WATER POLICY SUBCOMMITTEE
ENVIRONMENTAL QUALITY COUNCIL
January 20, 2000
Meeting Minutes
Draft: April 25, 2000
Approved: May 4, 2000

COMMITTEE MEMBERS PRESENT
Sen. Bea McCarthy, Chair
Rep. Bill Tash
Sen. John Tester

STAFF MEMBERS PRESENT
Mary Vandenbosch
Judy Keintz, Secretary

Agenda (**Attachment 3**)
Visitors' list (Attachment 1)

I INTRODUCTION AND ROLL CALL

The meeting was called to order at 8:00 a.m. by CHAIR MCCARTHY. Roll call was noted; all members were present, **Attachment 2**.

II CONFEDERATED SALISH AND KOOTENAI TRIBES V. CLINCH

Don MacIntyre, Department of Natural Resources and Conservation (DNRC), remarked that in 1996, the Confederated Salish and Kootenai Tribes brought an action against the DNRC arguing that the State did not have any authority, within the exterior boundary of the Flathead Indian Reservation, for purposes of issuing water use permits. Separate actions were brought in state and federal courts. The federal action was staid pending state action.

In August of 1996, the Montana Supreme Court held in the Ciotti case that the statutory mechanism was not sufficient to allow the DNRC to issue permits either for new uses or change authorizations to existing uses within the exterior boundaries of the Flathead Indian Reservation. The Governor sought to change the law relevant to issuance of permits and change authorizations. Senate Bill 97 was passed in 1997 in direct response to the Ciotti decision. This legislation blessed all permits that had been issued since 1973 and changed the statutory mechanism to make it clear that the permitting system should proceed hand-in-hand with the adjudication process. The fact that water rights were not adjudicated should not be a bar to water development.

In November of 1997, the Confederated Salish and Kootenai Tribes brought an original action in the Montana Supreme Court. This case is known as the Clinch case. The first issue raised was that SB 97 excluded federal Indian reserved water rights in violation of Article IX of the Montana Constitution. The second issue was that SB 97 constituted an unlawful delegation of legislative authority to a state agency. A third issue: SB 97 unconstitutionally discriminates against Indian tribes. The fourth issue: SB 97 violated tribal due process rights as well as the anti-retroactive provisions of the Montana Constitution. The Tribes also argued that, if the Montana Supreme Court should find that SB 97 was constitutional, then the Montana Supreme Court should review its earlier decision in the case of State of Montana ex rel. Greeley v. The Confederated Salish and Kootenai Tribes.

The Montana Supreme Court narrowed the Clinch case to one issue. The issue was whether or not the DNRC should be enjoined from issuing further water use permits on the Flathead Indian Reservation until the Tribal rights were quantified. The Court did not look at the constitutional issues. The Court found in favor of the state and also held that the protection continued to exist in the legal availability test. The Court looked at the legal availability criteria to determine whether or not it was constitutional. Without further legal analysis, the Court held that because the Indian water rights were pervasive in nature, until the quantity of the water right was known, water permits could not be issued within the exterior boundaries of the Flathead Indian Reservation. The Court enjoined the DNRC from issuing permits on the Flathead Indian Reservation.

This decision potentially affects four applications. The DNRC believes that they are not enjoined from changes in appropriation rights for those actions taken for existing water uses. This could include changes in irrigation uses. There is nothing in the decision that ties the legal availability to the change in use criteria.

The Department is disappointed in the reaction of the Montana Supreme Court and the situation wherein the Court took original jurisdiction without looking at the facts.

Mr. MacIntyre noted that in the last legislative session a law was passed that temporarily closed the Clark Fork River. This has limited development. He further noted that negotiations with Avista regarding water rights in the basin are ongoing at this time.

REP. TASH questioned whether consumptive and non-consumptive use had been addressed by the Court. **Mr. MacIntyre** remarked that the Court did not look at this issue. He added that the items raised in the Clinch case which were not addressed by the Court could be addressed by the Legislature.

SEN. TESTER inquired as to the disadvantages of a notice procedure versus a permit procedure. **Mr. MacIntyre** explained that the permit system provides that existing users do not

need to be placed in the position of always going to the court system to enjoin new users. The notice system would revert back to the law prior to 1973. Existing water rights holders would only have the courts to protect them if they are adversely affected. The first user doesn't always use the water to the fullest extent. This case states that permits cannot be issued to new users that are on the Flathead Indian Reservation who are non-Indians.

MS. VANDENBOSCH remarked that the dissenting opinion stated that the Department was precluded from issuing permits for ground water. She asked whether this opinion carried any weight. **Mr. MacIntyre** remarked that Judge Rodeghiero, who authored the dissenting opinion, is a water judge for the State and is very knowledgeable on water rights due to his exposure to the adjudication process. He laid out scenarios of the consequences of the majority opinion. Although Judge Rodeghiero's points are very valid, dissenting opinions do not have the force of law.

MS. VANDENBOSCH inquired as to the Governor's possible actions in respect to this case. **Mr. MacIntyre** explained that the Governor wanted an analysis of the case and also that he was interested in personally visiting with tribal leaders and legislators on this issue.

SEN. MCCARTHY asked if the DNRC would be proposing legislation in response to this decision. **Mr. MacIntyre** state that the DNRC is not advocating legislation at this time. SEN. MCCARTHY requested that the DNRC inform the Water Policy SUBCOMMITTEE if it decides to propose legislation.

III REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs)

Tim Byron, Department of Environmental Quality (DEQ), stated that **an** animal feeding operation is a facility where animals are confined for more than 45 consecutive days in any 12-month period and where vegetation is not sustained. If an animal feeding operation has a direct discharge or a potential to have a direct discharge into state waters, the operation meets the definition of a CAFO. Federal regulations use definitions based on numbers of animal units. One thousand animal units is a concentrated feeding operation under federal regulations. There are three categories of animal feeding operations: 1) greater than 1,000 animal units; 2) 301 to 1,000 animal units; and 3) 300 and less.

Feeding operations with 301 to 1,000 animal units are CAFOs if they discharge through a man made conveyance and if the source of water is above the operation and it passes through or otherwise comes in contact with the animals. If the operation has 300 or less animal units, in order to be defined as a CAFO, it must be specifically designated by the regulating authority after an on-site inspection. They have the discretion to issue individual permits to CAFOs based on proximity to state water, size of the operation, etc.

The status of the current permit is that it was last issued in May of 1994 and will expire at the end of June 1999. The permit will remain in force until it is reissued. Permittees are still operating under that permit. The new draft permit was sent out for public notice, hearings were held in Billings and Great Falls, responses to comments have been prepared, and the permit has been redrafted and is ready for reissuance. An issue which needs to be addressed before the permit can be reissued is the federal government's clean water initiative. A draft strategy was prepared by the U.S. Environmental Protection Agency (EPA) in the fall of 1998 and was finalized the following spring. It was sent out with another document from the Enforcement Office of the EPA. The second document was the Compliance Assurance Implementation Plan specific to CAFOs. The State is required to develop a strategy for improving water quality compliance from CAFOs. The draft state strategy went out for public notice in May 1999. Numerous comments were received. The final version of the draft general permit should be submitted to the Director of the DEQ this week.

The federal documents recommend that all animal feeding operations implement nutrient management plans. The draft general permit includes the requirement for a comprehensive nutrient management plan from operations that have more than 1,000 animal units. This will cover several of the large feedlot operations in Montana and most of these are in the Yellowstone Valley. Most Montana operations contain less than 500 animal units. The EPA also wants a complete inventory of all of Montana's animal feeding operations. The DEQ's inventory is voluntary and complaint driven. The effluent limit in the federal regulations states that CAFOs shall be non-discharging except in the case of an overflow that would result from a specific storm event--a 25-year, 24-hour storm event.

SEN. TESTER remarked that out-of-state operations would be looking to Montana to set up CAFOs. His concern is that CAFOs be strictly regulated. However, he would not like to see legislation that would put family ranchers out of business. He questioned whether legislation could be focused on truly large operations that have the potential for environmental disaster. **Mr. Byron** believed that the individual permit would be the best process. The need for legislation would depend on the number of large operations that would want to set up in the state. In the last six months, he has received a half dozen phone calls from large operations interested in moving into the state. Standardized design requirements would need to be developed by the DEQ.

SEN. TESTER questioned whether the Pondera Colony was always regulated under a general permit. **Mr. Byron** explained that the Colony was under an individual permit for approximately two years. The individual permit required that they pump directly from the tank into a tank truck that had an injection toolbar. It became a manure spreading operation.

SEN. TESTER questioned whether the DEQ had an adequate staff for oversight. **Mr. Byron** explained that they did not.

SEN. TESTER further questioned whether on-site visitation was allowable without a complaint. **Mr. Byron** stated that it was but that his time did not allow for many on-site visits. He is able to perform 25-30 inspections each year.

SEN. TESTER maintained that it was important that investors seeking to set up CAFO operations in the state have all the facts beforehand. The rules needed to be adequate from the beginning.

REP. TASH remarked that one of the tools that could be used as a criterion for issuance of a permit would be siting. **Mr. Byron** added that the DEQ has the flexibility to move the proposed location so that it is isolated from surface water, ground water, and downwind neighbors. **Mr. Byron** added that a consent decree has been drafted in the Pondera Colony matter. MS. VANDENBOSCH added that **John Arrigo, DEQ,** explained that the violation included both the Water Quality Act, which prohibits pollution of state waters, and the CAFO permit. The administrative penalty amounted to $4,800. The Colony was ordered to cease any irrigation with manure through pivot no. 7 and to disconnect the piping between the various parts of the irrigation system. Pivot no. 7 was used in the July incident. Settlement negotiations are ongoing but the DEQ expects the Colony will sign the administrative order on consent, pay the penalty, and settle the case.

SEN. COLE questioned whether the DEQ had an inventory of the feedlots in the state. **Mr. Byron** remarked that they had a breakdown of the feedlots with 1,000 animal units or more. **Bonnie Lovelace, DEQ,** remarked that this information was provided to the EQC earlier when the CAFO issue was reviewed. She offered to provide updated information for the Subcommittee.

SEN. TESTER stated that the Pondera Colony did not have violations when it was under an individual permit. When it went to a general permit, within a short period of time, there were problems. **Mr. Byron** explained that he was not aware that the Colony was having economic problems with the sub-surface injection. The general permit does not require a specific mode of land application. The individual permit was more specific.

Ms. Lovelace added that she is working to get more people on the ground for site visitations. They are attempting to come up with an inventory of feedlots in the state. The DNRC has information regarding state leases which will help them locate confined operations., Other methods will also be implemented to arrive at an inventory of feedlots.

REP. TASH inquired about the schedule for completing the compliance strategy with the EPA. **Ms. Lovelace** explained that the DEQ is not asking for nutrient plans for the smaller operations. The EPA is in disagreement with that position but recognizes that people can question their authority as well. The EPA does not have clear authority. She emphasized the importance of

giving the process a chance to work. The Water Quality Act is always available for different problems.

IV REGULATION OF HOG FARMS: COMPARISON OF LAWS IN SELECTED STATES

MS. VANDENBOSCH provided an outline entitled, "Review of Regulation of Hog Farms in Other States", **Exhibit 1**. Montana's framework addresses ground water and surface water. Some states have laws and regulations that are specific to swine. Colorado's law is the result of a 1998 ballot initiative that was approved by the voters. It allows local governments to impose regulations for hog facilities that are more stringent than state law. Nearly all states use the same definitions for their NPDES CAFO programs. A majority of states use the federal definition of CAFO for state non-NPDES CAFO programs. Colorado uses dilution standards for odors. The odor needs to be diluted to a certain amount at the boundary of the operation and a different amount at a receptor, which may be a home. The validity of odor measurement is debatable. Minnesota regulates feedlot air emissions through enforcement of the Minnesota hydrogen sulfide ambient air standard. The highest concentrate of hydrogen sulfide was at swine and dairy facilities. They did not find any correlation between the number of animal units and hydrogen sulfide. Some states require setbacks from water sources.

MS. VANDENBOSCH noted the list of possible next steps for the Subcommittee. She added that a comprehensive review of hog farm regulation would be a study comparable to the MEPA Study or the Eminent Domain Study.

SEN. TESTER asked about DEQ's ability to address each of the different types of water quality regulations identified in the overview of other states' laws and regulations (**see Exhibit 1**). **Mr. Byron** stated that DEQ had no authority to require the following: fixed setbacks from domestic wells, streams and/or water sources; financial assurance; and closure plans. Soil testing is not generally required. He stated that the DEQ needs to have design standards. There are no specific design standards for animal feeding operations. He is borrowing from the DEQ standards for domestic waste.

Mr. Byron further explained that the draft general permit would require nutrient management plans for large operations (more than 1,000 animal units). This is a source of controversy. Stockgrowers oppose this requirement. The DEQ will ask for enough information to ensure that land application does not exceed agronomic rates.

Mr. Byron continued to explain that ground water monitoring is required for some operations through the authorization letter. This is the only form of leak detection that is required. The application process requires submittal of information showing the construction plan, design and site characteristics. The general permit does not specify the mode of land application; however, this can be addressed in the authorization letter.

A spill contingency plan is not required, however the permittee is required to mitigate the spill to the best of their ability.

REP. TASH remarked that siting criteria should be explored as a possible tool to address this issue. He added that he does not think that the Subcommittee should address the nuisance issues.

SEN. TESTER requested an evaluation of criteria for an individual permit versus a general permit and investigation of bonding for large hog operations.

V UPDATE ON WATER POLICY ISSUES

▸ Update on EQC Request to State Agencies Re: Environmental Trend Data

MR. MITCHELL recapped that the Subcommittee has asked state agencies for the type of environmental data they have collected and the value of the data in terms of identifying the quality of the environment and trends in natural resources. He provided copies of responses from the DNRC, **Exhibit 2**, and the Natural Resource Information System (NRIS), **Exhibit 3.** The DEQ responded with a list of contacts for their various programs, **Exhibit 4**. The DNRC, Water Rights Bureau, listed a few items available that may be helpful in identifying water quantity issues. The NRIS listed its efforts in serving as a clearinghouse for databases.

MS. Vandenbosch remarked that a supplement had been prepared for the DEQ entitled "Environmental Trend Data Needs - Water Quality", **Exhibit 5.**

CHAIR MCCARTHY requested that the Subcommittee members review the list and provide remarks to MS. VANDENBOSCH by February 20", which would allow preparation time for the next Subcommittee meeting.

▸ DFWP Water Leasing Report

CHAIR MCCARTHY explained that the DFWP Water Leasing Report had been sent to Subcommittee members for their review.

VI BUSINESS AND NEXT STEPS

▸ Adoption of Minutes

Motion/Vote: SEN. TESTER MOVED THAT THE MINUTES OF THE OCTOBER 21,1999 WATER POLICY SUBCOMMITTEE MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

▸ Agenda for Next Water Policy Subcommittee Meeting (March 23, 2000)

MS. VANDENBOSCH presented a list of potential agenda items, **Exhibit 6.** It was decided that item no. 4 would be moved to the May meeting since the next meeting is scheduled for Billings.

VII ADJOURNMENT

There being no further business, the meeting adjourned at 11:00 a.m.