ENVIRONMENTAL QUALITY COUNCIL

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DONALD HEDGES
JIM PETERSON

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

PUBLIC MEMBERS
THOMAS EBZERY
JULIA PAGE
ELLEN PORTER
HOWARD STRAUSE

COMMITTEE STAFF
KRISTA EVANS, Research Analyst
LARRY MITCHELL, Research Analyst
REBECCA SATTLER, Secretary
TODD EVERTS, Legislative Environmental Analyst

ENVIRONMENTAL QUALITY COUNCIL MINUTES

Date: September 13 -14, 2004 Room 102, State Capitol Building

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

COUNCIL MEMBERS PRESENT

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

REP. DEBBY BARRETT
REP. NORMA BIXBY
REP. PAUL CLARK
REP. DON HEDGES
REP. JIM PETERSON

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

COUNCIL MEMBERS ABSENT

REP. CHRISTOPHER HARRIS
SEN. MICHAEL WHEAT (Absent on 9/14/04)
MR. TODD O'HAIR

STAFF PRESENT

KRISTA EVANS, Research Analyst
LARRY MITCHELL, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA A. PETERSON, Secretary

VISITORS

Visitors' list (ATTACHMENT 1)
Agenda (ATTACHMENT 2)

COUNCIL ACTION

- The EQC recommended LCEQC1, as amended, be submitted as a bill draft request.
- The EQC requested Judge Loble to remove the reference to the Steering Committee from the proposed mandatory on-motion rules.
- The EQC amended the proposed final draft report on Metal Mine Bonding in Montana by striking “Thoughts and Potential Options” on pp. 42-45. The EQC accepted the proposed final draft report on Metal Mine Bonding in Montana as amended.
- The EQC accepted the proposed final draft report of the Zortman and Landusky Mines, HJR 43, Water Quality Impacts, as amended to include footnotes identifying the origin or controversial comments.
- The EQC will send a letter to Judge Loble thanking him for his testimony and informing him that EQC has determined no further legislation is necessary. The letter will acknowledge Judge Loble’s authority and encourage Judge Loble to complete the process. The letter will also discourage Judge Loble from including a steering committee in his proposed rules.
- The EQC passed DEQ’s package of proposed legislation with the exception of priority Nos. 1, 2, 3, 4, 6, 19, and 21, and DEQ’s proposed enforcement legislation.
- The EQC approved bill draft request LC0208, as amended.

CALL TO ORDER - ROLL CALL - ADOPTION OF EQC MINUTES - Chairman McNutt

Sen. Walter McNutt, Chairman of the Environmental Quality Council, called the meeting to order at 10:02 a.m. in Room 102, Montana State Capitol Building. The secretary noted the roll (ATTACHMENT 3). Rep. Jim Peterson asked that the July 20 minutes be changed to reflect that he was present at the meeting. The secretary noted the change, and the minutes were approved unanimously.

ADMINISTRATIVE MATTERS - Mr. Everts

- **EQC Budget**

Mr. Todd Everts, staff attorney, reported the EQC's budget prior to the September meeting was $21,500. Mr. Everts reported there is enough money in the budget to cover the September meeting, as well as the first meeting of the new interim in 2005.

- **Staff Evaluations**

Mr. Everts distributed staff evaluation forms to the EQC members and asked the members to complete and return the forms by the end of the day.

ENERGY SUBCOMMITTEE UPDATE - Sen. McGee

Sen. Daniel McGee, Chairman of the EQC Energy Policy Subcommittee, reported problems with the alcohol incentive application process. Sen. McGee summarized the process by stating if a person is the first one to put in an application for an ethanol production plant, they are first on the list. If that applicant meets certain "milestones" as part of their development plan, they retain the first position. There is $6 million available annually in tax credits, which can be divided equally between two ethanol producing plants. Currently, there are six entities that have filed business plans, and of those six, four positions are held by the same company. No money is disbursed until there is actual production, but the money is obligated to the companies in the first and second position, as long as they are moving forward and meeting their milestones. Therefore, there is no incentive for anyone else to come on board and do something productive. Sen. McGee stated the current procedure is slowing down the process and tying up the money. Sen. McGee explained the Department of Transportation (DOT) considers the start of construction as a milestone, but there is no definition for "construction." The Energy Policy Subcommittee voted to define "construction" in law. Mr. Everts and DOT staff will work on a proposed definition. Sen. McGee suggested that the incentive should be available once a plant actually begins to produce ethanol and invited comments from the EQC.

Chairman McNutt identified the current milestones a company is required to meet as (1) file a business plan; (2) complete 25 percent of construction within 24 months; (3) complete 50 percent of construction within 36 months; and (4) be fully operational within 48 months. In the current situation, a Great Falls company has purchased land, and DOT has accepted the purchase of land as the start of "construction."

Sen. McGee directed the EQC to the proposed "Fiscal Pocket Guide Focus on . . . State Debt" (EXHIBIT 1), and Mr. Everts submitted "Understanding Energy in Montana" (EXHIBIT 2) and "The Electricity Law Handbook: A Montanan's Guide to Understanding Electricity Law" (EXHIBIT 3).

- **Questions from the EQC**

Sen. Story wondered how many businesses had been in line for the ethanol incentive and dropped out. Sen. McGee did not have that information. Sen. Toole reminded the EQC that the problem is companies having placeholders in the ~~que~~ queue. Mr. Everts provided a history and stated the first ethanol plant in Montana started production in 1980, and that there are currently

no ethanol production facilities in operation. Mr. Everts did not have any information available on entities that may have dropped out of the application process.

Rep. Don Hedges wondered how it was decided that construction on a plant was 25 percent complete and who would determine whether the milestones were met. Sen. McGee stated that was an internal DOT process and was uncertain how the process worked. Mr. Everts clarified that an independent third party is used to provide an assessment.

Sen. Story asked about the Hardin facility, and Sen. Toole recalled the Hardin facility is anticipating beginning production in July 2005.

Rep. Paul Clark inquired if there was any financial benefit during the construction phase. Sen. McGee replied it was his impression that being in first or second position in the process would be beneficial in securing financing and would make a company more attractive to potential lenders. Sen. Story agreed, and Sen. McGee explained that if the money does not go out to an ethanol plant, the money remains in the fund and is used to match federal funds to build highways. Sen. McGee recalled DOT is projecting in FY 2006 they would spend $3.3 million and in FY 2007 they would have spent all $6 million. Sen. McGee stated spending the $6 million in FY 2007 would bring the account down to $1 million. Sen. Toole reminded the EQC that DOT's figures are projected on worst-case scenarios.

Rep. Clark observed the process did not seem very fair if the same entities are in line over and over again. Sen. McGee agreed and stated that is why legislation is needed, and why he is considering an approach that would require ethanol production prior to the incentive being paid out. Sen. McGee admitted this kind of approach could cause problems with financing.

Chairman McNutt stated LC208 will take care of a company reserving spots in line and will only allow a company to apply one time.

Rep. Hedges asked if the rules could be changed in the middle of the game and wondered what would happen to the companies already in the process. Mr. Everts reported the legislation would need an applicability date.

Rep. Peterson thought eliminating duplication in the queue made sense, but stated changing the rules beyond that and eliminating the policy that is in place would significantly change the business plan request to financial institutions. Sen. McGee agreed the rules should not be changed for those companies already in the process, and suggested a line should be drawn for new companies applying. Sen. McGee thought a company should be able to sell itself to a financial institution on its own merit.

Sen. Roush recalled that companies had to meet milestones before they get the money and if they do not meet the milestones, they do not receive any incentive. Sen. Roush was not concerned about the current companies.

Mr. Ebzery stated in the federal energy bill there is a significant tax incentive for ethanol production.

(Tape 1; Side B)

Mr. Ebzery thought state incentives should be somewhat consistent with federal incentives. Mr. Ebzery requested Mr. Everts to take a look at the proposed federal incentives.

Chairman McNutt asked the EQC members if they were in agreement on the need for a definition for "construction." The EQC agreed unanimously that a definition was needed.

CLARK FORK TASK FORCE MANAGEMENT PLAN

Ms. Krista Evans, Research Analyst, directed the EQC to the "Clark Fork Basin Watershed Management Plan (EXHIBIT 4) and the "Clark Fork Basin Water Management Plan - Summary Report" (EXHIBIT 5). Ms. Evans explained the Clark Fork River Basin Task Force was established by the 2001 Legislature and is required to report to the EQC by September 15, 2004. In addition, new proposals for the state water plan must also be presented for public comment and the new sections must also be submitted to EQC. Ms. Evans directed the EQC to four pieces of potential legislation (EXHIBIT 6).

Mr. Gerald Mueller has been facilitating the Clark Fork Task Force on behalf of the Montana Consensus Council for the past two years. Mr. Mueller gave a Power Point presentation to the EQC (EXHIBIT 7). Mr. Mueller stressed the Task Force is recommending Montana's adjudication process be accelerated and result in durable, accurate water rights.

(Tape 2; Side A)

In addition, the Clark Fork Task Force recommended re-establishing the focus on water.

- **Questions from the EQC**

Sen. McGee had questions about the 35-gpm exemption to require a permit for the development of two or more wells from the same source for common projects such as subdivisions. Sen. McGee noted subdivisions in the Bitterroot Valley that are located quite a distance from each other would pull water from the same aquifer. Sen. McGee wondered if the proposal would require the wells to be permitted. Mr. Mueller responded that if they are using the same source, they would not be allowed an exemption. Mr. Mueller suggested people who are putting in new wells would not have to subject themselves to the test that other water rights holders are required to do, which is to demonstrate their new use of water would not adversely affect water rights holders. Mr. Mueller agreed it would cost more money, but stated their needs to be a balance between cost and benefit.

Rep. Clark asked about DNRC's existing policy which allows DNRC to continue issuing additional water rights knowing there is an impending collision. Mr. Mueller referred the question to Mr. Jack Stults.

Rep. Clark stated he is concerned and stated the Clark Fork Task Force's plan strikes him as a threat to Avista and suggested the plan could result in lengthy litigation. Rep. Clark wondered why the burden was being placed on Avista.

Mr. Jack Stults, Division Administrator for the Water Resources Division, Department of Natural Resources, responded to Rep. Clark's concern and stated DNRC is not in the best position to say whether a new water right would adversely affect an existing water right since they do not know the specifics of operation of all water rights. Mr. Stults explained that is why existing water rights holders are notified of a pending application for a new water right. Mr. Stults suggested the water being applied for may not make a proportional impact on the operations to the point that Avista would be concerned.

Rep. Clark explained his problem is with the methods that say there may be challenging hydropower rights and may be condemning hydropower rights. Mr. Stults referred Rep. Clark's concern to members of the Task Force. Mr. Mueller responded the Task Force tried to identify a way to meet everyone's interests and identifies options, including condemnation.

Mr. Stults added the DNRC's opinion about the provisions referred to by Rep. Clark and stated the provisions are virtually unviable.

Rep. McGee asked about the correlation between ground water and surface water and the proposed ground water storage theory and wondered what entity would apply for those ground water rights. Mr. Mueller explained their discussions have centered around return flow for irrigation and whether that return flow can be protected. Mr. Mueller stated the plan does not have a recommendation about exactly how the system would work, but rather suggests a plan should be developed.

Rep. Story restated Rep. Clark's question and asked why permits keep being issued and asked if it was because the basin was never closed. Mr. Stults replied the law states if the applicant meets the criteria, they are required to issue a permit. Rep. Story assessed the Task Force's plan as a 180-degree turnaround since it requires more state involvement. Mr. Mueller replied the plan is trying to address the burden that exists today that falls on the individual water right holders rather than the state. Mr. Mueller admitted a number of the recommendations would increase state involvement, but noted the state owns the water and is required under the Montana Constitution to allocate the water. Mr. Mueller stated if water rights are going to be the way water is allocated in the future, then it will be necessary to figure out what those water rights are and how Montana will enforce those rights.

Sen. Story asked if completion of the adjudication and issuance of preliminary decrees would give the district courts an enforcement tool. Mr. Stults agreed completion of adjudication is key to enforcement.

Sen. Story wanted to know why DNRC would not be interested in stopping illegal diversion of water. Mr. Stults replied DNRC gets its enforcement through the District Courts, but it has been difficult since enforcement is very resource consumptive.

(Tape 2; Side B)

Sen. Story asked if a statutory change was needed to give certain enforcement authority to DNRC. Mr. Stults said that it was.

Sen. Story asked about leasing water from Hungry Horse Dam and wondered how the state would prevent people from using the water as it is pulled out of the dam and moved

downstream. Mr. Mueller stated storage of the water does not adversely affect the hydropower utilities. Mr. Mueller explained they would not be making any more water, but just changing the timing of when the water would be released. Mr. Mueller explained that use of the Hungry Horse Dam water could provide a way to meet the needs of new users without adversely affecting the hydropower utilities. Mr. Mueller explained some of the water would be used on the way down, but much of it would be returned.

Sen. Toole asked about new users coming onto the system and noted there is a balancing act between individual water rights holders and hydropower utilities. Mr. Mueller reminded the EQC about DNRC's concerns that during the licensing process there may be constraints on the future development of water, and junior water rights holders may be subject to calls by the utilities. Mr. Mueller noted there has now been one instance where Avista chose to object to a new water right.

Sen. Toole was curious about what kinds of other activities might be occurring in terms of new water rights. Mr. Mueller related new water rights to the economic development of Montana and stated the new water rights support people moving into the Clark Fork Basin.

HJR 4

- **Database Update**

  - **Jack Stults, Department of Natural Resources and Conservation**

Mr. Jack Stults, Water Resources Division Administrator, Department of Natural Resources and Conservation, provided an update on DNRC's database and the database's transition to Oracle. Mr. Stults reported that since the last EQC meeting, they have had eight meetings with pertinent user groups. In addition, DNRC entered into a contract with Northrop Grumman to submit an estimate of what it will cost to have the database be fully functional and able to use automation to issue a decree without manual manipulation. The cost of Phase I, which is the ability to issue a decree by January 1, 2005, is $96,000, and the cost for all three phases of the plan would be $184,000 and could be completed by July 2005. In addition, Mr. Stults reported they have continued to work with the Water Court and the electronic docketing of water court cases. They have also been in discussions with the Department of Revenue (DOR) about the proposed billing process and are recruiting for an additional Oracle programmer. Mr. Stults stated his intention is to implement the ITSD recommendations to the best of the department's ability.

  - **Kyle Hilmer, Department of Administration**

Mr. Kyle Hilmer, ITSD, Department of Administration, Bureau of Policy and Planning Services, stated his charge was to look at the water rights database and determine the requirements to make it fully functional to the point where it would support the new proposed legislation. Mr. Hilmer explained a team was organized to outline the three different phases needed to develop the system to the point where it could issue decrees. Mr. Hilmer stated his professional opinion is that if Phase I is completed, the system will be fully functional in terms of being able to issue a decree and perform its other responsibilities. Mr. Hilmer submitted a written report to the EQC (EXHIBIT 8). Mr. Hilmer stated it would be very difficult for a new programmer and the systems administrator to perform any of the work proposed in Phase I by January 1, 2005. Mr. Hilmer suggested the EQC should not look to DNRC's technical staff to absorb much, if any, of the

work to be done, and all the work should be delegated to an outside contractor. Mr. Hilmer strongly suggested that any contract entered into with an outside vendor should be reviewed with a fine-toothed comb. In addressing project management, Mr. Hilmer suggested the enhancements should be entrusted to people who have appropriate training and background. Mr. Hilmer explained it is a science to manage a complex project efficiently. Mr. Hilmer also suggested a new user guide be developed, and getting an independent party to take a look at existing operational procedures for backup, recovery, change control, modifications, and testing. Mr. Hilmer stated he received conflicting information regarding the current operational procedures.

- **Bud Clinch, Montana Department of Natural Resources and Conservation**

Mr. Bud Clinch, Director of the Montana Department of Natural Resources and Conservation, spoke about the funding alternatives that would be necessary to proceed. Mr. Clinch suggested the database is a high priority. Mr. Clinch stated the DNRC is willing to commit up to $100,000 of existing internal dollars between now and January 1 to implement the essential parts of Phase I in order to proceed.

- **Questions from the EQC**

Rep. Barrett asked Mr. Hilmer if he has seen other problems of this magnitude in other state government offices.

(Tape 3; Side A)

Mr. Hilmer stated while it is not an epidemic, they do find problems, and often times it is difficult to say whether the problem is with the vendor or whether the problem is within the department.

Rep. Peterson expressed concerns on how a successful adjudication process could be achieved without a functional database. Rep. Peterson asked Director Clinch how he would feel about a caveat that would state funding for the adjudication process would not be official until the database is fully functional. Rep. Peterson asked if there was an objective measure that could be included that would provide assurance of a functional database. Director Clinch agreed and thought that would be a reasonable request.

Sen. Wheat appreciated the DNRC's commitment for the $100,000, but noted realistically it will cost approximately $183,000 to complete Phase I. Director Clinch stated the $100,000 would need to be used to address the essential elements of Phase I that will enable DNRC to issue a decree. Director Clinch stated he would look at other funding avenues in the next appropriation process to meet the remainder of the funding requirements. Sen. Wheat asked ~~in~~ if there was any other way to find additional money to help the process along. Director Clinch stated there may be other pots of money available.

Mr. Stults added that in order to meet the deadline of January 1, 2005, a contract needs to be in place by September 27, 2004, and they will continue to pursue every avenue to be able to continue the project. Sen. Wheat asked if the contract would be a fixed-price contract or a time and material contract. Mr. Stults stated his preference would be to have a fixed-price contract.

Rep. Clark wondered what kind of checks and balances would need to be in place to ensure the contract is sufficiently detailed. Mr. Hilmer explained the contract would be very specific and list individual deliverables in depth. Mr. Hilmer stated that while it takes a great deal of work to put together a contract with this amount of detail, the team has already completed 90 percent of the work. Mr. Hilmer stated DOA will work with DNRC, and he will have final approval of the contract.

Rep. Clark wondered what could be accomplished between now and January 1. Mr. Hilmer directed Rep. Clark to the first page of his report, but cautioned that if the contract is a fixed-price contract, the cost estimates will go up since the contractors will want to include a protective cushion.

Chairman McNutt was concerned because all of the deadlines in the proposed legislation were contingent upon getting the database fully functional. Chairman McNutt requested support for the effort to look for additional funding to carry the project through to July 2005. Mr. Clinch replied they absolutely would.

- **Bruce Loble, Chief Water Judge, Montana Water Court**

Judge Loble provided the EQC with an update on the Water Court's On-Motion Rules (EXHIBIT 9). Judge Loble stated he would like to see the rules released in September and a public hearing held in November, revisions made, and submit the Rules to the Montana Supreme Court before the end of December. Judge Loble pointed out that the proposed rules are limited in scope and that he has been urged by the Attorney General, the Department of Fish, Wildlife, and Parks (FWP), and DNRC to adopt a far more aggressive set of rules. Judge Loble explained those agencies would like to see a policy where the Water Court would call in all suspect claims on its own motion. Judge Loble stated that while he is sympathetic to the agencies' concerns, their proposal reflects an activist policy that the Legislature has not clearly defined to the Water Court. Judge Loble suggested if the Water Court were to take on a mandatory role of calling in thousands of claims with unresolved issue remarks without the express approval of the Legislature, the focus on the Water Court's activities would shift away from the merits of the adjudication of water rights, and center on an assertion that an activist judiciary has become the adversary of Montana's water right holders and is engaged in the unconstitutional taking of protected property rights. Judge Loble was absolutely convinced this is what he would hear if he were to follow a mandatory on-motion policy without the express approval of the Legislature. Judge Loble suggested the next legislative session would be the proper forum for this debate. This would enable the Legislature to approve the mandatory call–in policies, and the Supreme Court could then tailor rules to fit the legislation. Judge Loble recommended the EQC include a provision on this topic in its proposed funding bill that would tie the funding and on-motion policy into one bill and, if the Legislature believes both provisions are essential, then it will be clear as to what the intent of the legislation is.

Judge Loble explained the proposed on-motion rules involve three steps: (1) the mandatory review of nine categories of claims, including issues that have reasonably clear answers which can be resolved without much adversary; (2) provide the discretionary process to call in claims with unresolved issue remarks; (3) creating a steering committee of the lawyers in a basin or source to review any claims with unresolved issue remarks and propose a plan to resolve those remarks. Judge Loble explained the concept of forming a steering committee came from the *Manual of Complex Litigation*. Judge Loble explained how this method has been successfully

used by many courts. Judge Loble explained if significant but unresolved issue remarks remain on a basin or source, the steering committee can identify the problems and provide the court with a plan of resolution. Those claims would be called in on the Court's own motion, and the Court would require evidence for the issue remark. Judge Loble suggested this procedure would provide a neutral forum for adversaries. If issue remarks are not cleaned up, they would remain on the claim and be deleted in the final decree. Judge Loble also provided an alternative proposal that would limit the Water Court's on-motion activity to the nine mandatory categories.

- **Questions from the EQC**

Sen. McGee asked about one of the on-motion categories relating to claims asserting recreation, fish, and wildlife purposes and asked Judge Loble to provide the EQC with an explanation of how the objection process would work. Judge Loble explained the claims are required to be called in by the Water Court by virtue of the Bean Lake III decision. The Water Court has been directed by the Supreme Court to call in the claims and review them to determine if they are historically accurate. Judge Loble stated there are 13,415 of these claims. Sen. McGee wondered who would be filing objections to these claims under the current system. Judge Loble replied any water user who does not feel the claim is historically accurate would file an objection; but, Judge Loble added that as a practical matter, not many objections are filed to in-stream recreation, fish, and wildlife claims. These claims would now be subject to the same process used for the on-motion procedure.

In answering Sen. Story's question, Judge Loble stated he did not believe the Supreme Court would act on his proposed rules until after the Legislature meets.

Mr. Ebzery was intrigued by Judge Loble's suggestion of utilizing a steering committee made up of people who practice before the Water Court. Mr. Ebzery suggested this could create a conflict of interest situation. Judge Loble pointed out there would be a series of lawyers filing objections on a particular basin or a particular source. Judge Loble stated there are not a whole a lot of attorneys who operate in the Water Court and for the most part, the attorneys are federal or from the Department of Fish, Wildlife & Parks (FWP). Judge Loble explained how the attorneys for objectors would go through the list of claims with unresolved issue remarks and determine which of those issue remarks would impact their water rights. Those claims which have been determined to have merit would be called in, and the DNRC claims examiner who placed the issue remark on the claim would be contacted for an explanation. Judge Loble noted difficulties in cross-examining the claims examiner if they are not represented by counsel. Judge Loble suggested lead counsel designated by the steering committee could perform that function. Judge Loble explained that if the issue remarks are important enough, the parties should be willing to take the last step to deal with the issue remarks. Judge Loble explained how clients would be responsible for paying for their attorneys to be on the steering committee.

(Tape 3; Side B)

Judge Loble noted the federal courts use the steering committee concept ~~on~~ for a substantial amount of complex litigation. Judge Loble stated that if senior water users receive more water than they are historically entitled to, junior water users would suffer. Judge Loble stated he likes the steering committee concept because it would preserve the Water Court as a neutral party.

Sen. Wheat commented that he did not like the steering committee concept and believed it would cost the water users a substantial amount of money. Sen. Wheat encouraged Judge Loble to rethink the steering committee concept. Sen. Wheat believed it is up to the Water Judge to make a decision on the water rights, and that water users who have a water right should be able to use the water free of any encumbrances. Sen. Wheat suggested issues should be addressed earlier in the process. Judge Loble agreed it could be done that way, but stated that is not the way Montana set up its process. Judge Loble recalled that in 1979 when the Legislature passed SB 76 it said the claims are *prima facia* proof of their contents. Therefore, if no one submits evidence to the contrary, the claim stands. Prior to 1979, the historical burden of proof was on the plaintiff to prove every element of his water right, including the priority date, place of use, and chain of title. Now, the burden is on the objectors to demonstrate the water right is wrong.

Sen. Wheat asked if there was a role for DNRC to play in assisting the mediation of disputed claims prior to be submitted to the Water Court for final decision. Judge Loble agreed, but wondered who would pay for the mediator. Sen. Wheat noted it would be the same people that would pay for a steering committee, but added a mediator would be less expensive. Sen. Wheat referred to letters the members of the EQC received from Candace West (EXHIBIT 10), Robert Lane and Steven Brown (EXHIBIT 11), and Tim Hall (EXHIBIT 12), which indicate all the issue remarks should be dealt with in order to ensure accuracy. Judge Loble explained that the on-motion practice, on a limited basis, works, but he is concerned that if the on-motion process is extended and thousands of water right claims are called in, they will lose objectors. Judge Loble stated people are not likely to object if they believe the State of Montana or the court system will resolve the issue remarks. Judge Loble suggested accuracy would be lost with the reduced number of objectors. Judge Loble cautioned that there is not a simple solution.

Sen. Story agreed there is not a simple solution, but agreed that a steering committee should not be used since it would be a second bite at the apple, when nobody wanted to take a first bite. Sen. Story thought there are a number of people already through the process who are not in as good a position as they could have been because they only looked at their own basin and did not want to cause problems with their neighbors. Sen. Story stated if the process is changed now, it would create an unfair advantage over those who have already gone through the process. Judge Loble stated whatever on-motion policy the Supreme Court adopts would be implemented for all decrees issued after 1977. Judge Loble stated it would be necessary to go back and pick up all the temporary preliminary decrees issued prior to 1977, and the same criteria would then be applied to those claims.

Chairman McNutt commented that he was concerned when so many people do not like the idea of a steering committee, and asked Judge Loble whether he has considered other ideas or whether he was only willing to consider the concept of a steering committee. Judge Loble replied he would listen to any proposal. Chairman McNutt noted that *pro se* water users may not be willing to join in the process and expressed concerns that those water users would be excluded from the process. Judge Loble replied that the lawyers that are involved in the adjudication process are not a large group of people, and that the adjudication of water rights is a user-friendly process. Judge Loble stated federal, state, and other attorneys do not go out and crush water users. Judge Loble suggested utilizing a steering committee would work once it was implemented. Judge Loble depicted the Water Court as a giant JP Court.

Mr. Ebzery asked Judge Loble what he would do if the EQC recommended against utilizing a steering committee. Judge Loble replied if the EQC would not support the concept of a steering committee, he would delete the concept from the proposed rules before submitting them to the Supreme Court. Judge Loble encouraged the EQC to retain the steering committee concept.

- **Funding Alternatives Work Group - Sen. Wheat**

Sen. Wheat explained the Adjudication Subcommittee received further public comment on proposed legislation which resulted in a new bill draft. Sen. Wheat stated the subcommittee would like to see the water rights adjudicated as quickly and accurately as possible and has identified a 15-year time limit to complete the process and has set a cost constraint of $26 million. In addition, the fee should be as fairly distributed as possible and there should be accountability to the water users that the adjudication process will be completed. Sen. Wheat submitted a copy of LCEQC1 as the proposed legislation (EXHIBIT 13). Sen. Wheat commended the subcommittee and Ms. Krista Evans for their hard work. Sen. Wheat addressed the proposed fee matrix (EXHIBIT 14). The individual fee will be $10 per water right per year and will generate $3,120,500 on an annual basis and the money will flow into a special account and cap out at $26 million. The interest on the account will not be counted toward the cap.

Ms. Evans explained that $26 million was an estimate made during the work session. Ms. Evans obtained estimates from the Water Court and DNRC on how much it would cost to do a mandatory on-motion, which came to approximately $47,743,500. Ms. Evans referred to the Montana Water Adjudication Revenue Necessary for Completion by 2021 (EXHIBIT 15). Ms. Evans noted that when DNRC calculated its costs for employees, it neglected to include benefits. Therefore, $141,795 needed to be added on.

Sen. Wheat noted the account would stop once it reaches the set amount. The DOR will collect the fees. Accountability will be provided for by preset benchmarks that will need to be met and are addressed in Section 2 of LCEQC1. The subcommittee set priorities and determined all of the claims would be examined first. Sen. Wheat cited the reasoning for setting that focus as being the loss of historical information due to the natural passing of people with vital information. The Water Court would still have discretion to call in claims for re-examination if it thought it was necessary. Sen. Wheat noted if the benchmarks are not met, the legislation becomes void.

(Tape 4; Side A)

Ms. Evans explained that the way the bill reads, if the benchmarks are not met, the fee cannot be imposed the next even-numbered year and noted a Legislative Session would fall in between. Therefore, if DNRC fails to meet a benchmark, it could lobby the Legislature and ask for relief or attempt to change the statute. Ms. Evans noted this would also provide an opportunity to keep the process alive in the event of an unforeseen event.

Sen. Story commented that if the DNRC does not meet a benchmark, the Legislature will have to decide whether to make a general fund appropriation or redo the statute.

Mr. Ebzery expressed concerns about the people who had already paid their fees and what would happen if the DNRC or the Water Court fails to meet its benchmarks. Sen. Wheat

recalled discussion among the subcommittee about inserting flexibility into the legislation. However, public comment indicated government accountability, not flexibility, was the priority.

Ms. Julia Page observed that if the Water Court and DNRC have a plausible reason why they have failed to meet a benchmark, they would have the option to go before the Legislature. Ms. Page suggested a strict timeline is necessary and noted the DNRC supports having the benchmarks. Mr. Stults agreed and stated the benchmarks are extremely important, and that the DNRC is confident it can meet the benchmarks.

Sen. Story asked whether discussions had occurred about hiring additional DNRC employees and laying off those employees if the benchmarks are not met. Ms. Evans stated she did not specifically have the Legislative Fiscal Division look at staffing issues if the process has to be stopped and restarted. Ms. Evans offered to research the issue, and Sen. Story suggested it would be a good idea.

Sen. Toole commented 60 percent of the fees will come from the smallest users while the large hydro users make up less than one percent and one-half percent of the total. Sen. Wheat recalled the majority of the users at the hearings were in favor of the proposed fee structure. Sen. Toole expressed concern about the way the proposed fee is spread between basic water users and large water users. Sen. Story noted some of the larger water rights are no more complex to adjudicate than some of the smaller water rights.

Ms. Evans explained she included the less than 20 water rights category so the EQC could see the numbers. Ms. Evans explained the options for imposing a penalty for nonpayment of the fee, which include a lien on the water right or the lack of ability to transfer the water right until the fee is paid. Ms. Evans stated if a deed is silent with regard to the water right, the water right automatically transfers. Ms. Evans noted the water rights transfer certificate currently used is only to enable DNRC to update its database and actually has no legal affect on who actually owns the water right. Ms. Evans stated without a lien, the water right would automatically be transferred. Ms. Evans suggested a lien could get to the end point easier and cleaner than limiting a transfer.

Sen. Story asked about DOR's collection procedure. Ms. Evans explained if someone did not pay the fee, DNRC would turn the debt over to DOR for collection. DOR could utilize a collection agency or withhold any money that may be due from a refund. If the debt remains unpaid, a lien could be filed on the water right.

Rep. Hedges was curious how much it would cost to file a lien and suggested it may not be worth collecting the $10 fee. Ms. Evans pointed out that it would depend on how many water rights were owned by the delinquent landowner. Ms. Evans directed the EQC to page 9, Section 6(2) and suggested "shall" could be changed to "may." Sen. Toole agreed it should be "may" because he was not convinced a lien should be filed on a delinquency of $10. The EQC agreed. Sen. Toole suggested the costs of preparing and filing a lien should be paid by the delinquent party.

Mr. Ebzery suggested the language could be left broad by inserting language saying "or other remedies available." Ms. Evans pointed out the legislation provides that DOR can use whatever remedies are available in Title 17, Chapter 4.

Rep. Hedges commented the costs of collecting the money for DNRC would be charged to the DOR, and DOR may not see any benefit in collecting the delinquent fees.

Rep. Peterson expressed concerns about the proposed benchmarks.

(Tape 4; Side B)

Sen. Wheat replied that he believes DNRC has been straightforward about what they can and cannot do, and they believe they can meet the benchmarks. Sen. Wheat stated the most important thing is to be able to print a final decree by the end of the year. Sen. Wheat believed he is now much more informed about the process and, therefore, he is not as worried as he was in the past. Sen. McNutt reminded the EQC that they will be meeting in January and that they will continue to monitor the issue.

Ms. Evans addressed Rep. Hedges' earlier concern and noted subsection (3)(a), page 6, allows the DOR to keep an amount of the fee to cover its cost of performing the fee collection.

Mr. Strause asked about Section 10 and the penalty for nonpayment of the fee. Mr. Strause believed there should be a penalty for people who do not pay and suggested the penalty for smaller fees should be substantial enough that people would pay their fee.

Sen. McGee asked Mr. Chuck Swysgood, Director, Office of Budget and Program Planning, Office of the Governor, if there was something else that could be done to get funding to expedite the adjudication process. Director Swysgood stated the Water Court's budget is presented with all other budgets, and revenues decide how the money is allocated. Director Swysgood believed the Water Court is doing the best job it can with the resources provided. Director Swysgood thought there could be inherent problems with the proposed approach and stated counting on a certain amount of dollars to come in from the fee could place the benchmarks at jeopardy. Director Swysgood also reminded the EQC that water is a state resource and people have a claim to use the water for a beneficial use based upon their claim. Director Swysgood noted there are more claims for water use than there is water. Director Swysgood stated the money available will be determined by the Legislature's priorities, and there is no guarantee that the money will be there year after year unless there is a dedicated revenue stream.

Chairman McNutt asked how the EQC would like to deal with transfers of appropriation rights in Section 12.

Sen. McGee moved to strike Section 12. The motion carried unanimously.

Ms. Evans submitted a legal opinion from Mr. Gregory Petesch, Director of Legal Services, Montana Legislative Services Division (EXHIBIT 16). Ms. Evans stated that she requested the legal opinion because she had concerns that only examining irrigation claims could cause a problem. Ms. Evans explained that Mr. Petesch thought the proposed process was feasible and suggested the EQC may want to go into 85-2-237, MCA and add language that deals specifically with reexamination of verified basins. In addition, there should be a stated legal rational basis for only doing irrigation claims. The EQC agreed unanimously with Ms. Evans' suggestions.

Ms. Evans also requested that the EQC consider the language in Section 5(1)(c) and stated that she included the exemption for federal water rights and tribal water rights because she believed it was never the intention to include those water rights. The EQC agreed unanimously with the proposed language in Section 5(1)(c).

Sen. Wheat moved the EQC approve LCEQC1, as amended, as a bill draft request.

Rep. Peterson commented that he has received a lot of feedback from the agricultural community, and there is no agreement on the proposed process. Rep. Peterson noted that many agriculture groups have not yet met to discuss the proposal. Rep. Peterson anticipated a lot of discussion during the Legislature, and cautioned the EQC that there is no unanimous consensus in the agricultural community.

Sen. Story commented the preference would have been to get the money from the General Fund but the competition in that arena would be extreme, and that you would not know until the 90th day whether you would get the funding for the program.

Rep. Hedges commented that using this type of funding approach is not new, and the only thing unusual about the approach is the frequency in which the individual is billed.

Sen. Toole stated the problem he has with the proposed legislation lies with the fee schedule.

Sen. Wheat commented that there are groups who may not support the bill, but suggested the proposed legislation is a good starting point. Sen. Wheat recalled everyone agreeing the adjudication process needs immediate attention. Sen. Wheat noted a lot of hard work was put into the proposed legislation.

Rep. Clark commented nothing will happen until the process is started and proposed legislation is introduced. Rep. Clark would like to kick the process off and get Montana started in the right direction.

Rep. Barrett commented that until adjudication is completed in Montana, nothing is for sure. Rep. Barrett noted that everyone who uses water will be included. Rep. Barrett suggested opposition to the proposed process comes from the failed system that was in place in the past.

Chairman McNutt asked Sen. Wheat if the subcommittee received any other suggestions on how to timely and accurately complete the adjudication process. Sen. Wheat responded that the subcommittee did not receive any alternative suggestions.

(Tape 5; Side A)

- **Public Comment**

Mr. John Bloomquist, representing the Montana Stockgrower's Association (MSA), identified MSA's official position as supporting the judicial adjudication of water rights in a timely manner. MSA has appointed a Task Force to review the adjudication proposal. Mr. Bloomquist suggested the benchmarks are a result of past failures. Mr. Bloomquist testified many people throughout Montana are viewing the proposed fee as a tax on water. Mr. Bloomquist suggested the imposition of a fee needs to be better explained to water users. Mr. Bloomquist also

suggested the Water Court, DNRC, and the Legislature need to get information out to the water users on how the proposed process will take the fees and get the job done. Otherwise, Mr. Bloomquist thought the proposal would fail. Mr. Bloomquist stated there are a number of people who believe the problem with adjudicating the water lies within DNRC and the whole process needs to be changed. Mr. Bloomquist indicated DNRC can get bogged down with one particular area or well and that holds up the process. In addressing the fee matrix, Mr. Bloomquist stated he visited with the Congressional Delegation and identified the federal government as part of the process that needs to be included. Mr. Bloomquist also identified reexamination and the possibility of filing liens as concerns to MSA.

Mr. John Youngberg, Montana Farm Bureau (MFB), could not say whether they would support the proposal until they have their annual meeting. Mr Youngberg stated MFB supports the timely and accurate adjudication of water rights.

Mr. Mike Murphy, Montana Water Resources Association (MWRA), supports the concept for an expedited and accurate adjudication process. Mr. Murphy predicted a lively debate and discussion at MWRA's annual meeting.

- **Questions from the EQC**

Mr. Ebzery was concerned about water users who feel they have already paid once and are now having to pay again. Mr. Bloomquist stated those fees were to get the process moving, and the available funds generated by those fees did not last very long. Mr. Bloomquist testified that the public's prevalent concern is the lack of accountability and the assurances that the job will get done. Mr. Bloomquist believed the benchmarks address that concern.

Sen. Wheat's motion that the EQC recommend LCEQC1, as amended, as a bill draft request carried by roll call vote (EXHIBIT 17).

Sen. Glenn Roush requested staff to develop a fact sheet or position paper that legislators can use to discuss with constituents. Sen. Roush noted that it would be important for legislators to be consistent with information they present to the public. Chairman McNutt agreed a position paper and press release would be developed.

Mr. Ebzery moved the EQC request Judge Loble to remove the reference to the Steering Committee from the proposed mandatory on-motion rules. The motion carried unanimously.

METAL MINE BONDING STATUS PAPER - FINAL DRAFT STAFF WHITE PAPER - Larry Mitchell

Mr. Larry Mitchell, Research Analyst, submitted the proposed final draft of the report on Metal Mine Bonding in Montana, dated September 13, 2004 (EXHIBIT 18). Mr. Mitchell stated the report went out for public comment and a conference call was held with Chairman McNutt and Vice Chairman Clark. Mr. Mitchell explained three issues were addressed in the report as a result of the conference call. Mr. Mitchell directed the EQC to the comments in all uppercase letters on pp. 8, 15, and 31. Mr. Mitchell also directed the EQC to the uppercase language on p. 42 regarding EQC's decision not to develop any findings or recommendations based on information in the report.

(Tape 5; Side B)

Chairman McNutt wanted to be clear that the report is not an EQC directive, and that the EQC decided not to develop any findings or recommendations based on the information contained in the report.

Sen. Toole moved to accept the proposed final draft report on Metal Mine Bonding in Montana.

- **Questions from the EQC**

Sen. Story inquired about the periodic annual and five-year evaluations and adjustments for inflation. Mr. Mitchell explained the adjustment could go either way.

Ms. Ellen Porter expressed concern about the table on pp. 12-13 and suggested the table may not present itself in a positive manner and makes it look like the Legislature was unsympathetic to the recommendations. Ms. Porter suggested using softer language. Rep. Clark suggested using "recommendation did not pass." Sen. Story noted the hyphen on recommendation No. 5 after "no," and suggested the hyphen could be removed. Mr. Ebzery suggested the result could read, "Not adopted - as a result, bond amounts will be parceled out to the state as needed for reclamation." The EQC agreed with Mr. Ebzery's recommendation.

- **Public Comment**

Ms. Angela Janakero, Executive Director of the Montana Mining Association, commented that the proposed final draft seems slanted and should have allowed more input from individuals who work day-to-day with metal bonding. Ms. Janakero noted Montana has the highest per-acre reclamation cost in the West. Ms. Janakero suggested there should have been a more balanced approach to referencing and gathering information.

Mr. Don Allen, Western Environmental Trade Association, agreed with Ms. Janakero and urged caution be taken to ensure no harm occurs to any part of the industry.

Chairman McNutt explained the options on pp. 42-45 were part of the report, but EQC is not making any recommendations. Chairman McNutt solicited comments from the EQC regarding those options.

Sen. Story thought it was unusual to append a list <u>of</u> things the EQC could look at and recommend, but is not. Mr. Ebzery agreed.

Mr. Ebzery moved to delete "Thoughts and Potential Options" from the report.

Sen. Wheat suggested changing the language rather than removing the entire section from the report. Sen. Wheat suggested the EQC may want to look at these issues in the future.

Mr. Mitchell explained he added the possible ideas portion of the report because the report seemed unwhole. Mr. Mitchell explained there were two options in terms of mine bonding: (1) either the state takes the position it is not paying any money; or (2) there will be circumstances where the public will have to ~~pick up~~ act as a safety net. Mr. Mitchell did not want the inclusion of the section in question to taint the contents of the report.

Mr. Ebzery disagreed with Sen. Wheat's comments, and stated he did not think it would be appropriate to discuss something from two years ago.

Rep. Bixby thought there were some good ideas contained in pp. 42-45, and agreed with Sen. Wheat that the language could be changed, but the ideas retained.

Rep. Clark stated he has seen reports that contain a list of areas for further study, but noted the language is unique because it suggests what the EQC could have done. Rep. Clark thought it was more important the report be factual rather than comfortable. Rep. Clark suggested there should be an ability to transfer to new leadership recommendations for issues that may arise in the future.

Sen. Story was curious where the statement "Given the assumption that the gap between mine reclamation needs and financial assurance should be minimized" came from. Mr. Mitchell responded he understood that the whole purpose was to fix the problem with having an unfunded reclamation liability and the gap should be minimized. Sen. Story thought the whole section of the report was disjointed.

Ms. Page agreed the language is odd and acknowledged that replacing "EQC" with "the state" could help. Ms. Page found the ideas presented to be provocative and helpful and thought it would be a positive step to present the ideas for consideration.

Rep. Harris had concerns about the statement "no public funds should be spent on hard rock mine reclamation," and asked if the Resource Indemnity Trust Fund would be considered a public fund. Mr. Mitchell responded it would depend on the definition of "public" and noted the funds are appropriated by the Legislature each session for a variety of purposes. Mr. Mitchell stated he would call the Resource Indemnity Trust Fund public funds.

(Tape 6; Side A)

Sen. Toole made a substitute motion to direct staff to rewrite pp. 42-45 to reflect there are two broad policy stances, Option 1 and Option 2, and change the wording to reflect it is a matter of state policy rather than an EQC recommendation.

Mr. Ebzery disagreed with Sen. Toole because of the short time frame remaining for action by the EQC .

Sen. Toole's substitute motion to direct staff to rewrite pp. 42-45 to reflect there are two broad policy stances, Option 1 and Option 2, and change the wording to reflect it is a matter of state policy rather than an EQC recommendation failed by roll call vote (EXHIBIT 19).

Mr. Ebzery's motion to delete "Thoughts and Potential Options" on pp. 42-45 from the report carried by roll call vote (EXHIBIT 20).

Sen. Toole's motion to accept the proposed final draft report on Metal Mine Bonding in Montana, as amended, carried unanimously.

HJR 43 - ZORTMAN AND LANDUSKY WATER ISSUES - FINAL DRAFT STAFF WHITE PAPER

Mr. Mitchell submitted a proposed final draft of Zortman and Landusky Mines, HJR 43, Water Quality Impacts (EXHIBIT 21). Mr. Mitchell also submitted a list of the individuals who attended the Zortman and Landusky Site Tour on September 9, 2004 (EXHIBIT 22).

Chairman McNutt commented that he was on the tour, and that he believes the report is an accurate reflection of what is going on at the site.

Sen. Wheat moved the EQC accept the proposed final draft report of Zortman and Landusky Mines, HJR 43, Water Quality Impacts.

Sen. McGee observed some of the comments inserted in yellow were contradictory to information in the report. In particular, Sen. McGee pointed out the comment contained on page 8. Mr. Mitchell responded that he reviewed all the comments with the project manager from DEQ to make sure the comments made sense and were accurate. If comments were deemed to be accurate, Mr. Mitchell stated he made an effort to soften the comments.

Chairman McNutt suggested the language should state that there was some evidence that the seeps are hydraulically connected to mine “reclamation” not mine “operations.”

Sen. McGee pointed out that the comment says the seeps <u>are</u> connected and Sen. McGee suggested it would be better to say the seeps <u>could be</u> connected. Chairman McNutt stated he was at the site, and that there is evidence the federal standards are being exceeded. Rep. Barrett asked if the comments in yellow originated from a report or whether they were in a letter. Mr. Mitchell explained the comments came from Mr. Andy Huff, Indian Law Resource Center, and that Mr. Huff is involved in litigation, and his information came from depositions and other evidence utilized in the litigation. Rep. Barrett asked if the comments could be footnoted, and Mr. Mitchell agreed that he could footnote the information.

Sen. Roush thought some assumptions were being made as to where the seeps are coming from. Sen. Roush recalled that there are methods available to test and find out exactly where the leakage is coming from.

Sen. McGee moved every comment be footnoted, and if the comment did not come from a factual basis, it should be removed. Sen. McGee suggested that if it was necessary, the footnote could reflect that the comment was someone’s opinion rather than fact. Sen. McGee was concerned someone would think the comments were the EQC’s definitive concepts. Rep. Clark suggested footnotes be used where controversy exists. Mr. Mitchell stated that some of the comments which seem to be contradictory reflect the litigious nature of the issues at the Zortman and Landusky mines.

Ms. Page thought footnoting some of the comments would be helpful since it would help explain where the controversy lies at the Zortman and Landusky mines since there are many different interpretations of the facts at the site.

Chairman McNutt summarized that items will be footnoted where it appears there are differing opinions.

(Tape 6; Side B)

He added that factual items in the report do not need to be footnoted. Chairman McNutt noted the items in yellow seem to be the comments where there is a difference of opinion. Sen. McGee added that he would like to see a qualifier as to who said what.

Sen. McGee's motion to amend the report to include footnoting identifying the origin of controversial comments carried unanimously.

Rep. Bixby attributed the substantial amount of mistrust and misunderstanding surrounding the Zortman and Landusky Mines to lack of communication between the parties. Rep. Bixby stated she has misgivings about the reclamation and would be more comfortable with an analysis by an outside source. Rep. Bixby stated the Tribes have suggested they are being excluded from certain portions of the mine.

- **Public Comment**

Mr. Andrew Huff, Indian Law Resource Center and the author of the yellow comments in the report, testified that an enormous amount of work had been done at the site and that the site looks much better. Mr. Huff identified significant disagreement about water at the site and stated the Tribes do not believe the current water treatment measures are keeping the waters reasonably clean. Mr. Huff testified that for purposes of getting unity and clarity for policy making at the state and federal level, the report is useless. Mr. Huff pointed out that the Tribes' statements in the report are all based on DEQ water monitoring reports which were developed during the litigation process. Mr. Huff agreed the contradictory statements are disturbing and suggested the EQC not accept the report and ask the Legislature to appropriate money to hire an outside expert team to develop water-quality information and review the reclamation information to obtain a neutral analysis. Mr. Huff did not believe a report based solely on DEQ information is an accurate report.

- **Questions from the EQC**

Sen. Wheat asked if an Environmental Impact Statement (EIS) had been done. Mr. Huff replied a supplemental EIS was completed in 2001 and a Record of Decision (ROD) was issued in 2002. Mr. Huff explained the EIS did address water-quality issues, and that a good amount of the information the Tribes relied on was from the supplemental EIS and the ROD. Sen. Wheat asked why it would be beneficial to do another EIS in 2005. Mr. Huff replied another supplemental EIS should be done because of contradictory statements regarding water quality.

Sen. Wheat asked Chairman McNutt what the purpose is for having the report. Chairman McNutt explained the report is necessary to report back to the Legislature on HJR 43.

Sen. Wheat suggested that placing the contradictory comments in the report would point out to the Legislature that there are differences in opinion. Mr. Huff was concerned that comments from the state would be assumed to be factual and comments from the Tribes would be assumed to be opinion.

Ms. Page asked who would be the outside party to perform the analysis and wondered if it could get done in a timely manner. Mr. Huff stated he would like to see an honest ~~of~~ assessment of

the existing information from the agencies. Mr. Huff suggested using independent outside experts to directly test water and soil samples and allow the outside experts to draw independent conclusions.

Sen. Wheat asked whether the Tribes had hired an independent expert to test the water quality. Mr. Huff replied the Tribes are working with Dave Chambers of the Center for Science and Public Participation as a water-quality expert. Mr. Chambers analyzes data produced by the agencies. Mr. Chambers' analysis has revealed violations of the water-quality standards throughout the mine sites. Sen. Wheat asked whether the Tribes object to the manner in which the tests are performed. Mr. Huff said the Tribes do not object to the procedures used to test, but object to the interpretation of the results. Mr. Huff suggested a third set of eyes could provide a definitive answer.

Rep. Clark asked if there was data to back up the statements, and Mr. Huff replied the data is available but is not getting to the people who need to see the data. Rep. Clark suggested the contradictory statements in the report are accurate since there is controversy surrounding the mine sites and suggested there should be a preamble to the report acknowledging the controversy. Mr. Huff agreed a preamble to the report and the addition of footnotes would be helpful.

Chairman McNutt stated it appeared to him upon visiting the site that the only water he saw flowing from anywhere close to the mine site was starting at Swift Gulch, and that the bulk of the water treatment flows into the Milk River or the Missouri River. Chairman McNutt did not think the water was impacting the Reservation at all. Mr. Huff explained the data indicated that violations of water quality standards were occurring in King Creek at the Reservation. In Swift Gulch, Mr. Huff testified pollution is getting steadily worse and is within 100 feet of the Reservation boundary. Mr. Huff stated the water quality reports the Tribes have recently received have not contained data from the Reservation boundary. Chairman McNutt observed there is no water in Swift Creek.

Rep. Barrett noted HJR 43 is very specific in its directive and Rep. Barrett suggested the report has met that directive.

Mr. Wayne Jepson, a hydrologist with the Department of Environmental Quality, acknowledged DEQ's interpretation of data differs from the interpretation by the Tribes. Mr. Jepson suggested there was an assumption where the pollution in Swift Gulch was coming from, but reclamation efforts at that source have not made a difference; therefore, DEQ does not feel that site was the primary source of the pollution. DEQ is attempting to do further hydrologic studies to better quantify where the pollution is coming from. Sen. Wheat asked whether DEQ was basing its reclamation changes upon its interpretations of the samples. Mr. Jepson agreed that was the case.

(Tape 7; Side A)

Rep. Clark asked if both sides would be agreeable to including a preamble in the report that would acknowledge the controversy. Sen. Story thought the footnotes should show the opposing opinions, and that the EQC does not have definitive answers to some of the issues. Chairman McNutt directed Sen. Story to p. 21 of the report.

Rep. Barrett asked whether it would be better to not write anything given the fact that there are currently three ongoing lawsuits. Rep. Barrett suggested the EQC should adhere to what was required by HJR 43. Chairman McNutt stated he believes the report meets the directives contained in HJR 43.

Sen. Wheat's motion that the EQC accept the proposed final draft report of Zortman and Landusky Mines, HJR 43, Water Quality Impacts, as amended to include footnotes, carried by roll call vote (EXHIBIT 23), with Sen. McGee and Sen. Toole voting by proxy.

LC9009 - METH STANDARDS DRAFT LEGISLATION

Mr. Mitchell directed the EQC to his memorandum dated August 24, 2004, and attached proposed legislation, LC 9009, and Summary (EXHIBIT 24). Mr. Mitchell explained that LC 9009 establishes a cleanup standard for properties contaminated by methamphetamine. The Agency Oversight Subcommittee is recommending that the EQC adopt the proposed legislation. Mr. Mitchell highlighted the proposed legislation which requires the Department of Public Health and Human Services (DPHHS) to:

(1) adopt rules for certifying and decertifying cleanup contractors;

(2) reciprocate with other states that have a cleanup certification process;

(3) maintain a list of certified contractors; and,

(4) maintain a list of contaminated properties as reported by law enforcement agencies and remove properties from the list after the property has been cleaned up.

Mr. Mitchell noted that it is optional to clean up property, but a landlord or property owner must notify a subsequent tenant or purchaser that a meth lab had been located on the property, unless the property has been cleaned up to state standards. Mr. Mitchell spoke about the Agency Oversight Subcommittee's difficulty in setting a standard for cleaning up indoor property, and stated the proposed legislation utilizes a standard set by Washington state.

- **Questions from the EQC**

Ms. Porter worked on the legislation and recalled Missoula County's attempts to include mobile home~~,~~ and recreational vehicles into the definition of inhabitable property or real property, and stated she believed recreational vehicles (RV) are in a gray area. Ms. Porter believed the cost to clean up a RV would exceed the value of the RV. Ms. Porter suggested deleting RVs from the definition. In addition, Ms. Porter would like Section 3(2)(a) to specify "closure" samples to make a distinction between initial samples which were taken to determine concentration prior to cleanup. Ms. Porter explained the statute should be concerned with post-cleanup concentrations. Also, Ms. Porter expressed concerns with Section 3(2)(b) and wondered who would decide how many samples must be collected and who would decide which areas would most likely be contaminated. Ms. Porter stated she would like to see these areas addressed.

Ms. Page noted the legislation is to protect public health and noted many RVs had been utilized for meth labs and wondered why they would be left out of the legislation. Sen. Wheat asked if

there was a definition for RVs and whether that definition would include vans. Sen. Wheat stated if RVs include motor homes, RVs should be left in.

Chairman McNutt noted meth labs today are more mobile than permanent. Rep. Barrett expressed concerns about mobile homes and vehicles from other states being abandoned in Montana.

Rep. Clark agreed that the proposed legislation needed work, and the property needs to be worth the value of the cleanup.

Rep. Clark moved the EQC accept the recommendation of the Agency Oversight Subcommittee and approve LC 9009.

Sen. Story recalled hearing testimony from Dr. Michael Spence that this was not a problem Montana needed to address.

Michael Spence, M.D., Chief Medical Officer, Department of Public Health and Human Services, stated currently there is no written documented evidence in the medical literature that would suggest that inhabiting a house or any facility after there has been a meth lab, and the main ingredients have been removed, causes injury to human health. However, Dr. Spence stated this is an extremely controversial issue and concerns the public. Dr. Spence thought LC 9009 was a good bill and supported the proposal. Dr. Spence cautioned that just because no human health injuries have been reported, does not mean they do not exist.

Sen. Story stated he has difficulty creating an expensive program for property owners without evidence of need. Sen. Story stated he would not support the proposed legislation.

Rep. Barrett stated she would support the proposed legislation because property owners have requested cleanup standards.

Rep. Bixby suggested having the legislation would make landowners more responsive in checking their property in an effort to keep meth labs off their property.

- **Public Comment**

Mr. Mitchell submitted a memorandum from Joan Miles, Lewis and Clark County Health Officer, supporting LC 9009 (EXHIBIT 25).

Mr. Brian McCullough, Montana Landlords' Association, agreed meth cleanup is a serious problem. Mr. McCullough also agreed with Dr. Spence that it has been difficult to identify anyone who has been impacted after the fact. Mr. McCullough suggested property owners could already be cleaning up the property, and that is why there are no instances of harm to public health that can be identified. Mr. McCullough suggested time is off the essence in passing legislation. Mr. McCullough spoke about property that was contaminated and a letter from the Montana Department of Justice being attached to the person's property and the difficulties in getting that letter removed from the property. Mr. McCullough stated amendments to the legislation would be suggested regarding law enforcement's ability to say whether a property should be listed.

Dr. Spence commented there are varying degrees of contamination with meth labs depending on the size of the lab. Therefore, the degree of cleanup would vary between those sites. Dr. Spence stated it would be possible that some of the sites could be cleaned by the landlord or a cleaning company, and would not require hiring a large commercial company.

Sen. Story inquired what authority law enforcement had to cloud the title to the property that was allegedly contaminated. Mr. McCullough replied he was never able to make that determination, but agreed that was a good question.

Sen. Wheat commented that the legislation would need substantial amendments.

(Tape 7; Side B)

Therefore, Sen. Wheat wondered if the EQC would want to endorse the proposed legislation.

Rep. Clark's motion to accept LC 9009 failed by roll call vote (EXHIBIT 26) with Sen. McGee and Sen. Toole voting by proxy.

RECESS

The EQC recessed at 5:55 p.m.

CALL TO ORDER

The EQC reconvened on September 14, 2004, at 8:34 a.m., in Room 102, State Capitol Building, Helena, Montana. The secretary noted the roll (ATTACHMENT 4).

UPDATE ON THE YELLOWSTONE COMPACT (HJR 35) - Jack Stults

Mr. Jack Stults, Water Resources Division Administrator, Department of Natural Resources and Conservation, expressed his appreciation for the attention and effort the EQC has put toward water issues over the interim. Mr. Stults addressed activities affecting water that crosses between Montana and Wyoming. Mr. Stults provided a history of the relationship between Wyoming and Montana as it related to water. Mr. Stults directed the EQC to the compact contained in §85-20-101, MCA. Mr. Stults explained that Montana did not receive spring runoff waters in 2004 as predicted either due to the drought or the water being picked up by Wyoming before reaching Montana. Montana then requested Wyoming to deliver water that would be sufficient to satisfy pre-1950 rights up to the level that Wyoming is satisfying their 1950 rights. Wyoming responded that it was not taking any water inconsistent with the compact and identified the drought as the cause. Mr. Stults explained they are attempting to compare historic irrigation to current irrigation utilizing aerial photographs, satellite imagery, and analytical data. Mr. Stults stated the process has been slow because the compact is unhelpful and vague. Mr. Stults explained the compact was written with the anticipation that there would be major storage facilities built along the border that would relieve the pressure on pre-1950 water rights, and the only place that happened was on the Big Horn. Mr. Stults testified Montana continues to work collaboratively with Wyoming, and the parties are trying to avoid expensive litigation. Wyoming has litigated with all neighboring states except Montana. Mr. Stults suggested the compact should be interpreted so the Doctrine of Appropriation could be applied equally between the two states. Wyoming's interpretation is that the two states should be able to act independently. Mr.

Stults explained that Wyoming's interpretation is not equitable since Wyoming has the advantage of being upstream. Mr. Stults would like to develop a way to manage the water and avoid the conflict, but was not confident that could happen. Currently, the two states are in Phase I of the dispute resolution process.

On the international level, Mr. Stults spoke about the allocation of water between Montana and Canada and the fact that Canada wants to build a new reservoir.

- **Questions from the EQC**

Ms. Page asked to what degree the states have been discussing coal bed methane ponds in Wyoming. Mr. Stults replied they are primarily looking at irrigation since it is the major use of water, and that is where there are water rights. Mr. Stults stated they have made it clear to Wyoming that water quality is an inherent component of the beneficial use of water.

Ms. Page inquired how many impoundments existed in Wyoming on streams flowing up to Montana. Mr. Stults did not have the exact number, but stated the number was in the thousands. Mr. Stults explained that any new impoundments must be off stream and have to meet standards if it is going to be used for storage of coal bed methane water.

Mr. Stults submitted copies of his May 18 correspondence to Wyoming calling for water (EXHIBIT 27) and Wyoming's May 24, 2004, response (EXHIBIT 28).

Sen. McGee asked if there was a relationship or concern about the amount of water coming into Montana where coal bed methane has diverted surface water or ground water to such an extent that the flows coming across the border have been diminished.

(Tape 8; Side A)

Mr. Stults replied there was concern that impoundments that were being constructed to store coal bed methane water would capture spring runoff and other flows that were destined to come to Montana. In addition, structures should be able to route water around. Water quality and the effects of withdrawing water from the aquifer and the impact that has on natural stream flows are also concerns.

Sen. McGee summarized the extraction of coal bed methane could be drawing down surface water to such an extent that for Wyoming to keep its water right capacity, the amount of water coming across the border is diminished and Montana is unable to attend to its own water right issues. Mr. Stults agreed that is the question that needs to be answered.

HJR 4 (Con't)

Ms. Evans submitted information to the EQC regarding the funding alternative, and the EQC requested that information be included in the final report (EXHIBIT 29).

- **On Motion and Database Bills**

Ms. Evans explained that in order for there to be an EQC bill(s) to address the issues of on-motion and the DNRC database, the bills need to be pre-introduced. Chairman McNutt solicited input from the EQC on the on-motion issue.

Ms. Evans stated if the primary concern is issue remarks remaining on claims into final decrees, EQC could put language into statute that would say a final decree may not be issued until all issue remarks are resolved. It would then be up to the water court on how to address the issue remarks. Ms. Evans added there are currently four final decrees and 148 water rights which still contain issue remarks within those final decrees.

Rep. Clark understood Judge Loble would like a mandate, and Rep. Clark thought Judge Loble was reluctant to take the initiative to execute the on-motion option for fear of being viewed as an activist judge.

Sen. Story agreed with Rep. Clark's analysis that Judge Loble would like a mandate from the Legislature. Sen. Story also recalled that Judge Loble had stated that it would be expensive to mandate the on-motion practice because it will expand the workload of the water court and the DNRC. Sen. Story was not certain having issue remarks remain in final decrees would be a big problem. Sen. Story did not want to slow the process down for basins that have not yet been adjudicated. Sen. Story suggested issue remarks could be dealt with anytime in the future.

Mr. Ebzery agreed with Sen. Story's suggestions. Mr. Ebzery recommended Chairman McNutt draft a letter to Judge Loble discouraging the implementation of a steering committee in Judge Loble's proposed rules. Mr. Ebzery urged the EQC to be cautious in entering into the process through legislation.

Chairman McNutt asked what the EQC thought about legislation stating a final decree could not be issued if issue remarks were remaining. Ms. Evans clarified that if legislation were passed, those decrees that currently have issue remarks remaining on them would have to be addressed.

Rep. Clark urged caution and agreed the whole system could be challenged if unresolved issue remarks remain in decrees. Rep. Clark suggested permission could be granted to Judge Loble to pursue the on-motion alternative if issues remain unresolved prior to issuing a final decree. Rep. Clark sensed Judge Loble's hesitation could hold up the process.

Sen. McGee agreed with Rep. Clark and thought Judge Loble is reluctant to make decisions and suggested legislation could direct Judge Loble to use whatever process is necessary to resolve issue remarks before a basin is closed.

Ms. Evans noted that Judge Loble issued an opinion stating he has the authority to call issues in on-motion. Sen. McGee agreed, but suggested Judge Loble was looking for confirmation from the EQC. Ms. Evans noted no appeals were filed to Judge Loble's opinion, and that Judge Loble, as well as other courts, already have the ability to call claims in on-motion. Ms. Evans wondered if the EQC would want to set a precedent that other courts could not call something in on-motion unless it has specific permission from the Legislature.

Mr. Ebzery stated Judge Loble already has the authority, and that authority has not been challenged, and did not think it was necessary for the Legislature to give him the authority. Mr. Ebzery thought it would be adequate to send Judge Loble a letter from the EQC stating he has the authority and he should use it.

Sen. Toole thought Judge Loble was clear that he would not use his on-motion authority without directive from the Legislature. Sen. Toole identified the question as to whether unresolved issue remarks call into question the quality of the work being done. Sen. Toole stated without a directive from the Legislature, a substantial number of issue remarks would remain on decrees, which would undermine the process.

Sen. Story recalled Judge Loble testifying, “The Legislature created the Water Court, and the Legislature can direct the Water Court.” Sen. Story asked how separation of powers would work between the Legislature and the Water Court and how it differs with other courts in Montana. Mr. Everts replied that there are definite separation of issue flags, and operating procedures are usually within the purview of the court system, even though the Water Court is a creature of the Legislature. Mr. Everts stated he would need to do more research.

Sen. Roush believed the EQC should address the problem as identified by Judge Loble. Sen. Roush reminded EQC of their intention to move the procedure along at a faster rate, and suggested doing nothing about giving Judge Loble direction would slow the process down.

(Tape 8; Side B)

Sen. Story stated if no one objects to the issue remarks, the issue remarks go away and the problem goes away.

Rep. Barrett stated the rules are necessary, so there is equal protection under the law from basin to basin. Rep. Barrett stated Judge Loble could use the on-motion process anytime, and suggested it is a judicial issue not a legislative issue.

Sen. Toole was concerned about the issue remarks being deemed resolved because nobody objects since not everyone knows what is going on. Sen. Toole suggested there is a public interest in assuring that the quality of the process is as good as it can be. Sen. Toole did not feel it would be right to let a problem slide by just because people did not complain.

Rep. Clark reminded the EQC that water adjudication is required by the Constitution. Rep. Clark suggested issue remarks should be addressed to provide a quality program.

Rep. Bixby noted the letter to Judge Loble from Tim Hall, Exhibit 12, suggests the on-motion issue does not have to be as complicated as Judge Loble is making it. Rep. Bixby suggested the EQC would not have to become involved since Judge Loble already has the authority.

Mr. Tim Hall, Chief Legal Counsel for the Department of Natural Resources and Conservation, agreed that in Exhibit 12 he stated the procedure does not have to be complicated. Mr. Hall identified the issue as whether Judge Loble will actually call claims in on his own motion. If there are no objectors and there are issue remarks, a meeting is held with one of the water masters, the claimant, and the DNRC examiner to discuss the issue remark. Mr. Hall reminded the EQC that the issue remarks were provided for by the Supreme Court and, therefore, should be dealt

with. Mr. Hall stated there is no question that Judge Loble has the authority, but the question is whether he will call the claims in.

Sen. McGee did not believe further legislation was necessary and commented that a judge is needed that will step up to the plate and do the work. Sen. McGee thought a letter of encouragement to Judge Loble is necessary.

Sen. McGee moved that EQC draft a letter to Judge Loble thanking him for his testimony and informing him that EQC has determined no further legislation is necessary, and that Judge Loble has the authority and encouraging him to complete the process. Mr. Ebzery suggested language should be included in the letter discouraging Judge Loble from including a steering committee in the proposed rules.

Rep. Clark expressed a lack of confidence that the proposed legislation would get the job done, and thought the system would be better if the water judge position was an elected position. Rep. Clark stated he would have difficulty supporting legislation that would charge his constituents more money for the water rights when he does not have a deep conviction the job can be completed with the current system.

Ms. Evans asked the EQC if they would like to send a copy of the letter directed to Judge Loble to the Montana Supreme Court. The EQC agreed that would be appropriate.

Sen. McGee's motion that the EQC draft a letter to Judge Loble thanking him for his testimony and informing him that the EQC has determined no further legislation is necessary, acknowledging Judge Loble currently has the authority and encouraging Judge Loble to complete the process, and discouraging Judge Loble from including a steering committee in his proposed rules carried unanimously.

The EQC will address the database issue when it meets in January.

- **Congressional Letter Update**

Ms. Evans reported she has spoken with Sen. Baucus's office and Sen. Burns's office, and needs to follow up with Rep. Rehberg's office. The primary concern from the federal level is that funding of the adjudication is not only a Montana issue but is an issue for all western states. The concern is trying to get money specifically for Montana. Ms. Evans stated there is a Fairness in Adjudication Act before Congress and any money received from the federal government would be for adjudication in the entire western United States. Sen. Baucus's staff suggested money might be available to help pay for the database, but indicated the timing is bad in relation to the funding cycle. Chairman McNutt agreed it would be some time before Montana could expect to receive any help from the federal government.

<u>REVIEW OF DEQ LEGISLATIVE PROPOSALS</u> - Jan Sensibaugh

Ms. Jan Sensibaugh, Director of the Department of Environmental Quality, submitted a packet of information regarding DEQ's proposed legislation (EXHIBIT 30). Director Sensibaugh introduced John Arrigo, Administrator, Enforcement Division, Department of Environmental Quality, who reviewed the first three pieces of legislation regarding enforcement.

Mr. Arrigo first addressed 5301-30-001b (EXHIBIT 31) and identified this proposed legislation as the number one priority bill. This piece of legislation will standardize and streamline DEQ's internal enforcement procedures and standardize penalty factors.

Mr. Arrigo presented 5301-30-032 (EXHIBIT 32) which will add administrative penalties to the Solid Waste Management Act and the Motor Vehicle Recycling and Disposal Act, and the Underground Storage Tank Installer and Permitting Act, and the Sanitation and Subdivision Act. Mr. Arrigo also presented 5301-30-030 (EXHIBIT 33) and directed the EQC to the attached table. Mr. Arrigo would like to use one set of penalty factors for calculating penalties under all the laws. Mr. Arrigo testified DEQ would write one set of rules which would describe the penalty calculation process.

(Tape 9; Side A)

Mr. Arrigo submitted a memorandum directed to Chairman McNutt clarifying DEQ's policy on accepting Supplemental Environmental Projects as partial payment of a penalty (EXHIBIT 34).

- **Questions from the EQC**

Sen. McGee asked Mr. Arrigo how he views the Enforcement Division's function in a violation and whether he views the Division as the police, court, or judge. Mr. Arrigo replied he provides a service to the rest of the DEQ in the enforcement of the laws administered by DEQ. Those services include calculating penalties, evaluating the strength of a case, working with attorneys to write and file papers, and following through with compliance on orders. Sen. McGee believed the proposed legislation creates a blurring of the Division's functions and will create an adversarial proceeding. Sen. McGee wondered at what point due process would be provided.

Director Sensibaugh replied everything the Division does can be appealed to the Board of Environmental Review (BOR) for an independent decision. A decision from the BOR could then be appealed to District Court.

Sen. McGee asked about the Sanitation and Subdivision Act and asked what kind of violation the Division is envisioning in its proposal to raise the fines. Mr. Arrigo replied they have fined people for constructing a subdivision without approval of water and sewer, and/or obtaining a certificate of subdivision approval or certificate of platting act from the county. Sen. McGee stated it is impossible to file a subdivision plat and transfer title to a lot without subdivision approval by DEQ. Mr. Arrigo stated he observed the development of condominiums when the law says they cannot build until the utilities for water and sewer have been approved by the DEQ or the governing body. Another instance involved a homeowner who divided a lot and constructed a home before the water and sewer was approved. Mr. Arrigo suggested it is important to understand that most permitted facilities have permit and monitoring requirements and that permit violations should be assessed a penalty, and laws are only as good as the enforcement.

Sen. McGee commented that to enforce a violation to address a philosophy of trying to level the economic playing field is erroneous. Sen. McGee added that to suggest the DEQ has a role in establishing economically level terrain is an arrogant attitude, and Sen. McGee found the philosophy offensive. Mr. Arrigo noted in some of the existing laws, economic benefit is a defined component of a penalty calculation. Mr. Arrigo emphasized DEQ does not drive its

enforcement business by focusing on economics, and economic benefit is considered as one factor in many. Sen. McGee wanted to know where the Division obtains the authority to determine whether the economic playing field is level.

Director Sensibaugh clarified they are attempting to ensure enforcement has a deterrence effect. Director Sensibaugh stated DEQ does not want to allow people who violate the law to get an advantage over people who do not violate the law.

Sen. Story asked about the violator's prior history referenced on page 2 of Exhibit 33, and noted in most criminal cases, "prior history" is not allowed to be considered. Sen. Story asked if this provision had ever been challenged. Mr. Arrigo replied to his knowledge it had never been challenged. Rep. Hedges added there is a precedent for repeat offenses contained in DUI laws where penalties go up for repeat offenses. Mr. Arrigo added the history of violations is narrow, and the violations have to be under the same law and part; therefore, a water violation could not be considered when calculating the penalty for an air quality violation.

Rep. Barrett also had questions regarding the prior history and asked how a prior history would be quantified if the violator is a state agency and whether a state agency would also be allowed to perform a SEP. Mr. Arrigo replied they would allow a state agency or local government to conduct a SEP. Mr. Arrigo explained that depending upon the particular policy or rule, there is a description on now much weight is given to history, but in most cases approximately ten percent of the penalty is based on past history. Rep. Barrett explained her concern is with the contaminated fish hatchery, and that she is concerned how that issue will play out and how the FWP will be treated. Mr. Arrigo replied he has not seen any enforcement requests for the fish hatchery.

Sen. Story asked how penalties would be structured. Mr. Arrigo responded most penalties are assessed per day, per violation, but evidence is needed that the violation occurred on each day, and they do not presume a continuing violation.

Chairman McNutt asked who was involved in the working group that prepared the proposed legislation. Mr. Arrigo explained he invited approximately 55 individuals including industry lobbyists, industry representatives, attorneys, government representatives, consultants, and environmental groups. Of that amount, 15 to 20 individuals regularly participated. Sen. Toole was curious who stayed in the process throughout the duration. Mr. Arrigo recalled industry representatives made up the majority of individuals who stayed in until the end of the process. Mr. Arrigo stated some environmental groups withdrew from the process because they did not believe they were being heard. In addition, Lewis and Clark County representatives were present, but no municipalities were represented.

In reviewing Exhibit 33, Mr. Strause noted the size of the violator was not considered and asked if size had been a factor in the past. Mr. Arrigo replied none of Montana's laws authorize size of violator as a factor, although EPA does. Mr. Arrigo explained size of the violator is based on net income, gross income, or number of employees. Although size of the violator was discussed by the work group, it was difficult to quantify on a state level. In addition, the working group thought the penalty should be the same for a violation regardless of the size of the violator. Mr. Strause viewed the penalty as punitive damages in a civil case where the worth of the defendant is considered. Mr. Strause noted if one of the purposes of the penalty is to deter future violations,

a large company would need to pay a much higher penalty. Mr. Strause requested Mr. Arrigo to rethink the issue of size of violator in calculating a penalty.

Mr. Strause asked if violators ever agree to pay a certain sum to the state without admitting any wrongdoing. Mr. Arrigo added that is often the case and that while they are not afraid to litigate, they often do not have the resources to fight all cases to the end. Therefore, settlements are negotiated, and an Administrative Order on Consent (AOC) will be entered into where the state alleges the violation, but the violator does not admit any liability, but pays a penalty.

(Tape 9; Side B)

Mr. Arrigo identified one problem as being if an AOC is entered and the violator does not admit liability, but pays a penalty, whether that violation would count toward prior history.

Mr. Strause noted that the penalty has to be assessed within the last three years under prior history and wondered why there was a three-year limitation. Mr. Arrigo replied there is a *de facto* two-year statute of limitations for assessing penalties, and it was decided to go a little further back than the statute of limitations.

Mr. Strause was troubled about not being able to include all violations in determining prior history and noted there are persistent felony offender statutes contained in criminal law.

Ms. Page asked why Mr. Arrigo thought it would be beneficial to standardize enforcement and suggested one of the reasons for the difference is because of differing circumstances in the different areas. Ms. Page suggested changing the law would result in losing a valuable distinction. Mr. Arrigo replied he is attempting to standardize how different circumstances are looked at. Mr. Arrigo explained the DEQ is attempting to streamline enforcement and ensure consistency. Ms. Page stated there are very specific time frames and requirements in the Strip Mine Act in particular and thought getting away from those would introduce uncertainty. Mr. Arrigo replied the only time frame they are proposing to change is contained in Exhibit 31 and proposes to extend the time allowed to appeal an order from 20 days to 30 days. Ms. Page agreed enforcement is key, but thought standardizing enforcement may not address all the relevant specifics. Mr. Arrigo disagreed and stated one standardized framework would make it easier to compare the statue-specific differences.

Director Sensibaugh continued reviewing DEQ's proposed legislation in Exhibit 30.

a. Priority No. 2, MEPA General Revision.

Sen. Toole asked for an example of operations that would fall under general permits. Director Sensibaugh identified storm water discharge permits and gravel pit permits as being included. Director Sensibaugh explained each time they identify an activity that would be subject to a general permit, they would utilize the general permit.

Mr. Strause asked if proposed expansion of a gravel permit would fall under the general permit. Director Sensibaugh stated the general permit is for the air quality activities due to the crushers located in the gravel pit. If an expansion is contemplated, an environmental review would be required.

Mr. Strause noted the language that says, “If the project is controversial, the MEPA process can become so time-consuming and complex . . . ‘ and suggested MEPA is in place because if a project is controversial, it provides the public an opportunity to raise issues. Director Sensibaugh explained they will try to identify a class of activity where the environmental impact is not enough to warrant an individual environmental review. Mr. Strause stated there is a huge controversy surrounding general permits issued by the federal government, and that the federal government is re-examining the issuance of general permits. Director Sensibaugh replied the federal government has been issuing general permits for quite some time, and a lawsuit was only recently filed. Mr. Strause expressed his concern about Montana getting sued over issuing general permits.

b. Priority No. 3–Water Quality Act Consistency.

There were no questions from the EQC.

c. Priority No. 4–Act to Revise MEPA Fees.

Rep. Barrett added there was a bill passed in the 2003 Legislature providing that in the future proponents of an outstanding resource water designation pay for the EIS. Rep. Barrett stated there is a difference because outstanding resource water can close a river and cause no more permits to be issued.

Mr. Ebzery asked where the money came from to perform the EIS when the applicant refused to pay. Director Sensibaugh replied the money came from several sources including federal carryover money. Director Sensibaugh explained the legislation would contain the parameters for what the activities are that would be paid for to do the EIS.

Sen. McGee asked if the DEQ determines an Environmental Assessment (EA) is the appropriate level of assessment and the DEQ is subsequently sued because someone believes an EIS is appropriate, who would pay. Director Sensibaugh replied DEQ would still pay for the EA and the applicant would still be responsible to pay for the EIS.

Rep. Peterson inquired whether an applicant would have to pay for an EIS even if the DEQ’s initial permit only required an EA. Director Sensibaugh responded that she did not anticipate DEQ changing its mind without being ordered to do so by a court. If for some reason that happened, Director Sensibaugh stated the applicant would be required to pay for the EIS.

d. Priority No. 5–Oil and Gas Air Quality Permit Application Requirements.

Sen. Story asked if the temporary operation permit was like a general permit. Director Sensibaugh stated it was.

Ms. Page suggested this proposed legislation would allow operation without a permit and that any kind of examination and approval would be after the fact. Ms. Page did not feel that would allow the DEQ to live up to its charge of preventing pollution from happening. Director Sensibaugh explained the reason DEQ is going to have the BOR adopt interim emissions requirements is to make sure there are no impacts that they cannot recover from in the interim time that the applicant is allowed to operate.

Rep. Bixby was concerned because of the coal bed methane being developed in her area. Rep. Bixby pointed out that the region she represents currently has Class I air, and that she would be more comfortable if permits were issued prior to beginning operation.

(Tape 10; Side A)

Director Sensibaugh explained that the process of getting all the permits issued is enormous, and the bill would apply to existing oil and gas facilities. In addition, it is difficult to know what emissions an oil and gas well will have prior to the well being drilled and producing. Director Sensibaugh suggested the proposed legislation would give them a better chance of issuing a correct permit.

Rep. Bixby noted that if the wells have been in operation, DEQ should already have the necessary data. In addition, Rep. Bixby suggested information could have been obtained from Wyoming. Rep. Bixby suggested the process should have already been in place.

Chairman McNutt commented that the conversation is not limited to coal bed methane and that there is a great deal of oil production drilling, and the Board of Oil and Gas issues permits, so the public knows when and where they are going to drill. Chairman McNutt spoke about a new gas plant being in operation in Richland County to help with gas flaring, and stated the process cannot be stopped to wait for permits.

Ms. Porter asked if the DEQ will take into account air-quality increments for the allowable emission increase for a certain area. Director Sensibaugh agreed the increments would be protected.

Mr. Ebzery asked about Wyoming's air-quality permits for all conventional oil and gas and coal bed methane wells.

Mr. Charles Homer, Air Resources Management Bureau, Department of Environmental Quality, stated the idea that oil and gas wells would require an air quality permit is new throughout the region. Mr. Homer explained Wyoming has adopted a policy where they are issuing approvals that are not totally in accordance with Wyoming's rules.

Sen. Roush asked for clarification that the proposed legislation only applies to air quality and not water. Director Sensibaugh agreed the legislation would only apply to air quality permitting and is not limited to coal bed methane, but would apply to all oil and gas wells.

Ms. Page asked about the proposed time frame and noted she does not see much incentive for the DEQ to act. Mr. Homer replied the DEQ would issue the permit within the mandatory statutory time frames of 60 or 75 days depending upon the application. Mr. Homer could not say how long it would take to issue the backlog of permits for existing facilities.

Mr. Strause asked under what circumstances a permit would be denied. Mr. Homer replied a permit application would be denied if the DEQ determines the facility would not be able to operate within the required laws or regulations. Director Sensibaugh clarified the BOR oversees the DEQ's activities, will put the regulations in place, and the Board of Oil and Gas does not regulate air-quality activities.

Sen. Story noted only oil and gas wells that produce 25 tons per year would require an emissions permit, which will be determined after the wells are in production. Mr. Homer indicated the operator will be able to estimate the well's emissions, and the DEQ will follow up. Chairman McNutt added the Board of Oil and Gas will set a limit in the permit on the amount of gas that can be flared.

e. Priority No. 6--Open-Cut Mining Act Amendments.

There were no questions from the EQC on the proposed legislation.

f. Priority No. 7--Authority to Hold Bonds Jointly with a Federal Agency.

There were no questions from the EQC on the proposed legislation.

g. Priority No. 9--Redefine Full Compliance.

Rep. Clark requested Director Sensibaugh to provide an example of a minor violation DEQ is suggesting be exempted from full compliance.

Mr. Ed Thamke, Bureau Chief, Waste and Underground Tank Management, Department of Environmental Quality, replied to Rep. Clark's question by stating an example would be record keeping where the owner/operator is required to have 12 months of leak-detection records. Mr. Thamke added there could be mitigating circumstances in such an instance, and DEQ would prefer to have discretion and the ability to work with compliance assistance.

Rep. Clark followed up and asked if the difference between "minor" noncompliance and "major" noncompliance would be made clear in the legislation. Mr. Thamke replied DEQ is working on defining "minor," "moderate," and "significant" noncompliance parameters, and those definitions would be provided in rule.

h. Priority No. 10--Recycling Tax Incentive.

Sen. Story noted the number of people using the program is not large, and wondered if it would be worth keeping the program. Director Sensibaugh replied any encouragement they can give people to recycle and purchase recycled projects is good.

Rep. Clark suggested something be placed in the bill to encourage the program to get moving and increase its numbers.

Mr. Art Compton, Planning Division, Department of Environmental Quality, explained distance to market, small population, and difficulty of bringing the economy to the recycling effort are the reasons the tax incentives should be continued. Mr. Compton explained the recycling tax credit is a small business assistance effort, as well as a recycling and solid waste stream minimization effort.

Sen. McNutt added that freight costs are one of the largest deterrents to recycling. Sen. McNutt spoke about a group home in Sidney that uses recycling as a fundraising effort and barely breaks even. Sen. McNutt commented he would hate to see the recycling program discontinued.

I. Priority No. 11--State Energy Conservation Program.

There were no questions or comments from the EQC.

j. Priority No. 13--Interim Reclamation Bond Authority.

There were no questions or comments from the EQC.

k. Priority No. 15--Loan Authority.

Ms. Page wanted to know what would not happen in the Orphan Share Program if the money was taken. Director Sensibaugh explained there were no applicants in the pipeline looking to use the Orphan Share money; therefore, there are not any projects that would be at risk.

l. Priority No. 18--Septic Pumper Fee Increase.

Sen. Story asked what the new fee would be. Mr. Thamke replied DEQ will propose a $250 annual license fee to the septic pumper applicant. Mr. Thamke explained DEQ is planning on meeting with the Septic Pumper Advisory Council (SPAC) and stated SPAC is enthusiastic about more DEQ involvement with their activities.

m. Priority No. 19--Montana Strip and Underground Reclamation Act Amendments.

There were no questions or comments from the EQC.

n. Priority No. 20--Junk Vehicle Component Part Definition.

There were no questions or comments from the EQC.

o. Priority No. 21--Incinerator Air Quality Permit Requirements.

There were no questions or comments from the EQC.

p. Priority No. 23--Update the Integrated Waste Management Act.

There were no questions or comments from the EQC.

q. Priority No. 26--Restrict MTBE and Encourage Ethanol as a gasoline additive.

Mr. Ebzery noted MTBE is prevalent in Montana and asked for the specifics of the proposed ban. Mr. Compton informed the EQC that 21 states have banned MTBE, and that numbers indicate it is not used widely in Montana. Missoula is the only community that has ever had mandated oxygenated fuel use, and Missoula uses ethanol. Mr. Compton testified Montana would be following a national trend and making a statement that MTBE is not to be used. Mr. Compton noted the language is modeled after other states.

Mr. Ebzery asked about the time frames and noted Montana does not have an ethanol plant. Mr. Compton explained the legislation would encourage the use of ethanol, but it would not be a

requirement. Mr. Compton stated ethanol does have a presence in Montana, but is imported from other states.

Mr. Ebzery asked what Rep. Hedges would do since he is not located close to an area where he could obtain ethanol readily. Mr. Compton noted ethanol use is encouraged, but not required. Mr. Compton noted the statutes that encourage the use of ethanol could be looked upon as a resolution.

Rep. Hedges wanted to know what additives were being put into the gasoline at the Laurel and Billings refineries and the Canadian pipeline.

Lou Moore, Bureau Chief, Air, Energy, and Pollution Prevention, Department of Environmental Quality, responded MTBE is being put into higher octane fuels coming out of the Laurel and Billings refineries.

Rep. Hedges asked what problems have been encountered in the pipeline system by adding ethanol. Ms. Moore was not aware of any ethanol being added at the refineries in Montana, although admitted she is not an expert.

(Tape 10; Side B)

Rep. Hedges inquired what kind of facility would be required to put ethanol as an additive in a tanker truck when he pulls the fuel from the pipeline. Ms. Moore did not have that information available.

Rep. Barrett asked whether people use gasoline with ethanol over other additives. Ms. Moore replied gasoline with ethanol is available in most major cities, but is not as available in Montana as it is in neighboring states.

Sen. Story noted Missoula is the only city in the state that has an air quality problem that requires an oxygenate in the fuel. Sen. Story asked if it were possible Billings, Bozeman, or another major city was close to having to use an oxygenate. Director Sensibaugh replied there are no other cities that are close.

Mr. Ebzery asked if the legislation would restrict the use or ban the use of MTBE. Mr. Ebzery also asked if a timetable to stop using MTBE has been discussed with the refineries. Ms. Moore replied they have not discussed the legislation with refineries in Montana. Ms. Moore stated they do not want MTBE coming into the state and becoming a major pollutant.

Sen. Story asked if the proposal was to restrict the sale of MTBE in retail products or to restrict the use of MTBE in the refining process. Ms. Moore clarified they are looking to restrict the retail sale of MTBE within Montana. They will encourage the use of ethanol, but have not mandated the use ethanol.

Sen. McGee noted it would be much more of a significant environmental hazard if a refinery were to have a spill of MTBE than it would be for a spill to occur from a vehicle. Therefore, Sen. McGee wondered how effective it would be to prohibit MTBE at the retail level. Sen. McGee suggested it would make more sense to limit MTBE at both the production and retail levels. Director Sensibaugh explained that while the quantities are greater at the refinery, there is more

of a risk of spillage at the pumps. Director Sensibaugh stated they did not want to restrict the producers from making MTBE if they were shipping it to a state that would accept it. Sen. McGee suggested targeting a date in the future where production could not include MTBE so refineries will have an opportunity to plan.

Rep. Hedges stated if fuel is not addressed at the refinery, it goes into the pipeline and is drawn off the pipeline at various places across the state and nation. Rep. Hedges stated the retailer has little choice about which additive is in the fuel. Rep. Hedges suggested the legislation could put numerous retailers out of business. Rep. Hedges believed the issue should be studied further.

r. Priority No. 27--Energy Performance Contracting in Public Buildings including Schools.

Sen. Toole asked if there was currently a restriction prohibiting the negotiation of contracts. Mr. Compton replied procurement procedures at the local level make it difficult to enter into the term of contract necessary for the energy service company to recover their costs and make it financially attractive. Mr. Compton identified local school districts as the target of the proposed legislation. Currently, the only way school districts can make their energy retrofits is to dedicate operational funds, and Mr. Compton noted very few school districts have those resources available. Sen. Toole had concerns that it would be difficult to install measures with cost-effective paybacks over 15 years.

s. Priority No. 34--Amend Metal Mine Reclamation Act (MMRA) to allow multiple small quarries under one operating permit.

Rep. Clark asked for clarification. Mr. Warren McCollough, Chief, Environmental Management Bureau, Department of Environmental Quality, cited Plum Creek Timber as an example and stated they have several dozen operators who would like to exploit sites on Plum Creek land. Mr. McCollough stated some of the operators will exceed the five-acre limit that would qualify them for a Small Miner Exclusion Statement, and that their operations are low impact. Mr. McCollough stated DEQ would perform inspections, and it would be restricted to operations that would have little or no possibility of other environmental impacts. Mr. McCullough explained these types of activities are sprouting up all over the state, particularly in western Montana, because of the demand for decorative and landscape rock.

- **Public Comment**

Ms. Ann Hedges, Montana Environmental Information Center (MEIC), noted a lack of sufficient detail in DEQ's proposed legislation. Ms. Hedges admitted MEIC could support some of the proposed legislation, but believed some of the legislation constituted more than a slight impediment to environmental protection. Ms. Hedges testified the enforcement legislation would turn predictability on its head and would give DEQ complete discretion to decide how to proceed and when to proceed with enforcement. Ms. Hedges charged she has never before been in a process where her concerns were so summarily dismissed. Ms. Hedges testified she felt useless during the process and thought her concerns were disregarded and, therefore, she walked out on the process. Ms. Hedges stated large industrials should not be deciding how enforcement should proceed.

In speaking about the definitions of “incineration” and “negligible risk,” Ms. Hedges charged the state agency ignored the statute and in 1996 wrote rules that ignored the statute. Ms. Hedges suggested that now DEQ wants the statute to match the rules.

Ms. Hedges stated TMDLs have been controversial over the years and suggested the EQC was being asked to lend its name to a bill draft request without having any idea what might be contained in the specifics of the legislation. Ms. Hedges did not feel the EQC had been given ample opportunity to review the proposed legislation package and urged the EQC to not endorse the bill package.

- **Questions from the EQC**

Mr. Ebzery asked Ms. Hedges for her thoughts on the FWP legislation. Ms. Hedges responded that she did not participate in developing the legislation and stated the DNRC bill on MEPA was not acceptable.

Regarding the oil and gas legislation, Mr. Ebzery asked about the fee structure and who would pay for it. Mr. Homer replied permits required for oil and gas wells would fall under the current permit and fee system and they would be required to pay a $500 permit application fee for every permit. Mr. Ebzery recalled there is a minimum fee and that a larger fee could be assessed given the amount of emissions. Mr. Homer clarified there is a minimum amount for annual operating fees for permitted sources. Application fees for sources are a flat fee of $500 regardless of the facility. Mr. Ebzery inquired whether $500 would cover the amount of work necessary to issue the permits. Mr. Homer explained $500 is the amount DEQ estimates will be needed with a minimal amount of effort devoted to a minimal permit and the fee does not recognize the amount of resources that would be needed for a more complex permit. Mr. Ebzery was curious how DEQ would find a remedy for the difference. Mr. Homer replied the permitting activities of the air-quality program are funded by operation fees, and application fees only make up a small portion. The percentage of how much of the program is funded by operation fees and how much will be funded by application fees is determined annually by the BOR.

Mr. Everts reviewed the process for approving agency legislation with the EQC members. Mr. Everts noted it is within the EQC’s purview to not endorse the legislation, and the agencies would still be able to find an individual legislator to introduce the bills. Mr. Everts explained one of the reasons agency bills are pre-introduced is to allow staff to draft the bills early in the process.

Mr. Ebzery moved to approve the entire package of DEQ’s proposed legislation.

- **Discussion**

Mr. Ebzery moved to segregate priority No. 26 regarding MTBE. Mr. Ebzery believed there were ~~to~~ too many questions surrounding the issue and urged the legislation not be included in the package.

Sen. McGee disagreed and believed the MTBE issue should be handled at the legislative level. Sen. McGee stated if Montana is ever going to take the lead, not only in environmental quality but also in commercial development of alternative energy, Montana will have to move away from its present position. Sen. McGee would like to see the legislation move forward.

(Tape 11; Side A)

Discussion was held among the EQC members on the proper procedure for segregating legislation. Sen. Story pointed out that segregation could be accomplished by an EQC member simply requesting segregation and then the piece of legislation would be voted on separately after the EQC votes on the entire package of legislation.

Mr. Strause noted that procedure was not followed when he moved to segregate the DNRC MEPA bill and the EQC voted on whether to segregate the bill from the rest of the legislation.

Mr. Ebzery requested priority No. 26 be segregated. Rep. Clark requested priority Nos. 1, 2, 3, 5, 6, and 19. Mr. Strause moved to segregate priority No. 21. Ms. Porter requested priority No. 4 be segregated.

Mr. Ebzery's motion to approve DEQ's package of proposed legislation, minus priority Nos. 1, 2, 3, 4, 5, 6, 19, 21, and 26, carried unanimously.

Sen. McGee moved the proposed enforcement package, Exhibits 31, 32, and 33, not be approved. Sen. McGee suggested the legislation would make DEQ not only the executive, but also the judiciary. Sen. McGee identified the issue as being whether DEQ is going to be a one-stop shopping place for police action, judge action, and execution of the judgment. Sen. McGee could not see where due process would be followed and opposed the philosophy.

Mr. Ebzery made a substitute motion that the proposed enforcement package, Exhibits 31, 32, and 33, be approved. The motion failed by roll call vote (EXHIBIT 35) with Sen. Wheat voting by proxy.

Chairman McNutt urged caution when voting proxies and decided that if Rep. Harris's and Sen. Wheat's proxies specifically did not state the bill number and vote, their proxies would not be sufficient enough for Chairman McNutt to allow the votes.

Sen. McGee moved priority No. 2, MEPA general revision, be approved. The motion failed by roll call vote (EXHIBIT 36).

Rep. Clark requested a review of the proxies of Rep. Harris and Sen. Wheat to determine whether the proxies were clear on how they were to be voted. Chairman McNutt stated Rep. Harris's proxy authorizes Sen. Toole to vote on his behalf without any specificity. Mr. Strause read Sen. Wheat's proxy, but acknowledged the list of bills Sen. Wheat wanted to oppose was not on his proxy. Chairman McNutt reiterated the proxies were not valid since they did not specify the question to which the proxies would apply. Therefore, Chairman McNutt would not allow the proxies.

Sen. Toole moved priority No. 26, the restriction of MTBE, be included in the DEQ proposed legislation package. The motion carried by roll call vote (EXHIBIT 37).

Sen. McGee moved priority No. 5, the oil and gas air quality permit application requirements, be included in DEQ's package of proposed legislation.

Sen. McGee thought it was important the DEQ be allowed to go forward since it is having to play catch up with the EPA.

Mr. Ebzery noted the bill is checked by the agency as controversial legislation. Mr. Ebzery believed there is more to the bill than meets the eye, and stated he is not comfortable including the legislation in DEQ's proposed package of legislation.

Sen. McGee's motion to include priority No. 5, the oil and gas air quality permit application requirements, in the DEQ's proposed package of legislation carried by roll call vote (EXHIBIT 38) with Ms. Porter voting by proxy,

Rep. Clark moved to table the remainder of the bills in DEQ's package of proposed legislation. The motion carried unanimously.

OTHER BUSINESS:

- **Clark Fork Basin Task Force - Sen. McGee**

Sen. McGee moved EQC draft a letter in opposition to the Clark Fork Basin Task Force Report in the State Water Plan.

Sen. McGee explained the State Water Plan is in §85-1-203(3), MCA and quoted subsection (3) which says:

> The department shall submit to the Environmental Quality Council established in . . . and to the legislature at the beginning of each regular session the state water plan or any section of the plan or amendments, additions, or revisions to the plan that the department has formulated and adopted. The Legislature, by joint resolution, may revise the state water plan.

Sen. McGee believed the process was backwards because it requires the Task Force to report to DNRC, and DNRC, after public hearings, would either adopt or not adopt the Task Force report in the State Water Plan. Sen. McGee noted the State Water Plan is a policy statement, but the Legislature will have to take an affirmative action to overturn the incorporation of the Task Force report. Sen. McGee's issue was not with the content of the Task Force report, but rather with the procedure. Sen. McGee identified a proper process as being DNRC offers the report, EQC takes a positive action, and then it becomes a state plan. Sen. McGee stated public hearings will be held on whether to include the Clark Fork River Basin Task Force Report in the State Water Plan, and the hearings will only occur west of the Divide. However, it will become policy for the entire state. Sen. McGee has submitted a bill draft request to correct the process.

Rep. Clark admitted he had some objections to the plan, specifically the threatening language toward Avista. Rep. Clark noted there were also some good things in the plan. Rep. Clark wondered if EQC's letter could make recommendations for changes in the plan rather than tossing out the entire plan.

Sen. McGee noted the deadline for public comments is November 19, 2004, and public hearings are scheduled. Sen. McGee emphasized that if the report is adopted, it will become part of the State Water Plan and formal guidance to the state of Montana concerning water

allocation and water management concerns in the Clark Fork Basin. Sen. McGee noted that process could occur without the Legislature ever having had an opportunity to review the report. At that point, the Legislature would have to take the report out of the water plan.

Sen. Toole noted executive agencies do all sorts of things that do not come before the Legislature. Sen. Toole suggested changing directions at a late hour would anger many people who participated in the process. Sen. Toole stated he would not support Sen. McGee's motion.

Ms. Page commented she did not feel EQC should step in and attempt to prevent the process from going forward.

Mr. Ebzery suggested the process is spelled out in the State Water Plan, and suggested Sen. McGee would have an opportunity to amend the water plan during the upcoming session. Mr. Ebzery stated he reluctantly could not support the motion.

Rep. Barrett noted the State Water Plan must be submitted to the EQC and the Legislature, prior to the session. Rep. Barrett had concerns about implementing the plan because it would cost billions of dollars. Rep. Barrett suggested a letter of concern could be sent to DNRC stating the report is unacceptable.

Chairman McNutt pointed out Sen. McGee's motion is to send a letter to DNRC stating EQC recommends not adopting the Clark Fork River Basin Task Force Plan as part of the state water plan.

Sen. McGee explained that if his motion would pass, EQC would simply be included as part of the public comment record, as not supporting the inclusion of the report and DNRC would still be free to incorporate the report in the water plan.

Rep. Clark requested Mr. Everts to clarify the EQC's role in the process for the State Water Plan. Rep. Clark asked if it would be unprecedented for EQC to interject itself into the process. Mr. Everts explained historically the EQC helped set up the process. Mr. Everts explained the EQC was intimately involved in the state water planning process and decided to let someone else do the work and report to the EQC, and the EQC could then deal with the issues on the back end if it deemed necessary.

(Tape 11; Side B)

Rep. Clark noted a lot of hard work has gone into the report and suggested it might be better to let DNRC know the EQC has reservations as opposed to rejecting the entire report.

Sen. Toole reiterated that government often times sets up collaborative citizen processes and requests people to participate because their involvement will make a difference. Sen. Toole suggested sending the letter would discourage people from becoming involved.

Sen. McGee stated the DNRC is required to bring the State Water Plan to the Legislature, but is not required to get any sort of an action from the Legislature. If the Legislature chooses, it may, by joint resolution, revise the water plan. Sen. McGee suggested the entire Clark Fork report could be brought before the Legislature and be included in the State Water Plan by legislative

action. Sen. McGee did not understand how a state-wide water policy could be developed without state-wide participation.

Sen. Story noted Exhibit 5 says after the hearing DNRC will consider adoption of all or part of the plan, and EQC will become the recipient of the newly adopted section. Sen. Story wondered when the EQC would get that section and what would happen if EQC does not receive that section of law. Sen. Story agreed with Sen. McGee that the process is backwards.

Chairman McNutt commented he was reluctant to support the motion because the process is in current law and when the work was done, the participants understood the process that would be followed. Chairman McNutt stated EQC could look at the issue in January.

Sen. McGee closed by stating the deadline for providing comment to DNRC is November 19, 2004, and he simply would like EQC to submit public comment.

Rep. Bixby encouraged Sen. McGee to submit his own public comment. Sen. McGee closed by stating it will cost $20,000 to drill a water well in the Clark Fork River Basin after the report becomes part of the State Water Plan. Sen. McGee stated every person in the state on the Clark Fork side will be required to have a hydro geologic analysis to determine whether other water users in the basin will be affected. Sen. McGee pointed out the Legislature would not have had an opportunity to approve or disapprove whether the provision should become part of the State Water Plan and that decision will lie with DNRC.

Sen. McGee's motion that EQC draft a letter in opposition to including the Clark Fork Basin Task Force's Report in the State Water Plan failed on a voice vote.

- **LC0208–Todd Everts**

Mr. Everts submitted a revised LC0208 (EXHIBIT 39) which contains a definition for "starting construction" and directed the EQC to subsection (12) on page four. Mr. Everts also pointed out the inclusion of language in subsection 6(b) which clarifies how it will be determined that 50 percent of the construction or remodeling of a production facility has been completed within 36 months. Mr. Ebzery pointed out the new legislation will also only allow one written plan for the same facility production location.

Mr. Ebzery moved LC0208, as amended, be approved as an EQC bill draft request and explained the amendments.

Mr. Ebzery's motion LC0208, as amended, be approved as an EQC bill draft request carried unanimously. [EXHIBIT 40]

- **Assign EQC Legislative Members as Sponsors of EQC Legislation**

Chairman McNutt agreed to carry the water adjudication funding bill.

Sen. Story agreed to carry LC0208.

Sen. McGee was assigned to carry LC0209.

Sen. Roush agreed to carry LC0210.

- **Other Business**

Rep. Barrett stated there are EPA standards that DEQ follows for SEPs, except when DEQ decides not to follow those standards. Therefore, DEQ was requested to present SEP guidelines. Rep. Barrett requested Mr. Arrigo to address the EQC, and Mr. Arrigo reviewed Exhibit 34 with the EQC.

Rep. Barrett requested language be inserted under Section B, Project Guidelines, stating "Cannot provide state agencies with additional resources." Mr. Arrigo did not feel DEQ should benefit from a SEP. Rep. Barrett explained if there is a cash penalty paid, the money is placed in the general fund, and a SEP should not benefit a state agency.

- **Environmental Public Health Tracking - Krista Evans**

Ms. Evans submitted an update on FWP and PCBs at Big Spring Creek and Hatchery (EXHIBIT 41].

- **Housekeeping**

Mr. Everts stated the issue of objectivity was raised regarding EQC work products. Mr. Everts explained EQC has had a tradition of extensive public involvement, and EQC involvement in trying to assure objectivity is maintained within its work product. Mr. Everts suggested the EQC never deals with sleeper issues and always deals with controversy. Mr. Everts suggested if a staff paper is needed, the issue should go before a subcommittee. Mr. Everts suggested this would be helpful in maintaining the integrity of the process. Mr. Everts thanked the EQC for its engagement during the past interim.

Chairman McNutt thanked EQC staff and the EQC members for their work.

ADJOURNMENT

There being no further work to come before the EQC, the meeting was adjourned at 1:56 p.m.