5 of service, the order becomes final. Failure to comply with a final order may subject the violator to an action
 6 commenced pursuant to 75-6-104, 75-6-113, or 75-6-114.

7 (3) If the alleged violator requests a hearing before the board within 30 days of the date of service,
 8 the board shall schedule a hearing. After the hearing is held, the board may:

9 (a) affirm or modify the department's order issued under subsection (1) if the board finds that a
 10 violation has occurred; or

11 (b) rescind the department's order if the board finds that a violation has not occurred.

12 (4) An order issued by the department or the board may set a date by which the violation must
 13 cease and set a time limit for action to correct a violation.

14 (5) As an alternative to issuing an order pursuant to subsection (1), the department may:

15 (a) require the alleged violator to appear, before the board for a hearing, at a time and place
 16 specified in the notice, to answer the charges complained of; or

17 (b) initiate an action under 75-6-111(2), 75-6-113, or 75-6-114.

18 (6) An action initiated under this part may include an administrative penalty not to exceed \$500
 19 for each day of violation. Administrative penalties collected under this section must be deposited in the
 20 public drinking water special revenue fund established in 75-6-115.

21 (7) In determining the amount of penalty to be assessed to a person, the department or the board,
 22 as appropriate, shall consider the criteria stated in 75-6-114 and the rules promulgated under
 23 75-6-103(2)(i).

24 (8) The contested case provisions of the Montana Administrative Procedure Act, provided for in
 25 Title 2, chapter 4, part 6, apply to a hearing under 75-6-108 or this section."

26

27 Section 3. Section 75-6-114, MCA, is amended to read:

28 **"75-6-114. Civil penalty. (1) A In an action initiated by the department to collect civil penalties**
 29 **against a person who is found to have ~~violates~~ violated** this part or a rule, order, or condition of approval
 30 issued under this part, the person is subject to a civil penalty **not to** exceed \$10,000.

1 (2) Each day of violation constitutes a separate violation.

2 (3) Action under this section does not bar enforcement of this part or a rule, order', or condition
3 of approval issued under this part by injunction or other appropriate remedy.

4 (4) When seeking penalties under this section, the department shall take into account the following
5 factors in determinina an appropriate settlement or judgment, as appropriate:

6 (a) the nature, circumstances, extent, and aravity of the violation; and

7 (b) with respect to the violator, the violator's abilitv to pay, prior historv of violations, the economic
8 benefit or savinas, if anv. to the violator resulting from the violator's action, and other matters that iustice
9 may require.

10 (5) Civil penalties collected pursuant to this section must be deposited in the public drinking water
11 special revenue fund established in 75-6-115."

12

13 NEW SECTION. Section 4. Codification instruction. [Section 1] is intended to be codified as an
14 integral part of Title 75, chapter 6, part 1, and the provisions of Title 75, chapter 6, part 1, apply to
15 [section 11.

16

-END-

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SENATE BILL NO. 78
Grofffield Knox Caschiarella Dhenry
BY REQUEST OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

A BILL FOR AN ACT ENTITLED: "AN ACT .MODIFYING CERTAIN REQUIREMENTS FOR THE 'WATER POLLUTION CONTROL ADVISORY COUNCIL; REMOVING THE VOLUNTARY PERFORMANCE BOND REQUIREMENTS UNDER THE WATER QUALITY LAWS AND AUTHORIZING THE DEPARTMENT TO REQUIRE PERFORMANCE BONDS FOR DISCHARGE PERMITS ISSUED TO APPLICANTS WHOSE ACTIVITIES WILL REQUIRE RECLAMATION OF DISTURBED LAND THAT MAY AFFECT WATER QUALITY; REVISING FEE REQUIREMENTS FOR HOLDERS OF A PERMIT OR AUTHORIZATION UNDER THE WATER QUALITY LAWS; REVISING THE ENFORCEMENT PROVISIONS OF THE WATER QUALITY LAWS TO CLARIFY EXISTING ENFORCEMENT AUTHORITY; AMENDING SECTIONS 75-5-103, 75-5-22 1, 75-5-401., 75-5-405, 75-5-516, 75-5-601, 75-5-616, 75-5-621, 75-5-631, 75-5-632, AND 75-5-636, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-5-103, MCA, is amended to read:

"75-5-103. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

- (1) "Board" means the board of health and environmental sciences provided for in 2-15-2104.
- (2) "Contamination" means impairment of the quality of state waters by sewage, industrial wastes, or other wastes, creating a hazard to human health.
- (3) "Council" means the water pollution control advisory council provided for in 2-15-2107.
- (4) "Degradation" means a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant pursuant to 75-5-301(5)(c).
- (5) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.
- (6) "Disposal system" means a system for disposing of sewage, industrial, or other wastes and

1 includes sewage systems and treatment works.

2 (7) "Disturbed land" means the area of land altered by activities associated with a permit issued
3 pursuant to this chapter that may affect the quality of waters located at or near lands owned or under the
4 control of the permittee.

5 ~~(7)(8)~~ "Effluent standard" means a restriction or prohibition on quantities, rates, and concentrations
6 of chemical, physical, biological, and other constituents ~~which that~~ are discharged into state waters.

7 ~~(8)(9)~~ "Existing uses" means ~~those uses~~ actually attained in state waters on or after July 1, 1971,
8 whether or not those uses are included in the water quality standards.

9 ~~(9)(10)~~ "High-quality waters" means state waters whose quality for a parameter is better than
10 standards established pursuant to 75-5-301. All waters are high-quality water unless classified by the
11 board within a classification for waters that are not suitable for human consumption or not suitable for
12 growth and propagation of fish and associated aquatic life.

13 ~~(10)(11)~~ "Industrial waste" means a waste substance from the process of business or industry or
14 from the development of any natural resource, together with any sewage that may be present.

15 ~~(11)(12)~~ "Interested person" means a person who has submitted oral or written comments on the
16 department's preliminary decision regarding degradation of state waters, pursuant to 75-5-303. The term
17 includes a person who has requested authorization to degrade high-quality waters.

18 ~~(12)(13)~~ "Local department of health" means the staff, including health officers, employed by a
19 county, city, city-county, or district board of health.

20 ~~(13)(14)~~ "Mixing zone" means an area established in a permit or final decision on nondegradation
21 issued by the department where water quality standards may be exceeded, subject to conditions that are
22 imposed by the department and that are consistent with the rules adopted by the board.

23 ~~(14)(15)~~ "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark,
24 lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or
25 discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state
26 waters.

27 ~~(15)(16)~~ "Owner or operator" means a person who owns, leases, operates, controls, or supervises
28 a point source.

29 ~~(16)(17)~~ "Parameter" means a physical, biological, or chemical property of state water when a value
30 of that property affects the quality of the state water.

1 ~~(17)~~(18) "Person" means the state, a political subdivision of the state, institution, firm; corporation,
2 partnership, individual, or other entity and includes persons resident in Canada.

3 ~~(18)~~(19) "Point source" means a discernible, confined, and discrete conveyance, including but not
4 limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel
5 or other floating craft, from which pollutants are or may be discharged.

6 ~~(19)~~(20) "Pollution" means contamination or other alteration of the physical, chemical, or biological
7 properties of state waters ~~which that~~ exceeds that permitted by Montana water quality standards, including
8 but not limited to standards relating to change in temperature, taste, color, turbidity, or odor; or the
9 discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance
10 into state water ~~which that~~ will or is likely to create a nuisance or render the waters harmful, detrimental,
11 or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife.
12 A discharge, seepage, drainage, infiltration, or flow ~~which that~~ is authorized under the pollution discharge
13 permit rules of the board is not pollution under this chapter. Activities conducted under the conditions
14 imposed by the department in short-term authorizations pursuant to 75-5-308 are not considered pollution
15 under this chapter.

16 ~~(20)~~(21) "Sewage" means water-carried waste products from residences, public buildings,
17 institutions, or other buildings, including discharge from human beings or animals, together with ground
18 water infiltration and surface water present.

19 ~~(21)~~(22) "Sewage system" means a device for collecting or conducting sewage, industrial wastes,
20 or other wastes to an ultimate disposal point.

21 ~~(22)~~(23) "Standard of performance" means a standard adopted by the board for the control of the
22 discharge of pollutants ~~which that~~ reflects the greatest degree of effluent reduction achievable through
23 application of the best available demonstrated control technology, processes, operating methods, or other
24 alternatives, including, where practicable, a standard permitting no discharge of pollutants.

25 ~~(23)~~(24) "State waters" means a body of water, irrigation system, or drainage system, either
26 surface or underground; however, this subsection does not apply to irrigation waters ~~where~~ when the
27 waters are used up within the irrigation system and the waters are not returned to any other state waters.

28 ~~(24)~~(25) "Treatment works" means works, including sewage lagoons, installed for treating or
29 holding sewage, industrial wastes, or other wastes.

30 ~~(25)~~(26) "Water quality protection practices" means those activities, prohibitions, maintenance

1 procedures, or other management practices applied to point and nonpoint sources designed to protect,
 2 maintain, and improve the quality of state waters. Water quality protection practices include but are not
 3 limited to treatment requirements, standards of performance, effluent standards, and operating procedures
 4 and practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material
 5 storage.

6 ~~(26)~~(27) "Water well" means an excavation that is drilled, cored, bored, washed, driven, dug,
 7 jetted, or otherwise constructed and intended for the location, diversion, artificial recharge, or acquisition
 8 of ground water."

9

10 Section 2. Section 75-5-221, **MCA**, is amended to read:

11 "**75-5-221.** Water pollution control advisory council -- general. **(1)** The council provided for in
 12 2-15-2107 shall select a ~~chairman~~ presiding officer from among its members. The director of ~~health and~~
 13 ~~environmental sciences~~ the department shall designate a member of the staff of the department to act as
 14 secretary to the council. The secretary shall keep records of **all** actions taken by the council.

15 ~~(2) It shall hold at least two regular meetings each calendar year. Special meetings shall~~ Meetings
 16 must be held at the call of the ~~chairman~~ presiding officer or on written request of two or more members.

17 **(3)** Each member may, by filing with the secretary, designate a deputy or alternate to perform ~~his~~
 18 the member's duties.

19 **(4)** The council shall act only in an advisory capacity to the department on matters relating to water
 20 pollution.

21 ~~(5) The director of the department may desinate other persons to participate with council~~
 22 members in evaluatins particular issues arising under this chapter that are brought before the council."

23

24 Section 3. Section 75-5-401, **MCA**, is amended to read:

25 "**75-5-401.** Board rules for permits. **(1)** The board shall adopt rules:

26 **(a)** governing application for permits to discharge sewage, industrial wastes, or other wastes into
 27 state waters, including rules requiring the filing of plans and specifications relating to the construction,
 28 modification, or operation of disposal systems;

29 **(b)** governing the issuance, denial, modification, or revocation of permits.

30 **(2)** The rules ~~shall~~ must allow the issuance or continuance of a permit only if the department finds

1 **that** operation consistent with the limitations of the permit will not result in pollution of any state waters,
 2 except that the rules may allow the issuance of a temporary permit under which pollution may result if the
 3 department ~~insures~~ ensures that ~~such the~~ permit contains a compliance schedule designed to meet all
 4 applicable effluent standards and water quality standards in the shortest reasonable period of time.

5 (3) The rules ~~shall~~ must provide that the department may revoke a permit if the department finds
 6 that the holder of the permit has violated its terms, unless the department also finds that the violation was
 7 accidental and unforeseeable and that the holder of the permit corrected the condition resulting in the
 8 violation as soon as was reasonably possible.

9 (4) The board may adopt rules governing reclamation of sites disturbed by construction,
 10 modification, or operation of ~~disposal systems~~ permitted activities for which a bond is ~~voluntarily~~
 11 a permittee pursuant to **75-5-405**, including rules for the establishment of criteria and procedures governing
 12 release of the bond or other surety and release of portions of a bond or other surety."

13
 14 NEW SECTION. Section **4.** Performance bond -- statement of policy. (1) The department may
 15 not require a bond under 75-5-405 unless it determines that the permitted activity disturbs land in a
 16 magnitude or manner that poses a significant threat to the quality of state waters. A bond required under
 17 75-5-405 must be used, if needed, only to reclaim disturbed land that may impact water quality. A bond
 18 required under 75-5-405 may not be used to remediate damages to state waters.

19 (2) The department may not require a bond for a permitted activity if the permitholder or applicant
 20 has posted a bond for the permitted activity with another state agency to reclaim disturbed land that may
 21 impact water quality.

22 (3) The bond amount must be limited to the reasonable costs necessary to eliminate anticipated
 23 potential impacts to state waters. In determining the bond amount, the department shall consult with the
 24 permitholder or applicant and give consideration to alternative means of water quality protection offered
 25 by the permitholder or applicant.

26
 27 Section **5.** Section 75-5-405, **MCA**, is amended to read:

28 ~~"75-5-405. Voluntary filing of performance~~ Performance bond -- terms -- hearing. (1) A person
 29 who holds or has applied for a permit pursuant to 75-5-401 may ~~voluntarily~~ be required to file a
 30 performance bond or other surety with the department for an amount sufficient to enable the state to

1 ~~reclaim the land~~ reclaim the land ~~disturbed lands resulting from activity authorized by the permit that may impact water~~
 2 ~~quality by the project or activity authorized by the permit in accordance with all permit requirements and~~
 3 ~~as needed to prevent pollution of state waters~~

4 (2) ~~If the~~ The department ~~determines that~~ shall determine the appropriate bonding level, ~~does not~~
 5 which must represent the present cost of reclaiming the disturbed land according to the reclamation
 6 requirements specified in the permit and the present cost of preventing pollution of state waters —
 7 ~~department shall notify the permittee and the permittee may modify the amount of the bond to accurately~~
 8 ~~reflect the present cost.~~

9 (3) The applicant shall file with the department a bond payable to the state of Montana with surety
 10 satisfaction to the department in an amount determined by the department to be reasonably necessary to
 11 protect the quality of state waters from impacts resulting from disturbed land associated with the permitted
 12 activity. The bond must be conditioned upon compliance with the provisions of this chapter, rules
 13 implementing this chapter, and the conditions or limitations of the discharge permit.

14 (4) The department shall review the amount of each bond at the time of the permit renewal and
 15 shall notify the permittee if the review indicates that the bond level should be adjusted. When determined
 16 by the department that the bonding level of a permit does not represent the present costs of compliance
 17 with this chapter or of the protection of state waters, the department may modify the bonding requirements
 18 of that permit.

19 ~~(3)(5)~~ (5) The department may not release all or ~~any a~~ portion of a performance bond or other surety
 20 filed pursuant to this section until reclamation of the disturbed land has been completed to the satisfaction
 21 of the department and the department has determined that pollution of state waters has not occurred. The
 22 department may initiate bond forfeiture proceedings if the permittee fails to satisfactorily reclaim the
 23 disturbed land or prevent pollution of state waters.

24 ~~(4)(6)~~ (6) The department may not release a bond or other surety filed pursuant to this section until
 25 the public has been provided an opportunity for a hearing."

26

27 Section 6. Section 75-5-516, MCA, is amended to read:

28 "75-5-516. Fees authorized for recovery -- process -- rulemaking. (1) ~~The~~ board shall by rule
 29 prescribe fees to be assessed by the department that are sufficient to cover the board's and department's
 30 documented costs, both direct and indirect, of:

1 (a) reviewing and acting upon an application for a permit, permit modification, permit renewal,
2 certificate, license, or other authorization required by rule under 75-5-201 or ~~75-5-401~~;

3 (b) reviewing and acting upon a petition for a degradation allowance under 75-5-303;

4 (c) reviewing and acting upon an application for a permit, certificate, license, or other authorization
5 for which an exclusion is provided by rule from the permitting requirements established under 75-5-401;

6 (d) enforcing the terms and conditions of a permit or authorization identified in subsections (1)(a)
7 through (1)(c). If the permit or authorization is not issued, the department shall return this portion of any
8 application fee to the applicant.

9 (e) conducting compliance inspections and monitoring effluent and ambient water quality; and

10 (f) preparing water quality rules or guidance documents.

11 (2) The rules promulgated by the board under this section must include:

12 (a) a fee on all applications for permits or authorizations, as identified in subsections (1)(a) through
13 (1)(c), that recovers to the extent permitted by this subsection (2) the department's cost of reviewing and
14 acting upon the applications. This fee may not be ~~less than \$250 or more than \$5,000~~ per discharge point
15 for an application addressed under subsection (1), except that an application with multiple ~~storm-water~~
16 discharge points may be assessed a lower fee for those points according to board rule.

17 (b) an annual fee to be assessed according to the volume and concentration of waste discharged
18 into state waters. The annual fee may not be ~~less than \$250 and may not be~~ more than \$3,000 per million
19 gallons discharged per day on an annual average for any activity under permit or authorization, as described
20 in subsection (1), except that:

21 (i) a permit or authorization with multiple ~~storm-water~~ discharge points may be assessed a lower
22 fee for those points according to board rule; and

23 (ii) a facility that consistently discharges effluent at less than or equal to one-half of its effluent
24 limitations and that is in compliance with other permit requirements, using the previous calendar year's
25 discharge data, is entitled to a 25% reduction in its annual permit fee. Proportionate reductions of up to
26 25% of the permit fee may be given to facilities that consistently discharge effluent at levels between 50%
27 and 100% of their effluent limitations. However, a new permittee is not eligible for a fee reduction in its
28 first year of operation, and a permittee with a violation of any effluent limit during the previous calendar
29 year is not eligible for a fee reduction for the following year.

30 (3) To the extent permitted under ~~this limitation~~ subsection (2)(b), the annual fee must be sufficient

1 to pay the department's estimated cost of conducting all tasks described under subsection (1) after
2 subtracting:

3 ~~(i)~~(a) the fees collected under subsection (2)(a);

4 ~~(ii)~~(b) state general fund appropriations for functions administered under this chapter; and

5 ~~(iii)~~(c) federal grants for functions administered under this chapter.

6 ~~(3)~~(4) For purposes of subsection ~~(2)~~(3), the department's estimated cost of conducting the tasks
7 described under subsection (1) is the amount authorized by the legislature for the department's water
8 quality discharge permit programs.

9 ~~(4)~~(5) If the applicant or holder fails to pay a fee assessed under this section or rules adopted under
10 this section within 90 days after the date established by rule for fee payment, the department may:

11 (a) impose an additional assessment consisting of not more than 20% of the fee plus interest on
12 the required fee computed at the rate established under 15-31-510(3); or

13 (b) suspend the permit or exclusion. The department may lift the suspension at any time up to 1
14 year after the suspension occurs if the holder has paid all outstanding fees, including all penalties,
15 assessments, and interest imposed under subsection ~~(4)~~(a)(5)(a).

16 ~~(5)~~(6) Fees collected pursuant to this section must be deposited in an account in the special
17 revenue fund type pursuant to 75-5-517.

18 ~~(6)~~(7) The department shall give written notice to each person assessed a fee under this section
19 of the amount of fee that is assessed and the basis for the department's calculation of the fee. This notice
20 must be issued at least 30 days prior to the due date for payment of the assessment.

21 ~~(7)~~(8) A holder of or an applicant for a permit, certificate, or license may appeal the department's
22 fee assessment to the board within 20 days after receiving written notice of the department's fee
23 determination under subsection ~~(6)~~(7). The appeal to the board must include a written statement detailing
24 the reasons that the permitholder or applicant considers the department's fee assessment to be erroneous
25 or excessive.

26 ~~(8)~~(9) If part of the department's fee assessment is not in dispute in an appeal filed under
27 subsection ~~(7)~~(8), the undisputed portion of the fee must be paid to the department upon written request
28 of the department.

29 ~~(9)~~(10) The contested case provisions of the Montana Administrative Procedure Act, provided for
30 in Title 2, chapter 4, part 6, apply to a hearing before the board under this section.

1 ~~(10)~~(11) A municipality may raise rates to cover costs associated with the fees prescribed in this
2 section for a public sewer system without the hearing required in 69-7-111."

3
4 Section 7. Section 75-5-601, MCA, is amended to read:

5 "75-5-601. Cleanup orders. (1) The department ~~shall~~ may issue ~~orders~~ an order to a person to
6 clean up any material that ~~he~~ the person or ~~his~~ the person's employee, agent, or subcontractor has
7 accidentally or purposely dumped, spilled, or otherwise deposited in or near state waters and that may
8 pollute ~~them~~ state waters.

9 (2) If a unit of state or local government, including but not limited to a local board of health, county
10 commission, governing body of a municipality, or state agency, has granted a permit or license to a person
11 to discharge waste or has otherwise authorized an activity that involves the placement of waste and the
12 department has reason to believe that the waste is causing or is likely to cause pollution of state waters,
13 the department may issue an order to the unit of state or local government to take measures to ensure that
14 the wastes causing or likely to cause the pollution are cleaned up.

15 (3) The department may include in an order issued to a county commission pursuant to subsection
16 (2) a request that the commission create a sewer district in the geographic area affected by the order for
17 the purpose of establishing a public sewer system in accordance with the petition and election procedures
18 provided by 7-13-2204 and 7-13-2208 through 7-13-2214."

19
20 NEW SECTION. Section 8. Enforcement response. (1) Whenever, on the basis of information
21 available to the department, the department finds that a person is in violation of this chapter, a rule adopted
22 under this chapter, or a condition or limitation in a permit, authorization, or order issued under this chapter,
23 the department shall initiate an enforcement response, which may include any of the following actions:

24 (a) issuance of a letter notifying the person of the violation and requiring compliance;

25 (b) issuance of an order requiring the person to correct the violation pursuant to 75-5-601,
26 75-5-611, 75-5-613, and 75-5-621;

27 (c) bringing a judicial action as authorized by 75-5-614 and 75-5-622; or

28 (d) seeking administrative or judicial penalties as provided under 75-5-611, 75-5-615, and
29 75-5-631 through 75-5-633.

30 (2) The provisions of this chapter do not limit the authority of the department to bring a judicial

1 action, which may include the assessment of penalties, prior to initiating any administrative action
2 authorized by this chapter.

3

4 Section 9. Section **75-5-616**, MCA, is amended to read:

5 "**75-5-616**. Enforcement of permits and chapter. The department shall take ~~such~~ actions ~~as that~~
6 are authorized ~~or required~~ under ~~75-5-612 through 75-5-615~~ this part to ~~insure~~ ensure that the terms and
7 conditions of issued permits are complied with and to ~~insure~~ ensure that violations of this chapter are
8 appropriately prosecuted."

9

10 Section 10. Section **75-5-621**, MCA, is amended to read:

11 "**75-5-621**. Emergencies. (1) Notwithstanding ~~any~~ other provisions of this chapter, if the
12 department finds that a person is committing or is about to commit an act in violation of this chapter or an
13 order or rule issued under ~~it which~~ this chapter that, if it occurs or continues, will cause substantial
14 pollution the harmful effects of which will not be remedied immediately after the commission or cessation
15 of the act, the department ~~shall~~ may order the person to stop, avoid, or moderate the act so that the
16 substantial injury will not occur. The order ~~shall be~~ is effective immediately upon receipt by the person to
17 whom it is directed, unless the department provides otherwise.

18 (2) Notice of the order ~~shall~~ must conform to the requirements of **75-5-611(1)** so far as practicable.
19 The notice ~~shall~~ must indicate that the order is an emergency order.

20 (3) Upon issuing ~~such~~ an order, the department shall fix a place and time for a hearing before the
21 board, not later than 5 days ~~thereafter~~ after issuing the order unless the person to whom the order is
22 directed ~~shall request~~ requests a later time. The department may deny a request for a later time if it finds
23 that the person to whom the order is directed is not complying with the order. The hearing ~~shall~~ must be
24 conducted in the manner specified in **75-5-611**. As soon as practicable after the hearing, the board shall
25 affirm, ~~modify~~, or set aside the order of the department. The order of the board ~~shall~~ must be accompanied
26 by the statement specified in **75-5-611(5)**. An action for review of the order of the board may be initiated
27 in the manner specified in **75-5-641**. The initiation of ~~such~~ an action or taking of an appeal may not stay
28 the effectiveness of the order unless the court finds that the board did not have reasonable cause to issue
29 an order under this section."

30

1 Section 11. Section 75-5-631, MCA, is amended to read:

2 "75-5-631. Civil penalties -- injunctions not barred. (1) A In an action initiated by the department
3 to collect civil penalties against a person who violates is found to have violated this chapter or a rule,
4 permit, effluent standard, or order issued under the provisions of this chapter, the person shall be is subject
5 to a civil penalty not to exceed \$25,000. Each day of violation constitutes a separate violation.

6 (2) Action under this section does not bar enforcement of this chapter or of rules or orders issued
7 under it by injunction or other appropriate remedy.

8 (3) The department shall institute and maintain any enforcement proceedings in the name of the
9 state.

10 (4) When seeking penalties under this' section, the department shall take into account the following
11 factors in determining an appropriate ~~settlement, or judgment, as appropriate if any, subsequent to the filing~~
12 ~~of a complaint~~

13 (a) the nature, circumstances, extent, and gravity of the violation; and

14 (b) with respect to the violator, ~~his the violator's~~ ability to pay, ~~any~~ prior history of ~~such~~ violations,
15 the economic benefit or savings, if any, to the violator resulting from the violator's action, and ~~any~~ other
16 matters as that justice may require."

17

18 Section 12. Section 75-5-632, MCA, is amended to read:

19 "75-5-632. Criminal penalties. A person who willfully or negligently violates 75-5-605 or any
20 pretreatment standard established pursuant to this chapter is guilty of an offense and, ~~upon conviction, is~~
21 subject to a fine not to exceed \$25,000 per day of violation or imprisonment for not more than 1 year, or
22 both. Following an initial conviction under this section, subsequent convictions ~~shall~~ subject ~~a person~~ to
23 a fine of not more than \$50,000 per day of violation or imprisonment for not more than 2 years, or both."

24

25 Section 13. Section 75-5-636, MCA, is amended to read:

26 "75-5-636. ~~Action~~ Investigation of complaints by other parties. A person, association, corporation,
27 or agency of the state or federal government may ~~apply to~~ notify the department ~~protesting a~~ of an alleged
28 violation of this chapter. ~~The~~ Based upon information submitted by the person, association, corporation,
29 or agency, the department shall ~~make~~ conduct an investigation ~~and make a written report to the person,~~
30 ~~association, corporation, or agency which made the protest~~ to determine the validity of the complaint. If

1 a violation is established by the ~~department's~~ investigation ~~of the department~~, the department shall initiate
2 an appropriate enforcement ~~action shall be taken~~ response as described in [section 7]."

3

4 NEW SECTION. Section 14. Codification instructions. (1) [Section 41 is intended to be codified
5 as an integral part of Title 75, chapter 5, part 4, and the provisions of Title 75, chapter 5, part 4, apply to
6 [section 4].

7 (2) [Section 81 is intended to be codified as an integral part of Title 75, chapter 5, part 6, and the
8 provisions of Title 75, chapter 5, part 6, apply to [section 8].

9

10 NEW SECTION. Section 15. Effective date. [This act] is effective July 1, 1995.

11

-END-