ENVIRONMENTAL QUALITY COUNCIL

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COUNCIL STAFF
TODD EVERTS, Lead Staff

MINUTES

Date: March 11, 2008

Room 102
State Capitol Building

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

COMMITTEE MEMBERS PRESENT

SEN. DAVID WANZENRIED, Chair
SEN. BOB HAWKS
SEN. CHRISTINE KAUFMANN
SEN. DANIEL MCGEE
SEN. JIM SHOCKLEY
SEN. ROBERT STORY JR
REP. NORMA BIXBY
REP. SUE DICKENSON
REP. JULIE FRENCH
REP. CAROL LAMBERT, Vice Chair
REP. CHAS VINCENT
REP. CRAIG WITTE
MR. BRIAN CEBULL
MS. DIANE CONRADI
MR. DOUG McRAE
MR. JEFF PATTISON

MR. MIKE VOLESKY

COMMITTEE MEMBERS ABSENT

REP. NORMA BIXBY

STAFF PRESENT

TODD EVERTS, Lead Staff
JOE KOLMAN, Research Analyst
SONJA NOWAKOWSKI, Research Analyst
CYNTHIA A. PETERSON, Committee Secretary

Visitors

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

COMMITTEE ACTION

- The Environmental Quality Council addressed the Kalispell Pole & Timber, Reliance Refinery, and Yale Oil Corporation Site and will send a letter to those PRPs that have reached an agreement and urge them to get going, and send a separate letter to the Burlington Northern and Santa Fe Railway Company saying it needs to reach an agreement and move forward. A third letter will be sent to the Department of Environmental Quality.

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Wanzenried, Chairman of the EQC, called the meeting to order at 8:03 a.m. The secretary noted the roll (Attachment 3).

AGENDA

EQC BUDGET UPDATE

00:00:27 Todd Everts, Lead Staff for the EQC, reported the EQC's budget is 26 percent spent, and that the EQC has a remaining balance of $56,413.94. Mr. Everts depicted the EQC's budget as on track for the remainder of the interim.

AGENCY OVERSIGHT SUBCOMMITTEE REPORT--Sen. Shockley

00:00:59 Sen. Shockley, Chairman of the Agency Oversight Subcommittee, reported the Agency Oversight Subcommittee (Subcommittee) studied Total Maximum Daily Loads (TMDL). The only two streams that do not meet the standards are the Blackfoot and the Yaak. The Subcommittee also looked at the progress on the remediation of the Kalispell Pole & Timber, Reliance Refinery, and Yale Oil Corporation Site (KPTS) site and discovered the cleanup has not gone well. The Subcommittee also addressed the use of wood burning stoves in the Bitterroot

Valley. Sen. Shockley reported the Department of Environmental Quality (DEQ) would like the air in the Bitterroot Valley cleaned up. Since 2001, the air in the Bitterroot Valley violated the federal standards on nine days outside of the fire season. The DEQ would like to regulate wood burning in the Bitterroot Valley. The Subcommittee also heard from the Board of Environmental Review (BER) which reviews the DEQ's rules and provides an appellate procedure. Sen. Shockley explained the Subcommittee also heard about reinjection, and stated the Legislature needs to decide whether the DEQ or the Montana Board of Oil and Gas will be responsible for overseeing reinjection. The Subcommittee also heard from Vivian Drake, an engineer in Helena, who has difficulties with the DEQ and the well fee. The DEQ and Ms. Drake will be making presentations at the next Subcommittee meeting. The Subcommittee is recommending the EQC send a letter to the Potentially Responsible Parties (PRP) and agencies involved at the KPTS site encouraging them to proceed expeditiously.

00:07:13 Sen. Story recalled there was a deadline for TMDLs and wondered whether the DEQ was on track.

00:07:40 Sen. Shockley responded the deadline was the first of January for the Yaak, but the Yaak will now be completed by July 1. Sen. Story thought there was a deadline for the whole state. Sen. Shockley explained there are only two streams remaining, and that the Yaak has been problematic.

00:08:28 Richard Opper, Director, DEQ, clarified there are more than two TMDLs not done. Director Opper explained the court deadline for the entire state is 2012, and that there are hundreds of streams remaining. There was an extension for the Yaak TMDL since the DEQ was asked to delay publication of the Yaak TMDL to allow for more input. Director Opper addressed the KPTS site and stated it was his understanding a separate letter would be sent to the Burlington Northern and Santa Fe Railway Company (BNSF), and a separate letter would not be sent to the DEQ. Sen. Shockley stated a letter would be sent to the BNSF encouraging them to comply with the DEQ's plan. A separate letter would also be sent to the DEQ encouraging the DEQ to proceed. Sen. Shockley recalled the Subcommittee wanted to utilize the same procedure used at the Livingston site. Director Opper stated DEQ has a plan and is enthusiastic about moving forward, and BNSF is the PRP that is attempting to re-open negotiations. Sen. Shockley summarized BNSF as being the PRP that did not like the plan, and that the DEQ had told BNSF that if it did not clean up the site, the DEQ would proceed as it did in Livingston and clean up the site at BNSF's expense. Sen. Shockley stated some of the Subcommittee members believed the DEQ was not moving fast enough, so the Subcommittee was going to tell the DEQ that it supports the DEQ's plan but still encourage the DEQ to proceed expeditiously.

00:12:27 Sen. Story asked for a status of the state-wide TMDL process in meeting the 2012 date.

00:12:56 Director Opper was not sure the DEQ would meet the 2012 deadline, and explained the program has been revamped and that modeling is being used. Director Opper thought the DEQ does not get out on site as much as they would

like. Director Opper stated the DEQ would be close to meeting the 2012 deadline.

00:14:27 Sen. Shockley moved the EQC direct letters to the PRPs, including the Department of Natural Resources and Conservation (DNRC), at the KPTS site, encouraging them to comply with the DEQ's proposed plan. Another letter would be directed to the DEQ asking them to proceed.

00:15:28 Sen. McGee noted the KPTS issue has been around for a long time and asked whether Sen. Shockley's motion included a letter to the DEQ. Sen. Shockley stated the DEQ has done its job, but the Subcommittee thought a letter should also go to the DEQ. Sen. Shockley explained the first letter will include the BNSF and other PRPs, and a second letter would go the DEQ.

00:16:57 Rep. Dickenson expressed concern and stated that BNSF is the only PRP that has not reached an agreement. Rep. Dickenson recalled her initial suggestion was the EQC send a letter to those PRPs that have reached an agreement and urge them to get going, and send a separate letter to the BNSF saying they need to reach an agreement and move. A third letter would be sent to the DEQ. Rep. Dickenson believed the letter to the BNSF should be different because BNSF is the reason for the delay.

00:19:00 Sen. Shockley asked how the EQC would address the DNRC. Rep. Dickenson replied the DNRC would get the same letter as the other PRPs that have reached an agreement regarding the Work Plan. Sen. Shockley stated he would consider it a friendly amendment to send three separate letters. Rep. Dickenson made the motion.

00:20:13 Sen. McGee asked whether the DNRC and the DEQ were considering suing each other.

00:20:35 Mary Sexton, Director, DNRC, reported that, initially, a lawsuit was being considered, but agreement was reached two years ago regarding the DNRC's percent of liability. The DNRC is working with the DEQ and giving them money to move the process along.

00:21:55 Sen. Story asked whether the letters would be approved by the Chairman and Vice Chairman of the EQC.

00:22:25 Sen. Shockley agreed the Chairman and Vice Chairman of the EQC would sign the letters. Sen. Shockley anticipated drafting the letters and then e-mailing the letters to the EQC members for comment.

00:23:03 Sen. Story recalled during the last interim, the EQC staff wrote a letter to the BER, and that the state threatened to take over the cleanup of the Livingston site and bill the BNSF.

00:24:19 Sen. Shockley recalled at the Livingston site, the state stepped in and was going to clean up the site. Sen. Shockley suggested remediation of these sites can go on forever.

00:25:09 Rep. Dickenson stated it was not her intention to threaten anyone with the letter, rather only to say we need the PRPs to agree and get moving.

00:25:47 Mr. Cebull clarified his suggestion was to add the DEQ because the Subcommittee wanted to be fair and did not have an opportunity to hear from the BNSF. Mr. Cebull stated the Subcommittee's intent was to encourage an expeditious cleanup.

00:26:34 Sen. Shockley suggested the Subcommittee may want to draft the letter and present it to the EQC.

00:27:05 The motion carried unanimously by voice vote with Rep. Bixby voting by proxy.

UPDATE ON ETIC CARBON SEQUESTRATION STUDY--Ms. Nowakowski

00:27:31 Sonja Nowakowski, Legislative Environmental Policy Office, reported the Energy and Telecommunications Interim Committee (ETIC) met January 24, 2008, and heard an overview of the Interstate Oil and Gas Compact Commission's recent report. The ETIC has scheduled a two-day meeting in Helena to flush out potential findings, recommendations, or legislation regarding carbon sequestration. Additionally, the ETIC would like to hear how other states are dealing with the issue of carbon sequestration and whether those states are examining a regulatory framework. Ms. Nowakowski has been in contact with individuals from Wyoming, New Mexico, and Washington and reviewed actions that have been taken in those states. Ms. Nowakowski identified jurisdiction as the key issue in Montana. Bonnie Lovelace, DEQ, will be attending a field hearing in Bismarck and will report to the ETIC.

Questions from the EQC

00:33:14 Mr. Cebull asked whether the ETIC is considering tertiary oil projects in its review of carbon sequestration. Ms. Nowakowski replied the ETIC is considering tertiary oil projects, and that Tom Richmond, Montana Board of Oil and Gas, is attempting to ensure that oil and gas is protected.

UPDATE OF WATER POLICY INTERIM COMMITTEE ACTIVITIES--Mr. Kolman

00:34:12 Mr. Kolman reported the Water Policy Interim Committee (WPIC) met in Hamilton in January and that there was substantial interest from the community. The WPIC reviewed approximately eight legislation discussion drafts. A survey of the committee was conducted to prioritize issues. The three discussion drafts which received priority were subdivision and water right disconnect, an accelerated permitting process, and letting local governments require public water systems based on certain criteria to address water quality. Another water quality proposal yet to be reviewed by the WPIC would require any mitigation plan or aquifer

recharge that discharges to state water would fall under current water-quality regulations. The next WPIC meeting will also entail a discussion on water marketing, water leasing, and the sale and transfer of water rights.

Questions from the EQC

00:38:26 Sen. McGee asked whether the WPIC discussed the expense of a hydrogeologic analysis and whether that would address wells that are 35 gpm or less.

00:38:42 Mr. Kolman responded wells that are 35 gpm or less are exempt and do not have to undergo a hydrogeologic assessment. The hydrogeologic assessment would apply to other appropriations of ground water.

00:39:15 Sen. McGee recalled the DEQ did not want an exemption for wells with 35 gpm or less. Mr. Kolman stated the WPIC has received information and discussed exempt wells, but has not taken any action. Sen. McGee asked whether the WPIC was looking at what it would take to do a hydrogeological analysis of a deep confined aquifer. Mr. Kolman noted the hydrogeologic assessment is required for any applicant of ground water appropriation in a closed basin. Sen. Sen. McGee suggested the U.S. Geological Survey would have the information. Mr. Kolman agreed to relay Sen. McGee's suggestion to the WPIC.

00:40:58 Rep. Vincent asked about the ground water baseline information and asked if that would include controlled ground water areas. Mr. Kolman agreed that was his understanding and offered to obtain more information for Rep. Vincent.

00:41:39 Chairman Wanzenried asked whether the WPIC had looked at water planning and the depletion of water. Mr. Kolman explained water depletion is interwoven in numerous discussions and would specifically be included in the WPIC's upcoming discussion about water marketing.

00:42:52 Mary Sexton, Director, DNRC, identified the State Water Plan, and noted the State Water Plan had not been updated for 10-15 years. Director Sexton explained there has been increased lawsuits and contentiousness in the water arena, and the DNRC has been responding to actual issues and areas.

00:44:11 Sen. Story stated he was involved in the creation of the State Water Plan. Sen. Story believed the State Water Plan should be looked at and updated. Chairman Wanzenried noted the competition for water use and suggested the EQC could use an update. The EQC members agreed the issue should be on the next EQC agenda.

FIRE SUPPRESSION INTERIM COMMITTEE ACTIVITIES

00:46:22 Leanne Heisel, Legislative Services Division, provided an update on the Fire Suppression Interim Committee (FSIC), and stated the FSIC subcommittees are working to finalize options to be submitted to the full FSIC. The options address wildland urban interface, funding, problems with contracting communities, and other issues regarding federal policy and the Governor's Emergency Declaration.

Wildland interface options include doing nothing, implementing building regulations in the wildland, and providing insurance company incentives. Funding options could include continuing the statutory appropriation and contracting. In addressing federal policies, the FSIC is considering making recommendations to the U.S. Forest Service regarding land management. The FSIC will finalize its list of options on March 27-28, 2008, and in the future, the FSIC will meet in five communities around Montana and solicit comments. In February, the FSIC voted to transfer a portion of the FSIC budget to the DNRC, so the DNRC can contract with a research group to discover how much more expensive it is to fight wildland fires in the urban interface. The FSIC also drafted a letter to Budget Director Ewer making five recommendations the DNRC could implement before the next fire season. Two of the FSIC's suggestions were to extend engine and aviation crews to seven days a week. The FSIC also heard from contracted service providers. Ms. Heisel directed the EQC members to the website for future FSIC meeting dates and locations.

Questions from the EQC

00:52:53 Sen. McGee asked whether the FSIC had any discussions regarding providing an opportunity for people building in the wildland interface to opt out of fire protection. Ms. Heisel responded the opt out provision had been discussed and summarized the question as how far structure protection should go. Ms. Heisel stated there was also discussion about providing tax incentives for maintaining property.

00:54:30 Sen. Shockley asked whether there was discussion regarding the difference in cost between contracting for aviation as opposed to using state-owned helicopters. Ms. Heisel responded the difference was discussed, and a member of the contracting community was disputing numbers provided by the Legislative Audit Division, so the Contracting Subcommittee would be further addressing the topic.

00:55:17 Sen. Kaufmann asked whether the $40 million statutory appropriation was the appropriate amount. Ms. Heisel stated the statutory appropriation is being viewed as one piece of the funding puzzle.

00:56:09 Rep. Vincent explained the FSIC is considering quite a few options, including letting the appropriation sunset and reappropriating funds or setting up a fire suppression fund.

WATER ADJUDICATION PROCESS OVERSIGHT

Department of Natural Resources and Conservation Update--Director Sexton

00:57:28 Director Sexton submitted and reviewed DNRC's Report to EQC, HB 22 Adjudication Process, March 11, 2008 (EXHIBIT 1); Basin Location and Adjudication Status, 3/14/08 (EXHIBIT 2); and Montana General Adjudication Basin Status (EXHIBIT 3).

Questions from the EQC

There were no questions from the EQC.

Montana Water Court Update--Judge Loble (via conference call)

01:03:07 Bruce Loble, Water Court Judge, provided the water court's update on the water adjudication process. Judge Loble issued a decree in basin 41QJ on February 6, 2008, which includes the Missouri River drainage and tributaries above Holter Dam and below the Sun River, excepting any water right claims in the Dearborn River and Smith River Basins. A public meeting will be held in Cascade on April 10, 2008, and the objection deadline is August 4, 2008. Judge Loble next addressed the Tongue River decrees and stated he has issued two decrees in the upper and lower Tongue River Basins. A public meeting will be held in Ashland on May 7 and in Miles City on May 8, 2008, and the objection deadline is August 26, 2008. Judge Loble explained a compact has been negotiated between the U.S. Forest Service and the Montana Reserved Water Compact, and the next step will be to notify water users of the Compact's existence and provide an opportunity for objections to be filed. A tentative date for mailing out the notices of the compact has been set for May 5, 2008, and the tentative objection deadline is May 3, 2008. Judge Loble also reported he recently spoke to approximately 200 lawyers regarding water court law.

Questions from the EQC

01:06:41 Mr. Pattison asked how he could obtain information regarding decrees. Judge Loble explained the decrees are available on the DNRC's website, in the appropriate County Clerk of Court's Office or DNRC regional office, and are also available on CD from the DNRC.

01:08:13 Rep. Dickenson asked for clarification on the date for the public meeting in Cascade. Judge Loble restated the date as April 10, 2008.

01:08:34 Sen. Kaufmann addressed Exhibit 2 and noted areas 43C and 43B are in preliminary decreed color and 41QJ has a temporary decree; however, it looks like the same thing happened. Director Sexton responded preliminary decrees and temporary decrees are often the same thing. Judge Loble expanded that a preliminary decree either has no federal reserved rights in the drainage, or the reserved rights have been resolved through a compact process. Temporary preliminary decrees address basins involving state-based water rights, and the theory they would come back and resolve the federal and Indian-reserved water rights.

01:11:39 Mr. Pattison asked for an explanation of the difference between a preliminary decree and a final decree. Judge Loble explained preliminary decrees are draft decrees, and that they contain objections that need to be resolved.

01:13:04 Mr. Pattison asked whether there was a date when decrees must be finalized. Judge Loble responded that under Supreme Court Rules, final decrees will not

be issued until the work is completed in individual divisions. Judge Loble suggested that would not happen until at least 2020.

01:14:35 Rep. Lambert wondered how final a final decree is. Judge Loble explained the water court was directed by the Legislature to re-examine final decrees. In addition, legislation in 1993 allowed for late claims to be filed across the state. Rep. Lambert asked whether the only final decrees that would be reexamined would be the late claims. Judge Loble responded that it would seem that is what the statutes contemplate. Rep. Lambert asked what State-Wide Adjudication Teams (SWAT) teams are. Judge Loble responded SWAT teams consist of claims examiners.

01:18:02 Sen. Story asked about staffing and the projected workload. Judge Loble responded the water court is doing very well, and that he is pleased with staffing. Judge Loble reported one vacant water master position. Judge Loble noted the staff's age is young, but that they understand the process. Judge Loble explained the water court continues to receive issues from district courts regarding water distribution. Judge Loble hoped to reduce current workload in anticipation of future work.

01:20:32 Sen. Story commented a number of areas have temporary decrees and asked Judge Loble what is currently being worked on. Judge Loble responded he is currently addressing the Teton River, finishing up work on the Bitterroot, the Yellowstone drainage, and the northeast part of the state. Sen. Story noted substantial work is being done in basins with preliminary decrees. Sen. Story requested a map indicating the status of all the basins and the basins the water court is actively working on. Judge Loble agreed to provide a map at a future EQC meeting.

01:23:38 Rep. Pattison addressed the costs listed in Exhibit 2. Jim Gilman, Water Adjudication Bureau Chief, DNRC, explained the cost referenced on Exhibit 2 is for the cost of paper. Mr. Gilman explained the cost is a reference if you wanted to purchase the decree in paper form and relates to the number of decrees in each basin. Judge Loble added the CD is available for $10, but a CD may not be available for older decrees.

01:26:13 Sen. Story commented the CD would be much better.

Update on the Proposed Supreme Court Order Regarding Unauthorized Practice of Law Issues Before the Water Court

01:27:03 Judge Loble submitted and reviewed a Proposed Order and exhibits from the Montana Supreme Court regarding the proposed rules regarding the unauthorized practice of law (EXHIBIT 4).

Questions from the EQC

01:33:28 Sen. McGee asked for clarification and whether someone found guilty of the unauthorized practice of law could lose their license. Judge Loble explained

attorneys are prohibited from assisting people in the unauthorized practice of law. Therefore, if the water court receives documents from someone engaging in the unauthorized practice of law, the water court could be disciplined by the Montana Supreme Court. If a person is proceeding on his own, that person could represent himself in the district court or water court. If a person is doing business as an artificial entity, an attorney is needed. Sen. McGee was uncomfortable with Judge Loble's explanation.

Public Comment

There was no public comment offered.

Questions from the EQC

01:36:17 Sen. Story asked if the Legislature decided to change the rule regarding the unauthorized practice of law to allow persons to represent their closely held corporations, whether that could be done in statute. Judge Loble responded the Constitution gives the Supreme Court the ultimate authority over attorneys. Judge Loble stated the Legislature had an opportunity in the last session to respond to the issue. Judge Loble suggested the proposed order represents a very good compromise and reflects what has been happening in the water court for the past 30 years.

01:38:54 Sen. Shockley expressed confusion with Rule 33(a) and suggested that even if a ranching corporation were going to proceed pro se, it would still have to hire an attorney. Judge Loble explained that once the water court issues a hearing track order, the incorporated entity would then be required to hire a lawyer. Currently, after a scheduling order is issued, water users doing business as an entity or closely held corporation, would have to hire an attorney. Sen. Shockley noted a water user could be assisted by a water expert up until the time a hearing track order is issued and the case goes to litigation. At that time, an attorney would be needed. Sen. Shockley stated that some EQC members might like to see a statute modifying Rule 33(a) to say that at the point litigation begins, a rancher doing business as a corporation could proceed pro se. Judge Loble suggested the Supreme Court would probably disagree. Sen. Shockley noted the rules are effective July 2009, which would allow an opportunity to do something legislatively.

01:42:53 Ms. Conradi recalled the EQC heard from the state agencies and the Montana State Bar and the Commission on Unauthorized Practice regarding why they believed it was a good idea that business entities and family corporations are represented by counsel. Ms. Conradi asked whether those organizations had weighed in on these proposed rules. Judge Loble was unaware of any written comments being filed with the Supreme Court but noted that in the past the organizations had voiced opposition to the proposed concepts in the order. Ms. Conradi recalled the primary objections voiced by the Montana State Bar and others were that the Supreme Court, not the Legislature, governs the activities of lawyers, that entities should be treated uniformly, and that the district court rules

require entities to be represented by counsel. Judge Loble agreed with Ms. Conradi's recollection.

01:45:25 BREAK

VALUATION OF EASEMENTS IN NAVIGABLE WATERWAYS

Director Sexton and DNRC Staff

01:59:02 Director Sexton provided and overview of background information regarding navigable waterways (EXHIBIT 5).

Questions from the EQC

02:09:56 Sen. Shockley asked whether laches was the defense. Director Sexton replied the Attorney General's Office intervened, and that it is statutory that the DNRC had the authority to use a leased structure for hydropower utilization, and it had not been done in the past. The court case determined the DNRC has the authority. Director Sexton clarified the DNRC's authority was questioned.

02:12:07 Tom Ebzery, representing Avista, clarified all of the defendants raised laches as a defense, but it was dismissed by Judge Honzel. Mr. Ebzery suggested the issue could go to the Montana Supreme Court.

02:12:51 Rep. Lambert asked how "navigable" was defined. Director Sexton explained the basic test is whether you can float a log. Rep. Lambert stated it was her understanding that the state claims all navigable rivers. Director Sexton explained that at statehood, the state gained ownership of the navigable waterways in the state, including the bed of the rivers and lakes. Rep. Lambert wondered whether a person would need a permit if they had a navigable stream coming through her private property and wanted to put a bridge across the stream. Director Sexton agreed a permit would be needed.

02:14:27 Sen. McGee addressed a stream in the Lewistown area that the DNRC had determined to be navigable. Director Sexton identified the stream as the Big Spring. Director Sexton explained that DNRC has taken authority for the cleanup of PCBs. Sen. McGee wondered how the stream can now be determined to be navigable if it was not navigable at the time of statehood, and Director Sexton explained the stream was left off in the survey in the 1980s. Sen. McGee thought it was a taking of private property. Director Sexton suggested the stream was probably always a navigable waterway and had just been missed in the survey. Director Sexton believed further assessments and information may result in some waterways being added and some being dropped. Sen. McGee commented that to his knowledge, Big Spring Creek is private property. Sen. McGee cautioned against taking private lands, and believed the DNRC had over stepped its limits.

02:18:28 Mr. Pattison asked Director Sexton about the definition of "navigable" under the Clean Water Restoration Act, which redefined navigable waters. Mr. Pattison

asked whether the state or the federal government now has more authority. Director Sexton offered to provide the differences in the definitions and criteria. Mr. Pattison sought to know whether the federal definition would supercede the state's authority. Director Sexton stated she did not have judicial authority to make that determination. Mr. Everts offered to do the research for Mr. Pattison. Mr. Pattison stated there is a bill pending in Congress redefining "navigable waters." Mr. Pattison wondered if the bill passes, how it would impact Montana and its navigable waters.

02:21:38 Sen. Shockley stated the definition of navigable waters would be tied to the definition that was in effect when the Organic Act was in effect. Sen. Shockley asked Mr. Schultz for his interpretation.

02:22:44 Tom Schultz, Trust Lands Administrator, DNRC, stated the DNRC does not take the issue of navigable waters lightly. Mr. Schultz agreed with Sen. McGee that the streams in controversy were at one time navigable. Mr. Schultz stated the Big Spring issue is being litigated, and the court is attempting to make a determination. Mr. Schultz emphasized the DNRC is not arbitrary in its determination of navigable waters. The navigable water definition the DNRC uses and the ability to float a log is the test and whether the water is used for commercial use. Mr. Schultz explained the definition adopted by Congress will not automatically apply to Montana statutes.

02:25:43 Sen. McGee stated the federal government identified three navigable rivers in Montana, while the state identified 33 navigable rivers in Montana. Sen. McGee stated a river's navigability must be shown by evidence. Sen. McGee recalled that in the mid-70s, the U.S. Army Corps of Engineers became the overall administrator of all waters, and there are permit requirements for performing work on the beds or shores of navigable rivers.

02:28:09 Sen. Story noticed that the map submitted by the DNRC indicated that the whole of the Fort Peck Reservoir is considered a navigable waterway. Director Sexton explained at the time the reservoir was built, the land was purchased from the landowners, and the state owns the land underneath the reservoir. Sen. Story addressed the PPL dams, Avista dam, and Pacific Corps dam, and asked whether the state was also claiming the land under those dams. Director Sexton stated the land is included to the low water mark in the flooded area. Sen. Story pointed out the land was flooded before the dam was built and wondered what use they were getting from the low water in the river channel above the dam that was not already there since it was covered with state water before. Sen. Story did not understand where the state received its authority for charging a lease for that land since there was no change of use. Director Sexton stated it was her understanding the flooded area behind the dams, which is utilized for commercial use, was also included. Mr. Schultz agreed and added the state claimed the entire flooded area of the dams. Mr. Schultz stated that trying to identify what was the original streambed was an issue before the court. Mr. Schultz stated the project area is determined by the Federal Energy Regulatory Commission (FERC) permit. Sen. Story commented about the value of other uses and asked how it would affect irrigation diversions. Director Sexton summarized the

question as when situations arise, does the state have the obligation to charge for navigation of waterways and stated the answer as yes. Director Sexton emphasized the irrigation structures are not hydroelectric power, and that there is a specific statute that delineates the DNRC's authority and requires the lease tool be used for hydroelectric power. Director Sexton stated it has nothing to do with senior water rights and that litigation could impact how the DNRC moves forward. Sen. Story suggested in the end, the DNRC will have to deal with all the diversions in some manner. Sen. Story knew of several diversions on the Yellowstone and was relatively certain that none of them are paying the state. Sen. Story wondered whether the DNRC would put them on a fee structure. Director Sexton admitted instances of trespass exist and, as those instances are brought to the attention of DNRC, the issues will be addressed and policies will be formulated. Director Sexton pointed out that the DNRC has dealt with structures in waterways in the past and will continue to deal with them in a logical effective manner. Sen. Story wondered how the DNRC addresses the Fish, Wildlife, and Parks' (FWP) structures, such as boat ramps, in the rivers and whether FWP is paying fees. Director Sexton replied some government entities are covered with a 351 Exchange with local governments, but Director Sexton suggested there is a need to reassess FWP fishing access site leases.

Public Comment

There was no public comment offered.

HJR 57 CONSERVATION EASEMENT/TRUST LAND

Proposed Brochure--Mr. Kolman

02:40:42 Mr. Kolman restated the EQC's desire to create a brochure regarding conservation easements and submitted and reviewed "Conservation Easements: 20 Things Everyone Should Know" (EXHIBIT 6).

Questions from the EQC

02:46:12 Sen. McGee stated he is aware of a situation in Wyoming where there is a 37-acre ranch with individual conservation easements. The easements are continually sold back and forth, so ranchers can file for the federal tax credits over and over. Sen. McGee was concerned some environmental groups may be utilizing the same practice in Montana. Sen. McGee asked Mr. Kolman to research the issue. Mr. Kolman agreed.

02:50:20 Rep. Lambert asked whether states have different laws dealing with conservation easements. Mr. Kolman agreed each state addresses conservation easements differently.

02:50:57 Sen. Story asked Glenn Marks, Executive Director, Montana Association of Land Trusts, if the practice depicted by Sen. McGee is actually occurring in Montana. Mr. Marks identified the practice as tax fraud and stated he has no knowledge of

the practice occurring in Montana. Mr. Marks offered to assist Mr. Kolman in obtaining information.

Public Comment

There was no public comment offered.

Legal Opinion--Mr. Everts

02:53:14 Mr. Everts directed the EQC members to his "Legal Analysis Regarding State Land Board and DNRC authority in Relation to HJR 57" (EXHIBIT 7).

Questions from the EQC

There were no questions from the EQC.

Public Comment

There was no public comment offered.

Directions for Staff

02:59:07 Rep. Lambert explained that Mr. Kolman and Mr. Marks were requested to conduct research in an effort to flush out illegal actions regarding conservation easements.

02:59:40 Mr. Everts explained EQC staff will assume the requests were analyzed by the EQC under the study and that staff will draft a report, and EQC will need to determine at the May meeting whether it wants to take further action.

03:00:34 Sen. McGee identified his only concern as how conservation easements are being used and the potential misuse of a conservation easement for financial gain. Sen. McGee requested that the final report address his concern.

ADDITIONAL COUNCIL DISCUSSION ON THE CLIMATE CHANGE STUDY (if necessary)

03:02:06 At the request of Rep. Witte, the EQC viewed a DVD entitled "Unstoppable Solar Cycles."

03:13:29 Sen. McGee offered copies of a DVD entitled "Global Warming or Global Governance" to the EQC members (see, March 10, 2008, Minutes, Exhibit 28).

03:14:01 Chairman Wanzenried suggested EQC staff resources would not be sufficient to do a complete cost-benefit analysis on the recommendations, and asked the EQC to clarify what is expected from EQC staff.

03:15:28 Jeff Blend, DEQ, addressed what type of economics are and are not included in the Climate Change Advisory Committee's (CCAC) recommendations. Mr. Blend stated costs and cost savings for the recommendations were estimated for implementing the recommendations. Estimated direct costs for implementing the recommendations were items such as capital costs for building carbon sequestration at a coal plant. Estimated cost savings were estimated from saved fuel usage and conservation. Mr. Blend explained social costs and benefits were not quantified and jobs gained or lost and income gained or lost, were not counted, and the analysis did not consider ripple effects. Mr. Blend stated a comprehensive cost analysis was not conducted for the 40 options because of the time involved. Mr. Blend suggested, on some issues, it could be justifiable to perform further analysis. Mr. Blend stated the cost analysis is not representative of the final costs.

Questions from the EQC

03:22:21 Mr. Cebull was concerned that the Legislature would be considering the recommendations, and wondered when the specific cost analysis would be completed. Mr. Blend could not respond, and stated it is a mystery on how a comprehensive analysis of all the recommendations could be completed. Mr. Blend suggested prioritizing concerns and identifying recommendations for further cost analysis.

03:24:31 Sen. McGee asked when a cost analysis is performed, whether consideration is given to what happens to government and the expansion of government. Mr. Blend responded there was some inclusion of administrative costs. Mr. Blend stated at this point, an assessment of every cost to government is not included and would have to be part of a further in-depth analysis. Sen. McGee spoke about the Department of Corrections debate in 1997 and the determination that it was more expensive for the state to house inmates than a private contractor because of the cost of buildings, people, fees, applications, etc. Sen. McGee asked Mr. Blend to please quantify all the costs. Mr. Blend responded the information is quantified in fiscal notes.

03:28:03 Rep. Vincent asked whether it was safe to say that most of the cost-effectiveness analysis was performed by Climate Change Strategies (CCS). Mr. Blend agreed. Rep. Vincent recalled a previous question from Sen. Hawks and relayed that David Turk, Executive Director, Beacon Hill Institute, is attempting to breakdown the numbers for the state.

03:29:25 Sen. Story stated the DEQ does get more involved in economic analysis in the Environmental Impact Statement (EIS) process. Mr. Blend agreed. Sen. Story asked whether the DEQ does the economic analysis on Environmental Impact Statements (EIS) or whether DEQ hires a private contractor. Mr. Blend explained both the DEQ and private contractors are utilized. Sen. Story wanted to know how much time and resources it would take to perform an economic analysis on just one concept. Mr. Blend estimated it would take an average of three to five weeks with him devoting all of his time to the task, but noted the time length would vary.

03:32:08 Sen. Hawks wondered what would be a fair analysis and thought one important consideration would be societal survival benefits and wondered how that would be analyzed. Mr. Blend responded the benefits of any green house gas reductions or environmental benefits costs were not included since those benefits cannot be quantified.

03:35:09 Sen. Hawks predicted that at some point, the cost analysis would become political. Sen. Hawks suggested a need to see every reasonable impact and benefit list when making decisions.

03:36:17 Rep. Lambert asked how much time would be needed and whether outside help would be needed to prepare a comprehensive cost analysis on the EQC's approved 15 recommendations. Mr. Blend stated a comprehensive analysis within two months could not be accomplished without a team and stated he would do everything he could. Chairman Wanzenried clarified the EQC did not expect Mr. Blend to make commitments on behalf of the DEQ.

03:38:59 Rep. Lambert admitted it would not be possible to have the cost analysis completed by the next EQC meeting. Rep. Lambert thought it was important to have a complete cost analysis. Chairman Wanzenried summarized that in order for the EQC to move forward, there needs to be an extensive cost-benefit analysis, and the analysis needs to consist of more than a fiscal note. Chairman Wanzenried suggested there would not be enough resources within the EQC or state government to perform an extensive cost-benefit analysis.

03:40:45 Sen. Story stated the financial analysis did not take into account climate change but just the economic impacts of the policy. Mr. Blend agreed the analysis did not take into account environmental benefits.

03:42:01 Rep. Vincent asked about the cost of a cost-effective analysis. Mr. Blend did not know what portion of the total cost of the study went to cost effectiveness. Rep. Vincent wondered about the deliverables from the Beacon Hill Institute before the next legislative session and believed the economics have already been politicized. Rep. Vincent suggested the study is based upon a false premise of survivability and that further economic cost analysis may not change people's opinions on whether we are headed toward impending doom. Rep. Vincent suggested a need for more scientific discussion.

03:45:01 Sen. Hawks' opinion does not fall within the doomsday camp, but he believed there was a need to deal with the extremes on either end. Sen. Hawks wanted an objective opinion before making any decisions. Sen. Hawks was curious about job-loss figures and cited a need to deal with reality rather than propaganda and requested objectivity. Sen. Hawks identified a need to do what is best for the state of Montana.

03:47:19 Rep. Dickenson explained that various questions were posed throughout the CCAC process when options were being discussed. Rep. Dickenson directed the EQC to the information listed in the column of key uncertainties. Rep. Dickenson asked Mr. Blend whether he found that some options and economic factors were

recognized as key uncertain areas. Mr. Blend agreed, but depicted FTEs and administrative costs as easy to estimate, and thought other items would be uncertain and difficult to estimate. Rep. Dickenson thought it was important for the EQC members to know what the numbers meant and the purpose of the numbers. Rep. Dickenson believed there would be substantially more information presented during the legislative process and as the EQC moves forward.

03:52:27 **RECESS FOR LUNCH**

CENTER FOR CLIMATE STRATEGIES

Tom Peterson, Center for Climate Strategies (CCS) Executive Direction (via conference call)

05:01:33 Tom Peterson introduced Michael Lazarus, Lewison Lem, and Stephen Roe, who were also present on the conference call. Mr. Peterson submitted and reviewed a document regarding the Montana Climate Change Advisory Committee (EXHIBIT 8).

Questions from the EQC

05:28:42 Sen. Shockley addressed the slide depicting Stepwise Marginal Cost Curves, All Sectors, and noted that the heat and power energy supply would cost $100 a ton to reduce CO_2 emissions, and asked if that was correct. Mr. Peterson stated the EQC would have difficulty reading the chart since it is not a color copy. Mr. Peterson stated there is a range of costs depending on which action is recommended. Sen. Shockley asked how much it would cost to take the CO_2 out of coal. Mr. Peterson explained it would depend on the specific action, and there are many potential actions for reducing emissions and directed Sen. Shockley to the CCS website. Mr. Lazarus also responded to Sen. Shockley's question and agreed with Mr. Peterson's suggestion that there is a wide range of strategies available. Sen. Shockley asked if reducing the CO_2 in coal would drive up the cost of coal. Mr. Peterson directed Sen. Shockley to the final report that contains a set of options and an even longer list of possible actions. Sen. Shockley referenced an earlier e-mail he received from Mr. Peterson saying the cost would be less than $50 a ton. Sen. Shockley was concerned about driving up the cost of coal.

05:35:56 Rep. Vincent thanked Mr. Peterson for taking the time to participate in the conference call. Rep. Vincent depicted the process as very intensive and asked for a ballpark figure regarding the resources that the CCS put into customizing the plan. Mr. Peterson explained a very significant part of the cost is associated with helping the group identify the policy options that work best in Montana and then building the policy to specification. Mr. Peterson stated from start to finish, the CCS organized its resources around the decisions of Montana's CCAC. Rep. Vincent noted that the CCS agreed to provide approximately $320,000 in foundation funding. Rep. Vincent wondered how many states the CCS is customizing plans for. Mr. Peterson responded the CCS is currently working with 15 states. Rep. Vincent wanted to know the source of the CCS's funding. Mr.

Peterson explained the funding is a combination of funds from the states and cost-share funding provided by the private donor community. Rep. Vincent asked whether the CCS is an advisory group. Mr. Peterson responded no, and that the CCS does not tell organizations which policies to pursue. Further, the CCS does not advocate on behalf of any specific policies. Rep. Vincent wanted to know about the relationship between the CCS and Enterprising Environmental Solutions, Inc. (EESI). Mr. Peterson responded EESI is the parent company of the CCS and directed Rep. Vincent to the Frequently Asked Questions on the CCS website.

05:44:05 Mr. Cebull thanked Mr. Peterson for making his presentation and asked Mr. Peterson to identify the CCS's top five private donors. Mr. Peterson stated he would be happy to provide the information. Mr. Cebull asked when the CCS's services would stop. Mr. Peterson was not certain when the contract ended and stated he would obtain that information. Also, Mr. Cebull stated a number of the other 15 states had already began drafting and approving legislation and asked whether the CCS has been involved. Mr. Peterson stated the CCS was not involved in drafting legislation and clarified that the work the CCS does is in states where legislation called for the creation of the process. Mr. Cebull asked specifically whether the CCS was involved in the drafting of legislation in Washington state. Mr. Peterson stated the CCS was not involved. Mr. Cebull expressed concern about the economics contained in the report and asked whether the numbers should be used as a basis for policy decisions. Mr. Peterson responded the analysis was designed to support the development of recommendations to be made to the Governor for further consideration, and that the analysis was tailor-made to what the group thought was needed. Mr. Cebull asked Mr. Peterson to compare and contrast the makeup of the Montana CCAC to other states and whether the CCS had any say in the makeup of the CCAC. Mr. Peterson responded the CCS did not have any say or input into the makeup of the CCAC. Mr. Peterson could not say whether the make up of the CCAC represented all interested parties in the state and noted the size of the group varies from one state to another.

Ms. Conradi noted the EQC's extensive discussion regarding the cost- benefit analysis and wanted to know about the CCS's involvement or experience in other states in implementing recommendations legislatively, and what kind of cost-benefit analysis the CCS had observed or participated in. Mr. Peterson responded the degree of supplemental analysis that occurs varies depending on the action being considered. Mr. Peterson identified a followup implementation phase to categorize more specifically based on the needs for further consideration for implementation. Ms. Conradi asked whether the CCS had been involved in assisting with implementation. Mr. Peterson stated many implementation issues are included in the recommendations, and that each state's assistance level varies. Ms. Conradi asked for an example of a service the CCS provides in the follow up stage. Mr. Peterson responded the CCS is assisting a legislative commission in North Carolina in looking at various issues related to the potential legislative consideration of options that have been recommended through an Executive Branch process.

05:58:02 Sen. Story stated the EQC is also trying to determine what recommendations would have enough support to move forward and determine how to analyze from the very general topics in the Governor' report. Mr. Peterson responded that one of the reasons they are less active in terms of implementation is that typically the Executive Branch and Legislative Branch take over. Mr. Peterson noted many states are asking the same question, and suggested communicating with other states that have been through the process.

06:01:15 Chairman Wanzenried thanked Mr. Peterson and Mr. Lazarus for their assistance.

06:01:38 Rep. French stated she visited the CCS website and provided information stating the CCS does not accept funds with contingent outcomes or allow individual donors to supply a majority of the funding for any project. Additionally, the convener of the process, typically the Governor, approves all funding sources.

UPDATE FROM MISSOURI RIVER CONSERVATION DISTRICTS COUNCIL

Vicki Marquis

06:02:52 Ms. Marquis, Coordinator for the Missouri River Conservation Council, greeted the EQC and reviewed a power point on the Missouri River Conservation Districts Council (EXHIBIT 9).

Questions from the EQC

06:19:12 Rep. Pattison asked Ms. Marquis to explain why the presence of salt cedar is a threat. Ms. Marquis explained salt cedar is especially threatening because it consumes a substantial amount of water and spreads rapidly. Additionally, the foliage is salty and when the leaves fall, the salt transfers into the soil. Ms. Marquis cited a 2005 study on the Fort Peck Reservoir that indicated if salt cedar is flooded for three months, it will die.

06:21:10 Rep. French asked Ms. Marquis to explain who controls the flow of the Missouri River and the amount of water that actually leaves Montana. Ms. Marquis explained the Corps of Engineers develops an annual operating plan that specifies what the water level will be that is released from Fort Peck on a monthly basis. Ms. Marquis identified downstream navigation as driving water releases. Rep. French asked whether the drop in water levels at Fort Peck is a result of a combination of increased downstream demand and a decreased amount of water coming in. Ms. Marquis agreed and stated any water will probably not stay in the Fort Peck Reservoir. In addition, the spring pulse, which mimics a natural flood to support habitat for endangered species, is also a contributing factor. Rep. French asked whether the habitat is being affected by the drop in water, as well as the temperature of the water. Ms. Marquis agreed that was the case.

06:24:01 Sen. McGee noted Ms. Marquis' slide depicting two houses along the Missouri River, and asked which house was preferred. Ms. Marquis responded the house

with vegetation is preferred since a riverbank is more susceptible to erosion without vegetation.

06:25:49 Rep. Witte commented the Fort Peck Reservoir produces hydro, and Ms. Marquis agreed. Rep. Witte spoke about a situation with the Corps of Engineers and dams in his area and recalled the Corps of Engineers estimating $450 million dollars worth of water was being sent downstream without creating electricity. Rep. Witte wondered if the same situation was occurring at Fort Peck, and asked whether water is being sent downstream and bypassing hydroturbines. Ms. Marquis replied that, generally, water is sent through the turbines.

06:27:46 Mr. McRae asked how much interaction is occurring with the Yellowstone Conservation Council. Ms. Marquis replied they do hold annual joint meetings with the Yellowstone Conservation Council and also attempt to identify joint projects.

06:28:38 Rep. French asked whether the state is looking at taking action regarding the release of Missouri River water downstream. Ms. Marquis reiterated the water releases feed barge traffic downstream. The Corps of Engineers has agreed when there is no navigation planned, they will not support the navigation target. Rep. French stated the Corps of Engineers is ultimately making the decisions regarding water in the Missouri River. Ms. Marquis agreed.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA AND THAT IS WITHIN THE JURISDICTION OF THE EQC

06:30:26 Jon Bennion, Montana Chamber of Commerce, stated the Montana Chamber is having a Montana climate change dialogue on March 19, 2008, in Billings. Mr. Bennion submitted the Agenda for the conference and directed the EQC members to the Montana Chamber of Commerce website for further information (EXHIBIT 10). Mr. Bennior invited the EQC members to attend the conference.

WATER ADJUDICATION PROCESS OVERSIGHT (Cont.)

Bruce Loble, Montana Water Court Judge

06:32:07 Judge Loble reported the Montana Supreme Court unanimously agreed to adopt the proposed order.

OTHER BUSINESS

06:33:17 Rep. Dickenson moved to extend EQC's list of items to explore and include ES-1. Rep. Dickenson noted the general support for conservation measures. Rep. Dickenson believed the measure was needed in order to make a larger impact on CO^2 emissions. ES-1 provides that each investor owned utility and public utility should meet 20 percent of its load using renewable resources by 2020, increasing to 25 percent by 2025. Rep. Dickenson emphasized the second part of the recommendation which calls for implementing a plan to obtain 100 percent of achievable cost-effective energy conservation by 2025. Rep. Dickenson

recalled discussion about ensuring utilities are not punished for conservation and that ES-1 received unanimous approval from the CCAC.

06:37:41 Sen. McGee noted ES-1 was not on the list of 30 recommendations, and that ES-1 received a 53 percent ranking from the public and a 42 percent ranking from the EQC as well. Sen. McGee saw the measure as a mandate and stated he would not support the motion.

06:39:21 Rep. Lambert also spoke against the motion and viewed the recommendation as a mandate.

06:39:44 Rep. Witte commented there are already similar laws on the books that will have a negative impact on the future, and that it is difficult to get renewable energy out of Kalispell.

06:41:13 Rep. Vincent noted hydro power is not considered a renewable resource in Montana. Rep. Vincent suggested the EQC consider drafting legislation making hydro power a renewable resource.

06:41:54 Rep. French supported the motion and stated all conservation contained in the 15 recommendations rest on the individual. Rep. French believed industry should also play a role in conservation.

06:42:36 Sen. Dickenson closed on her motion, and the motion failed 8-8 by roll call vote. Sen. Shockley and Rep. Bixby voted by proxy.

06:45:57 Sen. Story stated he obtained a list of bill requests from administration and noted they all have Chairman Wanzenried's name on them. Chairman Wanzenried stated the proposals are simply bill draft requests, and that he has no intention, at this time, of introducing any of the proposals.

06:46:58 Rep. Witte spoke about the proposed request to the BNSF to expedite remediation at the KPTP site and BNSF's plan. Rep. Witte stated his desire to have the issue placed on the next EQC agenda.

06:49:44 Director Opper clarified there was extensive opportunity for public comment and that DEQ's final plan will be revised from the public input, but that DEQ will not reopen negotiations on the Work Plan. Rep. Witte stated he attended the public hearings, and that the program started with $180 million and ended at $28 million. Rep. Witte suggested if the plan is not completed, it is still open for conversation and that something needs to happen to help the businesses relocate. Chairman Wanzenried stated it is his understanding the Work Plan is not subject to renegotiation. Director Opper agreed.

06:53:11 Sen. Story stated the EQC took an action based on the recommendation of the Agency Oversight Subcommittee. Sen. Story noted a representative from BNSF was not present at the Subcommittee meeting.

06:54:20 Mr. Pattison asked about possible legislation regarding hydro power being a renewable resource. Chairman Wanzenried stated there was an idea, but no motion to support the idea.

06:55:20 Chairman Wanzenried stated the next EQC meeting would be in Helena on May 12-13, 2008.

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