

ENVIRONMENTAL QUALITY COUNCIL

September 22 and 23, 1999
Original Minutes with Attachments

COUNCIL MEMBERS PRESENT

Sen. William Crismore, Chair
Rep. Kim Gillan, Vice Chair
Rep. Paul Clark
Sen. Mack Cole
Mr. Tom Ebzery
Ms. Julie Lapeyre
Sen. Bea McCarthy
Sen. Ken Mesaros

Rep. Doug Mood
Ms. Julia Page
Mr. Jerry Sorensen
Sen. Spook Stang
Mr. Howard Strause
Rep. Bill Tash
Sen. Jon Tester
Rep. Cindy Younkin

COUNCIL MEMBERS EXCUSED

Rep. Monica Lindeen

STAFF MEMBERS PRESENT

Mr. Todd Everts
Ms. Krista Lee
Mr. Larry Mitchell
Ms. Mary Vandenbosch
Ms. Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

COUNCIL ACTION

- Approved minutes from EQC meeting of May 24 and 25, 1999.
- Adopted final interim work plan.
- Adopted EQC Rules and Procedures for the interim.
- Approved sending a letter to the U.S. Environmental Protection Agency regarding the state's TMDL Program.
- Approved sending a letter to the Montana Department of Natural Resources, the Montana Department of Fish, Wildlife and Parks, the Montana Department of

Transportation and the Montana Department of Administration regarding best management practices.

- Adopted the Water Policy Subcommittee Work Plan.
- Adopted the Land Use/Environmental Trends Subcommittee Work Plan.
- Set next meeting date for December 2, 1999 in Helena.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN CRISMORE called the meeting to order at 8:00 a.m. Roll call was noted; REP. LINDEEN was excused. **(Attachment #2.)**

II ADOPTION OF MINUTES

Motion/Vote: SEN. MCCARTHY MOVED THAT THE MINUTES OF THE MAY 24 AND 25, 1999 EQC MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

III ADMINISTRATIVE MATTERS

A. Introduction of New Staff Member

KRISTA LEE was introduced as the new EQC staff member. MS. LEE previously worked for the Department of Natural Resources (DNRC) as a Public Education Specialist and has experience working with the Best Management Practices (BMPs) program. She has also worked for the Natural Resources Conservation Service.

B. Final Adoption of Interim Workplan

Motion/Vote: SEN. MCCARTHY MOVED THAT THE INTERIM WORKPLAN BE ADOPTED. THE MOTION CARRIED UNANIMOUSLY. (Exhibit 1 - Interim Workplan)

C. Final Adoption of EQC Rules and Procedures

MR. EVERTS explained that the technical corrections made included changing the term "co-chair" to "chair". A statement was added that meetings could be held outside of the state capitol.

Motion/Vote: SEN. COLE MOVED THAT THE EQC RULES AND PROCEDURES BE ADOPTED. THE MOTION CARRIED UNANIMOUSLY. (Exhibit 2 - EQC Rules and Procedures)

IV AGENCY RULE REVISION PROCESS

MR. EVERTS remarked that approximately 600 laws were added every legislative session and rule making power is given to various state agencies. The EQC has been given rule making oversight for the Department of Environmental Quality (DEQ), the Department of Fish, Wildlife and Parks (DFWP) and the DNRC. This oversight includes determining if the rules follow the statutory authority and also if they comply with the legislative intent. An economic impact statement may be requested and a determination may be made as to whether the rules are necessary. The EQC has the authority to hold public hearings, request a state agency to hold public hearings, ask the court to review a rule making process, and poll the Legislature regarding legislative intent.

In his technical review of the rules, MR. EVERTS checks to see whether the agency has the statutory authority for the rule making. Further, he checks for conflicts with the Montana Code and the rationale for the rule. He suggested that he summarize the rule activity and provide members this information prior to a general meeting. If there is an interest in a specific rule, the chair or vice-chair could be contacted. The state agency involved could then be present for the next meeting.

REP. YOUNKIN maintained that the summaries would be the best method for handling rule making. Rule notices are generally lengthy and difficult to understand.

SEN. COLE agreed. However, he maintained that the Council may wish to obtain more detail on certain rules.

REP. CLARK questioned whether the Council had oversight authority if an agency was remiss in promulgating rules. MR. EVERTS affirmed that the Council did have authority in such an instance and he added that he could track whether statutes had been translated into rules.

The Council agreed to having MR. EVERTS provide summaries to the members regarding the status of rules.

V STATE OF MONTANA AND AVISTA CORP. WATER RIGHTS AGREEMENT

MS. VANDENBOSCH provided two handouts which included a newspaper article, **Exhibit 3**, and a Joint Status Report of the Montana/Avista Corporation Mutual Negotiation, **Exhibit 4**. She introduced **Rich Moy, Chief of the Water Management Bureau - DNRC**, and **Steve Fry, Hydro Safety Manager - Avista Corporation**.

Mr. Fry provided two handouts: a brief overview of Avista - **Exhibit 5** and the Moratorium Agreement Between the State of Montana and Avista Corporation - **Exhibit 6**. He remarked that Avista Corporation was formerly Washington Water Power. The company handles both generation and distribution. With their presence on the lower end of the Clark Fork River Basin, they rely on input from the streams above. They have been involved with the Upper Clark Fork River Basin Steering Committee since its inception. The majority of the Cabinet Gorge Reservoir is located in Montana and is approximately 20 miles downstream of Noxon Rapids. The Noxon Rapids water rights are junior in their priority date but they are very substantial. The Cabinet Gorge Dam Federal Energy Regulatory Commission (FERC) license expires in 2001. An application has been filed and they are hoping the license will be issued for a term of 45 years. The negotiations resulted in a settlement agreement that became part of their license application. This involved approximately 40 stakeholders in a multi-year process. The water rights issue surfaced during the relicensing process.

Mr. Moy remarked that Avista designed the capacity of their turbines to accept the full capacity of the river system. In seven years out of ten years, the Clark Fork River will not exceed 50,000 cfs. In the three years that it exceeds 50,000 cfs, this occurrence takes place for approximately 25 days. There are 7,400 junior water users in the Basin. This means that one-third of the water users in the Basin are junior to the rights of Avista. The water users in the headwaters of the Basin were not included in the collaborative process. There is an agreement between Tim Matthews, the CEO of Avista, and Governor Racicot, for a process to occur after the signing of the settlement agreement. The memorandum included that for two years Avista would not make a call on any junior water users. In turn, the state sought a temporary basin closure. This closure is in place until 2001. Negotiations are continuing to provide opportunities for the junior water users. The negotiation team consists of persons from DEQ, DFWP, DNRC, and a junior water user. A working agreement has been signed and submitted to FERC and will serve as a condition of the license. The agreement states that Avista will

not make a call on junior water users if a permanent basin closure is established. This will involve a collaborative process to define the type of basin closure the public would like to have. If a call is made, the basin will be opened to appropriation unless the Governor decides to maintain the moratorium until the next legislative session. Avista has agreed that by April 15th of each year, the state will be notified as to the likelihood of a call. He added that Avista has never made a call but it does have the right to do so.

SEN. COLE questioned the inclusion of the Tribe. **Mr. Moy** related that the Tribe has a senior water right. He remarked that at some point in the future, the Reserved Water Rights Compact Commission would probably negotiate with the Tribe. Most of the water rights that have been claimed by the Tribe are for instream flows and this would be inside the 50,000 cfs water right.

REP. CLARK contended that with the competitive market developing, this situation may become very contentious in the future.

VI SELF AUDIT AGREEMENT UPDATE

Mark Simonich, Director of the DEQ, introduced the Memorandum of Understanding (MOU) between the State and the United States Environmental Protection Agency (EPA), **Exhibit 7**. He maintained that as Congress adopts various environmental statutes, authority has been provided for individual states to administer the federal law if the state has a program for administering the same. The state program needs to satisfy all federal requirements. The self audit act was submitted to the EPA for review and analysis due to primacy concerns. The Legislature included a specific clause in the bill that gives the DEQ some latitude in implementation. Section 75-1-1206, MCA of the self audit act speaks to the conditions that an individual or company needs to meet to gain immunity from civil penalties. Subsection (f) indicates that one of the limitations of the applicability of the self audit act would be in those areas where the department has assumed primacy over the administration of a federally delegated environmental law or program. If in granting immunity, that action would cause the state to not meet the delegation requirements for the program, then the self audit act would not apply. The Resource Conservation Recovery Act (RCRA) was submitted to the EPA following the 1997 Legislative Session. The EPA has reviewed the same but authority has not yet been delegated to the state for this program. One of the reasons given is that the EPA needed to review the law's impacts.

Also, the Attorney General's Office needs to certify that the state has the appropriate legal authority to implement the federal program involved. The EPA submitted a letter to Governor Racicot and the Attorney General which included a series of questions regarding Montana's self audit law. The response was submitted to the EPA and the EPA followed by giving the state two options. The state could either amend the law or indicate that they would implement the primacy savings clause; subsection (f) of the act. After discussions with the EPA, the MOU was proposed. The public comment period will conclude on September 24th.

The MOU states that the purpose of the self audit act is to allow the state to proceed on a case-by-case basis. The ten situations which are listed in the MOU are similar to the self audit act. Item (2) is not similar and addresses activities that may create imminent and substantial endangerment. Repeat violations may not be given immunity if the occurrence involves the same facility within the past three years. This differs from federal guidance which includes repeat violations within the past five years at any facility owned by the company.

An outreach strategy is ongoing to inform the public of the implementation of the self audit law. One year after the effective date of the MOU, the document will be reviewed again by the EPA and the DEQ.

MR. EBZERY raised a concern about the list including items not in law. He believed Montana's law was being ignored. **Director Simonich** explained that the language was necessary to negotiate the concerns of both parties. The list pertains to assessment and does not mean the immunity would be denied. The state has a certain amount of enforcement discretion. They look at each situation on a case-by-case basis. The MOU does not extend farther than the state act.

SEN. COLE asked the status of the MOU. **Director Simonich** claimed that the MOU should be signed by early October. He also stated that the department has not received any comments.

REP. CLARK asked if an administrative directive from the corporate headquarters which resulted in a violation at each facility owned by the company would include each facility being allowed immunity. **Director Simonich** explained that a violation which included

an act performed purposely or knowingly, would fit the willful and knowing violations of item (5) in the MOU. This would be a condition for not receiving immunity.

REP. CLARK asked how the draft was disseminated for public comment. **Director Simonich** claimed that a press release was sent out and there was a listing on the department website.

MR. STRAUSE asserted that denying immunity based on Section B, Items 1-10 of the MOU, could prompt a lawsuit, if these items were not in statute. **Director Simonich** stated that parties may appeal a decision. He added that parties have the ability to make an administrative appeal to the Board of Environmental Review.

MR. STRAUSE asked how the EPA would view the validity of our law at this point. **John Wordahl, EPA, (via conference call)** explained that the MOU does not prevent the EPA from taking a separate enforcement action.

REP. MOOD believed there was a contradiction between sections B and F. Section B states that the state and the EPA recognize that nothing in statute limits the state's authority to levy fines for certain items. However, on two of the ten items, the statute does not specially allow for denial of immunity. **Director Simonich** maintained that the provisions in the MOU are how the DEQ interprets the self audit act. They believe the law states the conditions upon which immunity can be given and also states that the conditions will not apply if primacy may be lost. If the state loses primacy, companies are subject to state laws as well as federal laws. The department believes they can live within the intent of the legislation and still maintain primacy for federal programs.

REP. GILLAN asked how many companies were using the self audit law. **Director Simonich** related that only one company has submitted a request for immunity through the self audit process. Montana Refining Company from Great Falls was provided an immunity for the violations disclosed. The company needs to enter into a compliance schedule with the DEQ. Montana Refining Company lived up to the conditions agreed to and has been given immunity.

MR. EBZERY asked to have MR. EVERTS review the statute in relation to the two provisions in question. He further suggested that the EQC may consider submitting some comments. MR. EVERTS agreed to provide an assessment of the statute.

Public Comment

Cesar Hernandez, Montana Wilderness Association, raised a concern that he had no knowledge of a comment period for the MOU. He believed that most of the conservation community was not aware of this opportunity for public comment since no comments were received.. He added that the individuals on the interested persons list from the debate on the self audit bill should have been provided information regarding the document. He further questioned whether the public would be included in the review of the MOU. He requested that the public comment period be extended.

Director Simonich agreed that the persons who testified on the bill should have received information regarding public comment. He added that it was available electronically. He indicated that he would visit with the other state agencies involved about extending the public comment period. He saw no problem with doing so.

Don Allen, Western Environmental Trade Association, remarked that there were parts of the agreement that were troubling. The EPA does not like Montana's self audit law. Two years after the effective date of this law, the public is finally receiving some interpretation. This places a lot of pressure on the departments in responding to those interested in using this act. He further questioned whether an MOU was considered a rule.

VII COUNCIL MEPA TRAINING

MR. EVERTS related that most of the environmental laws we have today were passed in the early 1970s. He provided a handout covering the Montana Environmental Policy Act (MEPA), **Exhibit 8**. Other handouts provided included a revised copy of MEPA, **Exhibit 9** , and the Final Environmental Impact Statement of the Keeler Mountain Timber Sale Proposal, **Exhibit 10**.

MEPA was enacted in 1971, a year prior to the Montana Constitution. The purpose of MEPA involves protecting the environment and pursuing one's livelihood in Montana. Rep. George Darrow was the sponsor of MEPA. MEPA speaks to an entitlement to a

clean and healthful environment. The national act speaks to enjoying the environment. Rep. Darrow believed that the public needed to be involved in contentious decisions. He also wanted state agencies to analyze the impacts of their actions beforehand. This bill passed 101 to 0 in the House. An extra representative was present for the Constitutional Convention. In the Senate, the bill passed 51 to 1. There was another act proposed at the time which was known as the Montana Environmental Protection Act. This act would have declared that a public trust existed in the natural resources of the state and they should be protected from pollution and destruction. This would have allowed anyone to sue based on that public trust. This bill died in the House 49/48.

MEPA sailed through both houses but the funding was not appropriated. During a special session, \$100,000 was appropriated for the Act. Basically, the Act remains the same as it was in 1971. SEN. MESAROS sponsored a bill in the 1995 Legislative Session which clarified that state agencies needed to analyze the regulatory impacts of their actions on private property rights. MEPA requires state agencies to analyze social and economic impacts.

One of the purposes of MEPA is to supplement agency statutory mandates and agency regulations. The objectives of MEPA include considering the environmental and human impacts of the agency's proposed action and insuring that the public is informed of and participates in the decisionmaking process.

Environmental review is required for an action that has an impact on the human environment. An action means a project, program, or activity directly undertaken by an agency. An action could include a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

There are six situations where no environmental review is required. These situations include: administrative actions; minor repairs, operations, maintenance of existing facilities; investigation, enforcement, data collection activities; ministerial actions; actions that are primarily social or economic in nature and that do not otherwise affect the human environment; and a transfer of an ownership interest in a lease, permit, license, etc.

Categorical exclusions include an action that does not individually, collectively, or cumulatively require an EA or EIS as determined by rule making or programmatic review and adopted by an agency. The MDOT.

The determination of the appropriate level of MEPA documentation the agency is required to perform is one of the most litigated issues involved with the process. This issue includes whether the documentation was adequate and whether it meets the procedural requirements of MEPA. Every MEPA case can be categorized into three issues: 1) Should an EIS have been prepared; 2) Was the document adequate under law? and 3) Does MEPA supplement a state agency's existing permit authority? The last issue has been decided in three separate court cases. In Beaver Creek, the Supreme Court prepared an initial finding that when a subdivision is reviewed, with exception of water quality and sanitation, MEPA can be used substantively. That preliminary finding was retracted in the final decision. A revised opinion was issued that stated that under the subdivision review statutes, the agency cannot go beyond its permitting authority and supplement that permitting authority with MEPA. Using MEPA substantively would be to go beyond what is in a permit statute and allow the agency to mitigate the impacts beyond what is allowed in the permitting statute. A classic case would be that of the Church Universal and Triumphant. The Department of Health and Environmental Science (DHES) received numerous comments on the wildlife impacts of the development taking place. The agency took those under consideration but did not have the authority to mitigate for wildlife impacts. The agency that has this authority is the Department of Fish, Wildlife and Parks (DFWP). The DHES prepared a contract that listed specific mitigation measures that would limit the impacts on wildlife in travel corridors. This separate contract was signed by CUT and incorporated into the DHES MEPA review document.

In Cabinet Resources, the First Judicial District Court issued a MEPA opinion in a Hard Rock Mining Act case. (When the First Judicial District Court issues an opinion, it is binding on all state agencies since they reside within the District.) The argument was that MEPA supplemented the department's authority under the Hard Rock Mining Act to enforce mitigation measures beyond that Act. Judge Bennett distinguished the Beaver Creek decision based on the fact that the decision involved a conflict between the Subdivision Review Act and MEPA. He found no conflict between the Hard Rock Mining Act and supplementing it with MEPA. He also noted that federal case law in certain

instances mandated that the national act was substantive. He concluded that for the Hard Rock Mining Act, MEPA is substantive. Since this opinion, the DEQ has given effect to that decision under the Hard Rock Mining Act.

Another MEPA court decision was Great Bear Adventures. This was also litigated in the First Judicial District Court. The DFWP came in under a zoo menagerie game licensing action and was sued by Great Bear Adventures because they decided to attach specific mitigation measures not found in the zoo menagerie licensing statutes or the game farm licensing statutes. The department requested that the bears be spayed or neutered but authority was not found in the licensing statute. Judge Sherlock concluded that agencies are required to look at mitigation. He concluded that for this specific statute MEPA was substantive.

A department needs to decide whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The decision is made based on whether or not the impacts are significant. The rules list significance criteria. This criteria is discretionary. If there are significant impacts, an EIS is necessary. Placing a game farm in an area hundreds of miles from elk travel corridors may not have significant impacts. However, placing this same game farm in an elk migration corridor could potentially cause great impacts. The state agency needs to know the scope and magnitude of the project. Every EA questions whether an EIS is required. The agency needs to respond to that question.

There have been five Supreme Court MEPA cases and the state has won four out of the five cases. There have been 18 cases resolved at the District Court level. Fourteen out of these eighteen cases have been won by state agencies.

The environmental review has four elements: 1) purpose and need of the proposed action; 2) affected environment; 3) alternatives; and 4) environmental impact analysis. Agencies are also required to consider whether a regulatory restriction analysis is necessary. To complete this evaluation, an agency must identify and document: 1) the impact of the restriction on the use of private property; 2) any reasonable alternatives that reduce, minimize, or eliminate the restriction while satisfying state or federal laws; and 3) agency rationale for final decisions concerning the regulatory restriction analysis.

Public participation is a process by which interested and affected individuals, organizations, and agencies are consulted and included in the decisionmaking of an agency. The EA level of analysis determines whether the action is either not significant or potentially could be significant. The degree to which a state agency includes the public under an EA is discretionary. Mitigated EAs have procedural requirements. Most agencies have policies for EAs which include a 30 day public comment period. For an EIS, the more significant the impact, the more stringent the procedural requirements for public participation. An EIS needs to be objective and scientific. No value judgements should be made.

The biggest difference between NEPA and MEPA is that NEPA applies to federal actions and MEPA applies to state actions. This act does not apply to local governmental actions unless state funds are used. MEPA recognizes that each person shall be entitled to a healthful environment. This entitlement language is not found in NEPA. The national act created an executive branch agency while the state act created a legislative branch agency. MEPA significance criteria does not include an applause meter. Cumulative impacts are broader under NEPA.

The Council recessed for lunch and Subcommittee meetings.

THURSDAY, SEPTEMBER 23, 1999.

VIII RECONVENE COUNCIL MEETING

CHAIRMAN CRISMORE reconvened the meeting at 8:00 a.m. on Thursday, September 23, 1999.

IX SUBCOMMITTEE REPORTS

A. MEPA Subcommittee

SEN. MCCARTHY reported that due to the length of the testimony and presentations on the MEPA process, the Subcommittee has not been able to prioritize and set goals for the interim. A meeting will be held in Great Falls on October 21st for this purpose.

B. Eminent Domain Subcommittee

SEN. COLE related that the Subcommittee heard a lot of testimony from various persons. Over 18 persons testified. The work plan was reviewed and edited. Some of

the elements of the work plan include studying the following: the historical condemnation actions including both governmental and private condemnations, several case studies, bonding, authorized entities that use eminent domain, liability issues, federal/state relationship, reversion of property, mitigation measures, and court cases. They are considering holding three public meetings.

C. Water Policy Subcommittee

SEN. MCCARTHY reported that due to the controversy regarding the concentrated animal feeding operation issue, the Subcommittee decided to hold a public hearing in Great Falls on the afternoon of October 21st. Public hearings have been held in Billings and in Great Falls. It has been suggested that the EQC might be able to obtain more response and public awareness of this issue. She asked all EQC members to attend the hearing if possible. This will be an issue during the next legislative session.

MS. VANDENBOSCH remarked that another issue involves the proposed EPA regulations regarding total maximum daily loads (TMDLs). The EPA also proposed related changes to the National Pollutant Discharge Elimination System and the Water Quality Standards Regulation. She referred to two handouts, "Draft Summary: Proposed EPA TMDL Rules in Comparison with Montana's Program", **Exhibit 11** and a letter from **Patrick Heffernan, Montana Logging Association, Exhibit 12**. The deadline for comments is October 22nd. The Water Policy Subcommittee recommends that a letter be drafted to send to the EPA requesting an extension of the comment deadline on this very complex issue. Several organizations are asking for a 180-day extension. The EPA will also be requested to allow the states that have already established TMDL Programs in compliance with the Clean Water Act to submit those programs as is to the EPA for approval rather than changing existing programs to comply with the new rules. The proposed rules would necessitate changes to our rules and we are two and a half years into implementing our law which was passed in 1997. This letter would be sent from the full Council.

Motion/Vote: SEN. MCCARTHY MOVED THAT THE EQC SEND A LETTER TO THE EPA AS RECOMMENDED BY THE WATER POLICY SUBCOMMITTEE. THE MOTION CARRIED.

MS. VANDENBOSCH further reported that last interim the EQC requested a resolution that encourages state agencies with land development and/or land management responsibilities to implement best management practices (BMPs). This resolution recognizes the efforts the forestry industry has made in implementing BMPs and recommends that state agencies serve as leaders and role models. She referred to a draft letter addressed to the DNRC, the DFWP, the MDOT and the Department of Administration . This letter encourages them to evaluate their practices and adopt BMPs for non-point source pollution. The letter includes a time line and requests the agencies to report to the EQC.

Motion/Vote: SEN. MCCARTHY MOVED THAT THE EQC SEND THE LETTER TO THE STATE AGENCIES THAT WAS APPROVED BY THE WATER POLICY SUBCOMMITTEE. THE MOTION CARRIED. (Exhibit 13 - Letter to state agencies)

SEN. MCCARTHY added that the Subcommittee had approved and adopted an interim work plan.

Motion/Vote: REP. TASH MOVED THAT THE EQC ADOPT THE WATER POLICY SUBCOMMITTEE INTERIM WORK PLAN. (Exhibit 14) THE MOTION CARRIED UNANIMOUSLY.

D. Land Use/Environmental Trend Subcommittee

MR. SORENSEN reported that they are dealing with several issues. They are tracking the growth policy legislation to observe the implementation of same. **Greg Hinkle, Chairman of the planning board from Sanders County**, provided a presentation to the Subcommittee. He maintained that the legislation was very beneficial and gave them a focus on the issue. Approximately four other jurisdictions have started growth policies in accordance with SB 97 and the Subcommittee will be tracking their progress. The Subcommittee is also searching for funding for cities and counties to be able to comply with SB 97.

Another issue is activity in accordance with HB 458 and includes disseminating information on BMPs in riparian areas. They will primarily be focusing on residential development in stream and river corridors. This is a very difficult issue and one with which the legislature has struggled with during the last few sessions. River corridors

command the highest real estate value of any property in the state and the public is also protective of the same.

The third issue the Subcommittee is addressing is examining the environmental indicators report which the EQC developed two sessions ago. They are hoping to come up with an efficient way to modify this report to make it more user friendly. State agencies will be requested to consider how they track the actual condition of the environment through their efforts along with their compliance and enforcement reports which they are mandated to provide to the EQC.

Motion/Vote: MR. SORENSEN MOVED THAT THE EQC ADOPT THE LAND USE/ENVIRONMENTAL TREND SUBCOMMITTEE INTERIM WORK PLAN. THE MOTION CARRIED. (Exhibit 15)

X OTHER BUSINESS

MR. EVERTS explained that REP. MOOD questioned how the DEQ and the state could agree to assess penalties for things that are not authorized in Montana's law. MR. EVERTS noted that it is important to understand the terms and conditions of the environmental self-audit legislation. He added that the proposed MOU between the DEQ and the EPA does not apply to or affect state implementation of state laws. In the case of state implementation of federally-delegated programs, the self-audit legislation lists certain conditions which allow the state to bail out of granting immunity under the self-audit legislation. The two critical provisions in the self-audit legislation include that immunity granted under the self audit law does not apply if the action would cause the state not to meet its requirements under federally delegated programs or the action would prevent the state from obtaining primacy for those programs. The state, under the MOU that has been drafted, is using those two provisions to justify the assessment of activities that may create imminent and substantial endangerment and for violations that confer on a violator significant economic benefit. The reason is if the state were to receive a letter from the EPA which stated that primacy was threatened, the state could bail out of the self-audit law. By doing so, the next question is whether the state and/or the EPA has the authority, under existing law, to assess penalties when there is the possibility of an imminent and substantial endangerment or the conference of an economic benefit. If the authority is present, the penalties may be assessed. At the point

that the state bails out of the self-audit law, there is the consideration of the threat to primacy. There may be other authority in statute for the state to assess these penalties.

Mark Simonich, Director of the DEQ, remarked that they interpret the self-audit law as not precluding their ability to assess the other elements. When a penalty is assessed, it is done specifically according to the provisions of the statute that is being enforced.

MR. EVERTS added that the self-audit legislation provides immunity from specific penalties. If the primacy bail out provisions are triggered, the immunity does not exist.

REP. CLARK remarked that each situation would be reviewed on a case-by-case basis. If, under the self-audit law, there is voluntary disclosure there would be no assumed immunity until the individual case is reviewed. He questioned whether this would discourage the utilization of the self-audit law. MR. EVERTS affirmed that it could.

MR. EBZERY maintained that when two provisions are specifically deleted from the statute, in this case the economic value and imminent danger provisions, and then later these provisions are used as elements for assessment, it colors the water. He did not believe that any industry would use the self-audit law given the interpretation of the same.

Director Simonich reported that in regard to the comment period on the MOU, the Department of Agriculture is willing to extend the comment period. He had not received a response from the Attorney General's Office at this time, but anticipated a favorable response. The comment period would probably be extended by two weeks.

MR. EVERTS related that the MEPA citizen's guide, the Growth Study report, and the TMDL report were recognized by the National Council of State Legislatures and awarded one of the outstanding publications across the United States. The EQC will be receiving a letter and a plaque for its outstanding work.

XII NEXT MEETING DATE

The next meeting will be held on Thursday, December 2, 1999, in Helena.

**XIII ADJOURN AND DEPART FOR FIELD TRIPS TO ROCK CREEK
MINE/KEELER MT. TIMBER SALE**

There being no further business, the meeting adjourned at 9:30 a.m. The Council members departed for field trips to Rock Creek Mine and the Keeler Mountain Timber Sale.

SEN. CRISMORE, Chair