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LEGISLATIVE ENVIRONMENTAL ANALYST
TODD EVERTS

AGENCY OVERSIGHT SUBCOMMITTEE MINUTES

October 8, 2003 Rm. 102, State Capitol

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

COMMITTEE MEMBERS PRESENT

MS. ELLEN PORTER
MR. HOWARD STRAUSE
REP. DEBBY BARRETT, Vice Chairman
REP. PAUL CLARK
REP. CHRISTOPHER HARRIS, Chairman
REP. DONALD HEDGES
REP. JIM PETERSON

COMMITTEE MEMBERS ABSENT

SEN. MICHAEL WHEAT

STAFF PRESENT

LARRY MITCHELL, Research Analyst
REBECCA SATTLER, Secretary

AGENDA & VISITORS

Agenda, ATTACHMENT #1
Visitors' list, ATTACHMENT #2

COMMITTEE ACTION

- Review, revise, and adopt Subcommittee Work Plan.

CALL TO ORDER AND ROLL CALL

The meeting was called to order at 8:20 a.m. by CHAIRMAN HARRIS, and the secretary noted the roll (ATTACHMENT #3).

I. WORKPLAN DISCUSSION AND APPROVAL

● **Agency Oversight, Resource Allocation, and Statutory Duties Review: Larry Mitchell, Research Analyst, Legislative Environmental Policy Office,** went through the work plan *(EXHIBIT 1)* and it was decided that members will propose areas of potential interest to the Subcommittee, and the Chairman and Vice Chairman will review the issue. CHAIRMAN HARRIS stated that every member has an obligation to participate in the Subcommittee, so the agenda will be flexible to include those items. Mr. Mitchell went through the Statutory Duties as included on Pages 2-5 of the work plan. CHAIRMAN HARRIS suggested that the Subcommittee return to a systematic oversight of statutory duties where merited, covering one or two per meeting. Mr. Mitchell said that tasks reserved for the EQC are contained in #3, #5, #9, and #10 on Pages 4-5 of Exhibit 1.

● **Rules Review: Todd Everts, Staff Attorney,** went over a memo from himself *(EXHIBIT 2)* to the Subcommittee delineating their rule review authority. He also demonstrated how to look up proposed administrative rules on the Secretary of State's website (www.sos.state.mt.us) for the Committee's reference. MR. STRAUSE wondered how the Subcommittee can have an input in the rule making process. CHAIRMAN HARRIS responded that the authority is unprecedented, so they have the opportunity to establish procedure. He added that if it is a time-sensitive rule, the Subcommittee can decide how to proceed on a case-by-case basis. Mr. Everts offered to provide a chart for the general procedural timing of rules.

● **Wildlife/Elk Management Plan:** Larry Mitchell presented *EXHIBIT 3*, the Department of Fish, Wildlife, and Parks' (FWP) proposed time line for developing and adopting a revised and updated elk management plan including MEPA analysis. REP. BARRETT stated that FWP must comply with MEPA, which they haven't done in the past. She asked if the Environmental Analysis (EA) would be done before they develop their plan. Mr. Mitchell responded that was not necessarily the case. REP. HARRIS suggested that if the biologist were to present a written document to the FWP Commission, it could be reviewed by the EQC as well.

● **Meth Lab issue - EQC response to Chris Christiaens' letter:** Mr. Mitchell referred to the letter with the Governor's response *(EXHIBIT 4)* and the Alcohol, Tobacco and Other Drug Control Policy Task Force's "Comprehensive Blueprint for the Future" *(EXHIBIT 5)*. CHAIRMAN HARRIS added that the issue was addressed last interim. **Ed Thamke, DEQ Enforcement Division,** explained that a committee was formed to give guidance to homeowners, landowners and others, to determine how to handle a property after it has been discovered as a meth lab. He stated that they joined efforts with MethFreeMontana.org to determine the best approach. CHAIRMAN HARRIS wondered how a person knows when a rental is safe for future tenants. Mr. Thamke responded that the human health dilemma is a DPHHS issue and that Attorney General Mike McGrath is on a working committee to represent the people of Montana. CHAIRMAN HARRIS asked if the committee will provide information (i.e. guidance, regulations) of when a home is safe to rent again. Mr. Thamke stated that there is no definite promise of that, but they are all committed and concerned with the same issue. REP. PETERSON wondered about any established federal or EPA standards, but Mr. Thamke informed him that

there are not any. Mr. Thamke explained that two meth cleanup firms are under contract, with most of the waste going to Wyoming, Utah, or Idaho, depending on the nature of the waste since Montana does not have hazardous waste landfills. REP. CLARK inquired if there have been any liability suits filed as a result of exposure to contaminates. Mr. Thamke said he is not aware of any liability cases, but there is an occupational health specialist available for any past exposure to the meth. CHAIRMAN HARRIS added that the topic is on the January agenda.

● **MEPA Litigation:** Larry Mitchell explained that this is being handled by the MEPA Oversight Subcommittee and agreed to provide periodic updates.

● **Wildland Fire Interface Issue:** Mr. Mitchell explained that this item is on the agenda for January and will be addressed at that time.

II. PUBLIC COMMENT ON WORKPLAN TOPICS: None.

III. COMPLIANCE AND ENFORCEMENT REPORTING

The Subcommittee previously received a document entitled, “Purpose of the Compliance and Enforcement Reporting Statute Section 75-1-314", included as *EXHIBIT 6*.

Jan Sensibaugh, Director, Department of Environmental Quality (DEQ), read her written comments regarding the reporting, included as *EXHIBIT 7.*

Steve Welch, Division Administrator, DEQ Permitting and Compliance Division, explained that they receive feedback on the reports and are able to provide programs to promote compliance with the laws. He added that the formation of the DEQ Enforcement Division has been very effective. When a MEPA analysis is done, they conduct evaluations to ensure compliance. He stated that some programs need to be provided with different resources or legislation, such as asbestos control, the septic tank pumper program, the open cut mining program, the Water Quality Act, and the Groundwater Pollution Act. He said that the programs are doing a good job, but there is always room for improvement.

Sandi Olsen, Administrator, DEQ Reclamation Division, stated that their focus for this report is the tank program. She said that they have achieved 95% compliance, and continue to further refine the program.

John Arrigo, Administrator, DEQ Enforcement Division, listed the functions of his division, and the efforts to encourage compliance by providing compliance assistance on a one-on-one basis to entities in violation. He explained the change from simply fining a violator to requiring a part-cash penalty plus a supplemental environmental project (SEP).

MR. STRAUSE asked if there have been studies performed to determine if bringing someone into compliance has a better success rate than just fining the person. Mr. Arrigo said that they have not evaluated that data across the board in that manner. He stated that they are trying to change the thinking from penalties to compliance, more of a cooperative effort approach. He added that providing compliance assistance ensures greater success, but measurement is difficult. MR. STRAUSE and Mr. Arrigo discussed the Montana Clean Air Act with regard to the refineries in Billings and the way they were handled with a partial cash payment and a SEP. REP. HEDGES wondered if "junk vehicle" is defined, and Mr. Arrigo replied that if a junk vehicle

is visible from a county road, it must be shielded, but the definintion does not include trailer homes or farm equipment. REP. BARRETT wondered what happens with hospitals' solid waste hazardous material in Montana. **Rick Thompson, Supervisor, Waste Management Division, DEQ,** explained that 90% of medical waste is shipped to Butte, where it is heat treated and becomes noninfectious, regular solid waste. It is then sent to the landfill in Great Falls. The other 10% of the medical waste is shipped directly to Utah.

CHAIRMAN HARRIS inquired about any surprises or trends uncovered by the report, and if it is useful to the DEQ. Mr. Arrigo replied that there were trends discovered in the permitting process. Dir. Sensibaugh added that it is of value to the Department to provide information on where the Department stands, what they have done to address problems, the subsequent effectiveness of those tactics, and illustrates necessary future projects to address.

CHAIRMAN HARRIS then asked about the used oil program and what DEQ is doing to educate generators. **Don Vidrine, Chief, Air and Waste Management Bureau, DEQ,** responded that it is not regulated by the federal government as hazardous waste. He said that the regulations are simple and compliance efforts include a CD-Rom virtual tour of a mechanic's shop showing proper disposal of used oil. Violation numbers reflect the number of people and firms that handle waste oil. CHAIRMAN HARRIS further inquired about the SEPs. Mr. Arrigo gave examples of the Glacier park sewage spill, Golden Sunlight mine cyanide spills, and illegal waste-burning in Forsyth, explaining the cash penalties paid and the environmental projects completed at each area.

CHAIRMAN HARRIS and Mr. Arrigo then discussed the fines and payment schedules. Mr. Arrigo stated that DEQ can collect interest on some of the fees, but not on fines. He added that the payment schedule does not exceed 6 months; overdue accounts are sent to a collection agency. CHAIRMAN HARRIS then asked about criminal enforcement actions, and Mr. Arrigo explained that those are referred to the Attorney General or county attorney. DEQ has filed enforcement actions against state agencies as well, including DOT, DOA, and FWP. Dir. Sensibaugh added that all monies from penalties go to the General Fund, with the exception of air quality penalties. CHAIRMAN HARRIS also inquired about the relationship of the federal government regarding enforcement. Dir. Sensibaugh stated that DEQ is responsible for enforcement; the federal government simply has oversight over them. If the Department does not have enough resources, they enter a work share agreement with the EPA. Mr. Arrigo added that they have conducted joint enforcement in some cases. MR. STRAUSE and CHAIRMAN HARRIS then thanked DEQ for the format of the report and commended them on their good work.

IV. DEQ ENFORCEMENT LEGISLATION WORKING GROUP

John Arrigo informed the Subcommittee that they have put together a working group to put forth and draft legislation that will hopefully succeed in the next legislative session. He stated that they are working on two main areas: 1) standardizing internal procedures; and 2) updating penalty authority. He said that the priorities associated with the second area include: A) reclamation laws (which presently differ from other environmental laws in how they are enforced); B) request administrative penalty authority in areas needed; and C) standardize penalty factors and put them into statute. He added that they have another meeting scheduled for January to fine-tune the proposed language. CHAIRMAN HARRIS pointed out that the laws are enacted for different reasons depending on the situation, and wondered if it would be a

good idea to have the same standards for everything. Mr. Arrigo answered that they are trying to require that the same factors be addressed in every instance to ensure a consistent penalty. (*EXHIBIT 8* is a copy of a DEQ memo regarding the Work Group's progress and meeting summary from their Aug. 21, 2003 meeting.)

V. HOLCIM, INC. UPDATE

Larry Mitchell referred the Subcommittee to two documents regarding Holcim, Inc. including an informational press release *(EXHIBIT 9)* and the Holcim Inc. detailed permitting chronology from DEQ *(EXHIBIT 10)*.

Dave Klemp, Air and Waste Management Bureau, Permitting and Compliance Division, DEQ, stated that this is a very controversial issue and gave a brief history of the Holcim permit application. He said that it involves the Clean Air Act, Solid Waste Management, and the Montana Environmental Policy Act (MEPA). He went over Exhibit 10 to explain the permitting chronology for Holcim, and explained that they couldn't prove that there would be no risk to the environment in the Environmental Analysis (EA), so they deemed it necessary to conduct an Environmental Impact Study (EIS) before issuing a permit. Mr. Klemp stated that the estimated cost for the EIS would be about $250,000-500,000 and explained the costs. He said that a big issue is who should pay for the EIS. The companies have generally volunteered to pay for them in the past, but Holcim does not believe they should have to pay for it and has refused to do so. The MEPA law limits what Holcim is required to pay for the production of an EIS. Holcim has agreed to pay the legally-required amount.

Nicole Prokop, Alternative Materials Manager, Holcim, Inc., said that of the 12 Holcim facilities, only 2 are not using waste tires as an alternative energy source. If they can get the permit, tires would provide for a 15% fuel substitution. She explained that they are making a $1 million investment, and it will in turn be good for the environment. She expressed frustration that they feel like they are re-inventing the process, when many cement kilns burn tires for energy very safely, complying with all laws and rules. Ms. Prokop stated that an extensive EA was prepared, well beyond the minimum requirements. She said that they have proven their compliance with the rules and are frustrated with the additional requirement for an EIS instead of just the original EA MEPA document.

Ann Hedges, Montana Environmental Information Center, stated that she argues against adding "garbage" to cement kilns, and that they are not designed to burn tires. She referred to a costly report done that proved the negative environmental impacts of burning tires. Ms. Hedges added that DEQ received 1,500 comments regarding the issue, only two of which supported the project. She stated that the time frame established in state law doesn't always work; Holcim took a lot of time to submit the complete application, and the analysis can't begin until then. She delineated three main problems with the whole system: 1) MEPA requires an EA first, then they can start the EIS (with very limited time remaining to complete it); 2) determining payment of the EIS; and 3) the cumulative impacts analysis with regard to negligible risk statute versus the DEQ negligible risk rules.

Don Allen, Western Environmental Trade Association (WETA), said that 2001 legislation attempted to streamline MEPA and make it more workable. Their concern is with the permitting process, and that it will be more difficult to get projects approved in the future. The legislation

tried to ensure that the process worked better and didn't take as much time; the handbook points out that the cumulative impact analysis can go on and on.

MS. PORTER inquired about the change from not requiring the EIS to later requiring it. Mr. Klemp explained that numerous doctors are now concerned over the lead health risk that the standard EA doesn't address. He said that they will assess existing levels of lead to determine the cumulative effect. MS. PORTER asked if Montana's permitting requirements are more rigorous than other states. Mr. Klemp stated that other states don't have negligible risk requirements like those found in Section 75-2-215, MCA. MS. PORTER wondered if an EIS will be required for an air permit on all other facilities. Mr. Klemp answered that this proposal is unique, even though that is a possibility.

REP. CLARK and Mr. Klemp addressed the MEPA and air quality permit statutory time line issue, specifically how much time it has taken DEQ to get this far, and how much time remains. Mr. Klemp added that the time spent on doing the EA was not wasted; they will use the information from the EA to expound upon in the EIS. In response to REP. CLARK's question regarding cumulative impact, Mr. Klemp explained that the Clean Air Act specifies that the risk assessment has to account for air and soil lead content. REP. PETERSON questioned why it took 60 days to complete the Request for Proposal (RFP) for an EIS contractor. Dir. Sensibaugh stated that they only have two staff to do the MEPA reviews, and they are working on other EIS with the same time frame requirement.

REP. PETERSON wondered about Montana's permit regulations versus other states regarding Holcim. Nicole Prokop stated that this is the first health risk assessment that is being required for Holcim's fuel change. She said that a federal regulation called the Portland Cement Maximum Achievable Control Technology Standard (MACT) regulates cement plants for dioxins and furans. Holcim has a federally-enforced limit and is regulated already, whether they are burning tires or not, and they will continue to have to meet those regulations regardless of a fuel change. She added that Holcim is committed to this project, but they are getting frustrated. Ms. Prokop said that they did not volunteer to pay for the EIS, since they are already complying with all regulations.

REP. BARRETT inquired about lead monitoring. Ms. Prokop stated that they are not aware of any lead issues in the communities, and that Holcim tests for lead every year. MR. STRAUSE wondered if the controversy over who will pay for the EIS is a result of the change in statute regarding MEPA. Dir. Sensibaugh answered that before, if a facility wanted to start operating and realized they wouldn't get a permit without an EIS, they would pay for the EIS to continue advancing the permit. Now with the MEPA time frames since the 2001 legislation, there is no incentive for a company to fund the EIS to ensure a timely permit. MR. STRAUSE inquired about DEQ's funding situation. Dir. Sensibaugh explained that there is not enough money to cover all EIS requests, so DEQ will have to prioritize and deny someone a permit. They are looking into transferring federal carryover money from other projects, and are drafting legislation to require that the EIS be paid for by the applicant. MR. STRAUSE asked about the grounds for not granting a permit. Dir. Sensibaugh said that they can require an EA, but don't have the legal authority to not give a permit based on MEPA. CHAIRMAN HARRIS had a question regarding competing entity priorities for permits. Dir. Sensibaugh said that the issue will probably end up in court, and a judge will mandate the DEQ to complete the EIS.

VI. AGENCY RULES OVERSIGHT AND REVIEW

● BALED TIRE RULES

Rick Thompson, Solid Waste Section Supervisor, Permitting and Compliance Division, DEQ, gave a brief update regarding *EXHIBIT 11* (Senate Bill 375). He said that the Solid Waste Program will develop a rule in cooperation with the Solid Waste Advisory Committee. Mr. Thompson added that waste tire uses must not allow the tire bales to disintegrate, which would provide for a large mosquito habitat. He said that many interests would like to acquire the waste tires, and this proposed rule would allow DEQ to enforce specific uses for those recycling and reuse purposes. It would also allow for local county attorneys to take enforcement action under the Solid Waste Management Act. The rules will be adopted in March 2004. CHAIRMAN HARRIS added that SB 375 gives additional regulating authority regarding a product and not just a waste. He wondered if they have enough legislation with this new bill to enforce what they need to. Mr. Thompson answered that they do have enough now. CHAIRMAN HARRIS wondered what other states are doing in this area, and Mr. Thompson stated that it varies greatly. CHAIRMAN HARRIS asked why the companies are not shipping recycled tires to Montana, since the bill provides for those products to be sold in Montana. Mr. Thompson answered that since the rules are not yet published, the commercial enterprises are being cautious.

Vern Reum, Owner, Tire Depot, Polson, Montana, said that they don't want to allow tires to be baled in Montana. He said that a tire bale becomes a waste product, but there is opportunity to recycle the tire instead and get further use out of it. He said that they need a great volume of tires to recycle them; for now they are sending them to Canada to be shredded since there are not enough tires being recycled here. The product is then shipped back to Montana to be sold. REP. BARRETT wondered how many waste tires are produced in Montana. Mr. Reum answered that about one million tires per year are produced, and they can use them all. REP. CLARK wondered why Montana can't create the products instead of having Canada make them. Mr. Reum answered that they have plans to build a plant this spring and that it does not require an environmental permit. REP. CLARK asked how the tires are processed and Mr. Reum explained that they are frozen with nitrogen and then pulverized. MR. STRAUSE inquired if Holcim burning the tires would impact the Tire Depot. Mr. Reum said that there are not enough tires to support both; a decision will have to be made. REP. BARRETT asked if baled tires can be recycled, but Mr. Reum said that they lose their roundness and moisture content, thus becoming a waste product.

● DNRC RULES

Tom Schultz, Trust Land Management Division, DNRC, went over his letter to the Subcommittee regarding the DNRC rule making processes regarding: 1) Land banking; 2) Natural areas; 3) Conservation easements; and 4) Reclassification of school trust land, included as *EXHIBIT 12.*

Janet Ellis, Montana Audubon Society, listed their concerns as follows: 1) the rules are proposing to put a disputed 1976 attorney general opinion in the rules regarding natural areas; 2) they are concerned with the 5% return on conservation easements, leases, and licenses (the Audubon can't afford that); 3) they are concerned that MEPA compliance has to be paid by the applicant; and 4) there is no environmental review required for the reclassification of school trust lands. The Committee discussed the natural area designation and Mr. Schultz explained that the intent is for the applicant to pay for what they want; i.e., if they want a grazing

lease, they pay for a grazing license. MR. STRAUSE requested that the Subcommittee receive a copy of the draft plan as presented to the Land Board.

VII. INSTRUCTIONS TO STAFF

Larry Mitchell said that he may adjust the agenda items for the January meeting. REP. PETERSON said that he would like an update on the MEPA litigation as well.

ADJOURN

CHAIRMAN HARRIS adjourned the meeting at 12:40 p.m.

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