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**ENVIRONMENTAL QUALITY COUNCIL
Oversight/MEPA Subcommittee
September 10, 2001
Colstrip, Montana
FINAL MINUTES**

COUNCIL MEMBERS PRESENT

REP. CHRISTOPHER HARRIS, Chair
REP. DEBBY BARRETT
MR. HOWARD STRAUSE

STAFF MEMBERS PRESENT

Mr. Larry Mitchell

AGENDA

Attachment 1

VISITORS' LIST

Attachment 2

SUBCOMMITTEE ACTION

- Adopt work plan

I WELCOME AND INTRODUCTION

REP. HARRIS called the meeting to order at 8:10 AM and introduced the Subcommittee members.

Don Hyypa, Fish, Wildlife and Parks (FWP), is here to observe the Subcommittee and answer any questions.

Don Allen, WETA, was in attendance.

II DRAFT WORK PLAN

MR. MITCHELL introduced the draft work plan for the Subcommittee, see **Attachment 3**. One of the goals for today is to go through the draft work plan one more time, make any suggestions to it and present it to the full EQC. What the work plan does is outline the objectives and the paths that will be taken to fulfill the work that has previously been outlined regarding MEPA, the CECRA program, the sage grouse issue, and some optional oversight. In addition, there are issues that will crop up, such as the FWP seasonal rules that the Subcommittee might be asked to address.

On pages 8 and 9 there is a time line that shows what will be done at these various meetings. The first one is this meeting. In terms of MEPA the Subcommittee will review the recommendations of the last Interim and what the 2001 legislative changes did to that. Also, they will review the need for rule changes, receive an overview of MEPA litigation, identify issues involved with CECRA, and hear a briefing on the Sage Grouse Conservation Plan and Technical Committee.

REP. HARRIS would, in relation to CECRA, like to look at the DEQ resources and their current problems, such as staff, etc. MR. MITCHELL replied that at the February meeting there is a CECRA staffing review listed for that meetings. This is to take a look at what they have to work with, what they have had in the past and what they might have going forward.

MR. MITCHELL continued that at the December meeting there will be a presentation from the CECRA people to explain how the program works and what it does. If the Subcommittee wants the CECRA staffing review to also be done at the December meeting, that could be worked in.

REP. HARRIS said that, there being no objections, they would move on to the rest of the topics.

III MEPA (Montana Environmental Policy Act)

• *Litigation update*

MR. MITCHELL said that as one of the elements of the work plan there is an update on MEPA litigation listed for each meeting. He thought he would try to keep current with what is going on in the courts and in the administrative boards dealing with MEPA issues. He referred to a document titled MEPA Case Litigation Update, see **Attachment 4**. This list shows the current status of cases that have MEPA issues as one of the causes of action. It is rarely the only cause of action, it is often a minor cause of action, but it is noted as one of the causes in the complaint.

Currently there are three administrative appeals pending with the Board of Environmental Review dealing with air quality permits: Pompey's Pillar/United Harvest, Northwestern, and Holnam. The Pompey's Pillar appeal deals with the issuance of a permit for a high-speed grain elevator and the concerns of the Pompey's Pillar Historical Society. The Northwestern gas to electricity plant alleges an inadequate environmental assessment evaluation in addition to other complaints. The Holnam Cement appeal is because the plant wants to up the percentage of petroleum coke that it burns. There are several grounds for this appeal, one of which is an inadequate environmental assessment evaluation.

Near Custer there is a Cattle Development Center feedlot that is under review. There has been a complaint filed in district court challenging the decision for a discharge permit. This is a water quality case. One of the issues was whether or not the department should do an environmental assessment on each one of the CAFO discharge permits.

There are two cases pending in district court that deal with Coal Bed Methane (CBM) and the issuance of water discharge permits, again alleging that the environmental assessment was inadequate and that an EIS should have been prepared.

The next case is an ancient case that has been rattling around the courts for many years. It deals with the proposed expansion of the Golden Sunlight Mine. The MEPA complaint is that DEQ should have done a new EIS when they issued the expansion permit. The statute was changed in the 2000 special session, but the permit was issued under the old statute.

In the Zortman-Landusky case, DEQ is preparing an environmental analysis of the reclamation proposals. This case is currently not active because DEQ is going back and doing a supplemental EIS.

There are two DNRC cases that involve the issuance of water use permits that have litigation pending. One is the Friends of the Wild Marias. One of the causes of action in this case is that the legislative amendments to MEPA violate the constitutional right to a clean and healthful environment. In this case a Hutterite colony has applied for a water use permit on the Marias to use a certain amount of water for irrigation. The amount of water left after that water use was determined to be insufficient to support fish and wildlife. However, the amount determined to support fish and wildlife was greater than what FWP has a water use permit for. The FWP is statutorily limited in the amount of water it can reserve.

REP. HARRIS asked if that is the only case in which the new MEPA rules apply.

MR. MITCHELL said that, as he recalls, it is.

MR. STRAUSE said that he had heard about a case on the Musselshell shooting preserve. He assumes that it must have applied to FWP and the need for a permit. He had heard that the same law was invoked there because neighbors were saying that a permit was needed. **Mr. Hyypa** replied that the law is pretty explicit about issuing a permit, but he had not heard of the case. MR. MITCHELL said that he had heard about that case, but that it had not been litigated yet. That has been a MEPA implementation problem that the agencies have identified in that particular case. This is a game bird shooting preserve for which a permit is required from the department. This is a proposal near Musselshell. The FWP environmental analysis of the proposal found that there is a school bus route near the proposed shooting preserve. They thought that they could limit the shooting to times when the school bus isn't going through there, but the department found that there is no authority in its shooting preserve permitting statute to condition for public safety.

Unfortunately, until cases like the previous get formally appealed or land in court, it is difficult to ferret out this information. REP. HARRIS asked about contacting the attorneys to get a copy of the complaint. MR. MITCHELL said that, in the instance where there is a complaint filed, he is getting all the complaints and the briefs. In the case where an agency is scratching its head over how to implement something, short of a complaint, it is tough to get that information.

MR. STRAUSE asked if MR. MITCHELL had ever tried to write a letter to the agencies saying, "Distribute this to the people most likely to be involved with the MEPA process."

MR. MITCHELL said that he could formalize it. He had done that informally at the Governor's Natural Resource Cabinet meeting in July.

MR. MITCHELL continued with the litigation update. There is another DNRC water use case in district court. It involves a proposed groundwater well near Ten Mile Creek that would be used for irrigation. The downstream water user has joined with MEIC for this litigation.

There are no FWP cases and only one inactive MDT case. The MDT case is an old Supreme Court case. The MDT is going through a contract process to do a new EIS.

• ***MEPA study recommendations***

MR. MITCHELL referred to **Attachment 5**. It is a summary of chapter 10 of the EQC's Interim report and a chart of MR. MITCHELL's interpretation of what has been done so far in terms of those recommendations. The majority of these dealt with recommendations or advice to the agencies to amend their administrative rules. Certainly, the Legislature could go beyond recommending a rule change, as it has in some of these issues. This summary goes together with the other documents provided in terms of model rules after the 2001 Legislative Session, see **Attachments 6, 7, 8**. This is a preliminary discussion that MR. MITCHELL has had with the agencies and the other participants in the 2001 Legislative Session to date. The question is, are new MEPA rules needed as a result of the 2001 legislative changes? His impression is that the DEQ is not interested, at this point in time, in doing a rule rewrite. They want to keep going with what they have and make the changes as they are necessary. DNRC appears content with the existing MEPA rules. FWP thinks that there might be some rule changes needed, but is not really sure at this point in time.

REP. HARRIS asked if the Subcommittee should try to get the agencies to comment on this issue.

MR. STRAUSE commented that there are two different issues: 1, whether there are rule changes needed as a result of the statutory changes in 2001; 2, whether or not there should be rule changes based upon the recommendations of the EQC in the last interim. He agrees with the idea that it may be too soon to try to implement the changes in the rules based upon the new statutes. However, he thinks that the EQC took a good enough look over the last two years at MEPA that the time might be right for rule changes based upon the recommendations. That is what he would like to concentrate on. He would like to have the agencies who have the most MEPA actions involved in the discussions.

MR. STRAUSE shared some background. One of the reasons that the EQC recommended some of these changes is that they hope to streamline the process and get the public involved earlier and possibly avoid some future litigation. A lot of the recommendations went toward getting the public more involved and keeping them more informed of what is happening within the agencies. Those seem to be pretty direct rule changes.

REP. HARRIS asked if MR. MITCHELL would to send a letter saying that the Subcommittee has asked for an official set of comments from the agencies on the set of recommendations from the EQC.

MR. STRAUSE commented that a lot of these recommendations didn't come directly from the Subcommittee, they came from the Governor's Consensus Council that was involved in the process.

REP. HARRIS asked if asking an agency for comments on the recommendations had ever been done before. MR. MITCHELL said that it had not been done on this study, but that he suspected it had been done before on other studies. It is within the authority of the Subcommittee to ask for that. REP. HARRIS asked if there was any objection with proceeding along those lines. The purpose of the request would be to get an actual response to a recommendation. MR. MITCHELL clarified that it would be a formal response to the previous study. REP. HARRIS also wanted to know the changes that they feel are necessary as a result of the 2001 Legislative Session.

MR. STRAUSE is afraid that if the Subcommittee doesn't address these problems, these problems will just slide by and nobody will address them.

REP. HARRIS said that, there being no objections, the Subcommittee will have MR. MITCHELL contact the agencies for the purpose of a formal comment on the recommendations. MR. MITCHELL will attempt to get something in writing and have a presentation at the December meeting.

MR. MITCHELL commented that the 2001 legislative changes to MEPA were effective at different times. Some were effective immediately, while others are not effective until October 1, 2001. Two of the more difficult bills to implement are not effective yet. One being the alternatives analysis (HB 459), and the other is the bill that talks about deadlines for MEPA (SB 377). Those will be the two bills that cause the agencies to think hard about how they implement MEPA and whether or not they can do it under their existing rules. In December, the agencies won't have had much opportunity to see how it works. On the other hand, if they aren't thinking about it yet, this will give them a heads-up that perhaps they should be.

REP. HARRIS said that if the agencies focus on it now, they may avoid some serious litigation in the future. He also thought that it made sense to work in some discussion about the rules at that meeting. He asked if the agencies had already commented on the model rules. MR. MITCHELL replied that, at the Governor's Natural Resources Council meeting, he had asked the agencies for what they thought should be included in the Subcommittee's tasks and objectives. DEQ said that the Subcommittee should take a look at the definitions of "significance" and "agency action." All the agencies asked for the Subcommittee to do something with MEPA fees because they are not able to implement them. FWP had some comments regarding the bill with the 90-day environmental analysis (EA) deadline and 180-day environmental impact statement (EIS) deadline. They have some concerns about that, basically it was a morale issue and an implementation issue.

REP. HARRIS said that those comments seemed to be toward the legislative changes and that raised the question of whether the Subcommittee wanted to invite their policy suggestions on legislation. He doesn't want to make the agencies' task so big that they won't remain focused.

MR. STRAUSE commented that he was surprised to hear them so concerned over the fee issue at this point because the agencies have had two years to give the EQC comments on that. He

doesn't know why the agencies wouldn't have wanted the Legislature to change that the last session if that was of concern.

Mr. Hyyppa responded that in the Interim last term the agencies did talk about what their concerns were about the fees. What FWP said that it is too big of a thing to do, and they only had a short time to do it. They just concentrated on one of the fees dealing with a shooting preserve. He is not sure what needs to be done with that. FWP is hoping to just do what they can and then come to the Subcommittee for advice.

REP. HARRIS thought that it made sense to say to the agencies, "Here are the recommendations, do you have any problems?" What needs to happen to make this process work more swiftly?"

IV CECRA – ORPHAN SHARE-VCRA-AGENCY STAFFING

REP. HARRIS referred to a memo from MR. MITCHELL, see **Attachment 9**. He didn't realize that there were two orphan share (CALA) projects underway. When he last looked at this, DEQ had said that there were none.

MR. MITCHELL said that this segment on what to do with CECRA is his question as well. At the next meeting there will be representatives from DEQ, and possibly others, who will provide presentations about how the program works, what it is, how it is, what it costs, and other information. What MR. MITCHELL has provided in that memo is a copy of the statute and the only rule that has been adopted. There are three programs: the traditional state Superfund (CECRA), the Voluntary Clean-Up Act (VCRA); and the Controlled Allocation of Liability Act (CALA). The differences in how each is implemented are summarized in the DEQ memo. See **Attachment 10**. MR. MITCHELL needs to know what the Subcommittee would like to know about these programs, what issues and concerns they have with the way it is structured or the way it is implemented, or any other questions.

REP. HARRIS said that, from his point of view, the controlled allocation of liability program currently has two parties in the process. He assumes that those are going moderately well over a long period of time. His question is, are there any suggestions from the regulated community or the agencies that would expedite that process. It seems like an overly complicated process that is almost destined to fail. REP. HARRIS had received a call from Steve Wade asking if he could participate in the discussion about the orphan share issue. This program needs to be made more user friendly, otherwise there will be a clean-up fund that will only get the occasional project to run with. A huge part of the allocation process is figuring out who owes what.

MR. STRAUSE asked if it was correct that the current balance is at four million dollars and the current revenues are at two million dollars for the rest of the biennium and does that mean that there will be another two million dollars every biennium. MR. MITCHELL said that was correct. He thought that was from the percent of the resource indemnity trust fund interest that is allocated to the orphan share program. Currently, the portion of the metal mines taxes that used to go into the RIT goes directly into the orphan share account. Also, a percentage of the RIT interest goes in the orphan share account. Once the RIT hits one hundred million dollars as a principal balance, then the tax money is diverted and no more money goes into the trust fund principal. The tax revenues that come in from oil, gas, coal, etc., will then be diverted and half will go into the orphan share account.

MR. STRAUSE was wondering if the revenue coming into it would be matching the money going out of it when this process becomes more popular. He asked a question of MR. MITCHELL dealing with the CALA process. MR. MITCHELL responded that if there was a site that needed to be remediated, rarely does the owner/operator of the site admit to making a mess and volunteer to clean it up. What generally happens is that someone else will complain about a well going bad or an odor, possibly a subsequent owner may stumble in to something, and then CECRA is involved and there is an investigation. Then, through a series of departmental orders to clean up, the person is required to prepare and follow a cleanup plan; that is the traditional CECRA way of handling sites. There are circumstances where the owner or subsequent owner may want to clean up a site to develop it further but doesn't want to wait for DEQ to go through the process, so the owner will volunteer to do the cleanup. There are some benefits for those who come forward under a voluntary cleanup plan. The person who is responsible for the mess doesn't necessarily have to be the person who eventually cleans it up. The orphan share is a third type of cleanup that could involve a voluntary cleanup. REP. HARRIS commented that he thought it had to include voluntary action. They have to submit the plan and follow through. MR. MITCHELL said that was correct. It can be both ways, through state ordered requirements, or it can be voluntary. The person who is doing the cleanup petitions for a cost allocation of liability. If there is an orphan share allocated, the responsible party for the site can get reimbursed for the orphan share after the cleanup is done. MR. STRAUSE asked if it was correct that people can come together and try to start the process and petition for allocation, even if there is not an orphan share. REP. HARRIS didn't know whether one would use an allocation process in the absence of an orphan share because it is a very lengthy process that would normally be done in a court. The only reason to do it under these circumstances is that one might save money on it. MR. MITCHELL said that was accurate. The agency has said that there are only a certain number of sites that it makes sense to go forward with the CALA process and one of the criteria is that there is an existing orphan share. If there is no orphan share then it apparently doesn't make sense to go through the process. Even under CALA the lead party may have to go to court to get the money from the other responsible parties.

REP. HARRIS said that it seems to him that it would be a lot less cumbersome to hire an arbitrator to go through this process. This process is quite cumbersome. MR. STRAUSE thought that maybe one person may want to use this process. They have to start it, as opposed to waiting. REP. HARRIS responded that he doesn't think that the arbitrator's recommendation necessarily has to be used in any situation, but if an arbitrator made it possible, it may make it easier.

REP. HARRIS is concerned that in a small CECRA case, where the cleanup is less than \$100,000, that the CALA process simply will not be cost effective.

MR. MITCHELL said that so far the things that he had to do were to contact the current communities, agencies and applicants and get them involved in this discussion; how to make CALA more efficient and user friendly; the things that the orphan share will pay for and won't pay for, including monitoring and attorney fees; how CECRA can be made more useable by small cases.

REP. HARRIS would also like to know whether the allocation process can be made more user friendly in a non-Orphan Share context.

MR. MITCHELL said that MR. STRAUSE had also had a question about the financial aspects, incoming and outgoing.

REP. BARRETT asked if there was any legislation about borrowing money from the orphan share account. MR. MITCHELL recalled some legislative discussions in which the orphan share funds came up because they are starting to build and until just recently there hadn't been any sites that went through the process. REP. HARRIS would like to know if there is any borrowing going on.

REP. HARRIS asked if WETA would be interested in testifying and sharing their experience. **Mr. Allen** said that he is sure that they would. Steve Wade would probably volunteer for that. REP. HARRIS said that he had talked to Mr. Wade and that Mr. Wade had some suggestions for legislative changes. **Mr. Allen** said that WETA has some people that were involved in many of the hearings, and they would make sure that a representative is present as long as they know when the meeting is. MR. MITCHELL said that the December meeting is a kick-off on CALA as to what, where, why and when, and hopefully to further define some questions. The February meeting includes a panel of case studies dealing with CALA as to what happened and where.

REP. HARRIS said that the case studies are helpful, but his impression of the CALA process is that it certainly protects DEQ's interest. However, it might be that no one wants to get involved, as has been seen by the fact that there have only been two cases. MR. MITCHELL had anticipated going through the files and trying to find out what letters of inquiry had been made and why they were dropped, in order to find out why this process is not being used. The first circumstance in which CALA was used was an extremely protracted process with Pegasus/Apollo Gold on the Corwin-Jefferson City site. Since it was the first one, MR. MITCHELL suspects that the DEQ spent much of its time meeting with the attorneys trying to figure out how they were supposed to do this. Also the applicant had some difficulties in following through with the process. The second petition for Darby Lumber was much easier when compared to the first one. He didn't know whether it was an easier site or that the DEQ now knew how to do it more efficiently. DEQ says that CALA was never anticipated to be used for a large number of sites, just a very few specific sites for which there were large orphan shares.

MR. STRAUSE said that he had one more question. Going back to the Lockwood site outside of Billings, he thought that there had been testimony that there were some responsible parties that they couldn't find. MR. MITCHELL said that in that case it was not Orphan Shares, there are some PRPs there that are still viable and still operational. They anticipate that the majority share of that contamination will go to one or two parties that are still there. The problem was that the type of chemicals that they are finding in the groundwater are cleaning solvents that have been used by a large number of businesses and former businesses in that area. The problem occurred in the notification process.

REP. HARRIS asked if the agencies would be candid with the Subcommittee. MR. MITCHELL said that it would depend on the administration. In the last administration there was no attempt to say that they needed more people or a larger budget. It seemed that the philosophy was, "No problem." However, when you get down into the cubicles of the agency you will find a whole different story.

V AGENCY OVERSIGHT

MR. MITCHELL said that the title of the Subcommittee starts with Oversight. The EQC was allocated .25 FTE for oversight and .4 for MEPA. In terms of what the Subcommittee wants to do, that needs to be part of the discussion today. One thing that was discussed earlier was compliance and enforcement information. There is a state law that requires the agencies to report, on a biannual basis, compliance and enforcement activities and current trends of those activities. Typically those run with the fiscal year, so it won't be done in time for the July 2002 meeting. There have been some complaints from DEQ that this reporting is not needed and not worth the effort.

REP. HARRIS said that it is a statute requiring the agencies to do this report. He thinks that the Subcommittee should receive the report. Given that this is the third report, the trend information may be helpful.

MR. STRAUSE said that the problem he saw was that they got those reports at a time when the members didn't have time to understand it. He would like to see if there is a way that the process could be changed to make it more meaningful. Instead of receiving the reports at the last meeting of the biennium, perhaps they could receive it at the first meeting of the next biennium so that the members could spend some time on it. He would support that or just getting rid of it.

REP. HARRIS said that sometimes there is value in having the information on file. You can see what the trends are. He would expect the presentation to show the trends and why they are happening. MR. STRAUSE said that the problem with that is that there isn't time to go back and compare.

REP. BARRETT suggested that the reports be made cumulative in regard to trend information. Then if there isn't anything new, they don't have to worry about it. REP. HARRIS thought that was a superb idea. MR. MITCHELL said that was always the idea, but may not have been done.

REP. BARRETT asked why FWP is exempt from this. MR. MITCHELL said that the compliance and enforcement study focused on DNRC, DEQ, and the Department of Agriculture programs, and very little on FWP. The reason being that most of the enforcement work that FWP did was seen as writing tickets by game wardens for fishing and hunting violations. The EQC felt that wasn't the compliance and enforcement effort that they wanted to focus on. Because of this, FWP wasn't included as an agency that was under review. Toward the end of the study it became apparent that there are some types of enforcement activities that FWP does that the EQC was interested in, such as exotic species violations. FWP did, in the first report, supply some information to the EQC, but when the legislation was passed, it only included the DEQ, DNRC and Department of Agriculture. It would take a change in statute to add FWP.

REP. BARRETT thought that it would be good to have FWP supply that information because they do a lot more now than they used to, such as water management and land acquisitions. It would be good for the public to know that.

MR. MITCHELL thought that FWP has some sort of report that comes out annually that does report activities, but it is not specific to the compliance and enforcement requirements. It is

within the authority of the Subcommittee to ask for that information, even though the statute doesn't say that it is mandatory. In the past the EQC has asked for information from FWP.

MR. MITCHELL will make a request of FWP for information. Typically the report is done biannually with the fiscal year, so that means that it comes up after July 1.

Mr. Hyyppa asked, under the current statutes, the Subcommittee requires reports for certain programs, is there something in addition to those reports that the Subcommittee is wanting. REP. HARRIS said that it could merely be a compilation of statistics from those reports that the Subcommittee is wanting. Perhaps, if they have the statistics already, they could just put them together under one cover.

REP. BARRETT agreed that it would just be combining the reports into an overview.

Mr. Hyyppa thought that the FWP should contact MR. MITCHELL to find out what should be included because the original discussion was in the context of enforcement and now the discussions seems to be a broader range of information.

MR. MITCHELL said that the specific statutory requirement is 75-1-314 MCA. This bill was passed by the Legislature in 1997. It specifies the DEQ, Department of Agriculture and DNRC will provide reports about the activities dealing with enforcement and compliance. This reporting should include trend information.

VI SAGE GROUSE ISSUE

Ms. Krista Lee Evans, EQC staff, referred to **Attachments 11, 12**. Right now, FWP is working through a consensus process to develop a statewide conservation plan for the sage grouse. As part of the consensus process they have working groups that work within the larger group on specific issues.

REP. BARRETT had attended two meetings on the sage grouse issue. She heard the concerns of the public. The first concern the public always says is, "Why are we still hunting them?" The next concern is the predators. When the working group came to the meeting in Dillon, those two issues immediately came up.

Ms. Evans said that the Western Association of Fish and Wildlife Agencies (WAFWA) put together guidelines to manage sage grouse populations. Montana is a part of (WAFWA). FWP is trying to do this statewide conservation plan to implement the WAFWA guidelines with the goal of having it implemented locally by local work groups. She thinks what they are trying to do is get a handle on population, predators, etc., through the working groups and the people that are out on the ground, so that when the statewide conservation plan comes together it is something that everybody has had input into.

Ms. Evans said that the other issue is that there was an internal appeal of a Forest Service decision. It was filed by the National Wildlife Federation (NWF); they were successful in that appeal. Some of the things that were brought up by the NWF that they were concerned about that, in the alternative, Forest Service proposed drift fences and upland water sites. The NWF thought that predators perching on those fences could be a problem and upland water sites could potentially be located in sage grouse habitat. It was felt that the Forest Service didn't do a

good enough job of evaluating the sage grouse habitat. The regional appeal reviewing officer agreed with the NWF, so the district ranger's decision to implement the Big Sheep Grazing Allotments project was reversed. The plan went back to the district ranger and they have to redo the NEPA analysis. Meanwhile, the Recission Act of 1995 directs that management will continue as is. It sounds like it might stay as is for a while. There haven't been any additional appeals that Ms. Evans has heard about.

REP. BARRETT added that the Forest Service biologist said that there are no sage grouse leks (breeding grounds) on Forest Service property, there may be some leks on BLM.

Ms. Evans said that is why management on the Big Sheep Grazing Allotments will probably stay as is for a while. The past management wasn't thought to be a huge issue.

Montana signed off on a Memorandum of Understanding with the Western Association of Fish and Wildlife Agencies (WAFWA). In turn, that group also signed an agreement with the US Fish and Wildlife Service dealing with the fact that WAFWA is going to implement the revised guidelines for sage grouse in the member states. A question has been raised regarding who may attend and take part in FWP's conservation plan development process. With the open meeting laws in Montana, anyone can attend the meetings of this group. The conservation plan for sage grouse is supposed to be finished in December.

John McCarthy, FWP, said that he would be happy to answer any questions.

REP. BARRETT asked how many meetings are left. **Mr. McCarthy** replied that there is one in Glasgow in October and one in Billings in November. REP. BARRETT asked if anything new came up at the Miles City meeting, in regards to the conservation plan. **Mr. McCarthy** said that nothing new was brought up. Grazing is a big issue. They spent a lot of time discussing the effects of the coal bed methane, oil and gas development, and the influence on the sage grouse. He thinks that the FWP is getting a pretty good viewpoint of what the issues are for the public and what the public thinks this conservation plan should address. They would appeal to the agricultural community to attend the next two meeting and see if they can't get their viewpoint. There has been steady representation at the meetings from the stock growers, but not the rest of the agricultural community. REP. BARRETT said that she thought that was understandable, considering that BLM and FWP were there. These are private individuals who have to attend all of the meetings. **Mr. McCarthy** said that if they could find someone from the agricultural community who had the time to attend, that perhaps FWP could help with their travel expenses.

REP. BARRETT asked if the FWP had the population numbers of the sage grouse in region by region. **Mr. McCarthy** replied that they don't. They do have trends and the information needed to make an estimate of the population. FWP doesn't feel that the bird is threatened or endangered in Montana. Montana's populations are among the best in the western states. One of the big thrusts of this conservation plan is to keep this bird from becoming endangered. If they can implement these programs, the hope is that it will help prevent listing. However, it doesn't guarantee anything. REP. BARRETT asked about the hunting season. **Mr. McCarthy** said that even with the hunting, their data shows that the population is on a steady increase and has been since 1994. FWP is active on addressing the public concern, but at the same time, there has been a tremendous decrease in interest in hunting sage grouse in the state over the years. The number of hunters has decreased, while the population of the sage grouse has

increased. From a biological standpoint, hunting isn't a factor in depressing these populations. As far as hunting being a factor, FWP has taken steps to increase the harvest. The conservation plan will have a model that FWP will use to address hunting on an annual basis based on the number of birds.

REP. BARRETT asked if the grazing issue on public land is being assessed to everything that grazes. **Mr. McCarthy** replied it has been assessed that it's everything. REP. BARRETT commented that the cattle numbers in Montana are going down, while the elk number go up. Is that reflected in this issue? **Mr. McCarthy** said that in the grazing guidelines they do discuss harvest, which is the only opportunity they have to address the number of elk. REP. BARRETT asked if there is deprivation on public land. **Mr. McCarthy** said that is only associated with private property.

MR. STRAUSE asked if the NWF was okay with the management of the Big Sheep Allotments going back to the old way. **Ms. Evans** wasn't sure. She said that if they weren't comfortable with that they shouldn't have filed the appeal because there is not another option. There is a federal law, the Recission Act of 1995, that says that if a management plan is appealed, they will stay with the current management plan until the appeal is decided. She would assume that the NWF considered that before they filed the appeal because they had to know that would be the result. MR. STRAUSE asked if there had been any cattle allotment decreases as a result of the sage grouse issue.

Mr. McCarthy was not aware of any. MR. STRAUSE asked if it was just FWP that was consulted in regards to the coalbed methane and sage grouse issue. **Mr. McCarthy** said that FWP is responding to the EIS and they are going to comment on it. As part of the conservation planning process, FWP is considering all actions, recommendations that affect parts of the plan. These are guidelines, they are not binding. MR. STRAUSE asked if the NWF is hooked into the public process, does Mr. McCarthy feel that the NWF will buy into the conservation plan. **Mr. McCarthy** would hope so as they have had a lot of input and spent a lot of time attending the meetings.

Ms. Evans commented, in regards to the coalbed methane issue, if it is on federal land, there will have to be a NEPA analysis done and sage grouse will be considered through that process. If it is on private land or state-owned land, she is not sure what permits the CBM process would have to get. At some level an environmental analysis will be done, but sage grouse may not be considered in that.

(Additional comments lost in the background noise.)

Ms. Evans said that any information that she receives that might be helpful to the Subcommittee, she will be sure to get to the members.

Action - The Subcommittee decided to request that EQC pay travel expenses for Rep. Barrett to attend the 2 remaining FWP conservation plan meetings.

(Additional comments lost in the background noise.)

VII BIG HOLE-BEAVERHEAD TEMPORARY RULE FOLLOW UP

MR. MITCHELL referred to **Attachment 13**.

(Background noise - transcriber estimates loss of about 10 minutes of comments)

MR. MITCHELL said that the Subcommittee can change the definition of what a rule is.

REP. HARRIS talked about jurisdiction. He commented that the next step is to be announced.

REP. BARRETT wasn't sure if the Subcommittee should change the agenda or not.

REP. HARRIS said that he had received one request. The FWP response was that there were numerous conditions and for that reason it may require some other response. That will be discussed thoroughly at the next meeting.

VIII PRESENTATION OF WORK PLAN TO EQC

REP. HARRIS asked if MR. MITCHELL would give a summary of what had been done and see if there are any changes that need to be made. MR. MITCHELL said that the Subcommittee has agreed to look at MEPA, to keep track of any litigation that deals with MEPA, to review the recommendations of the last EQC, to ask the agencies for a formal response to those recommendations, to update the MEPA handbook later in the Interim. REP. HARRIS would also like to ask the agencies if they have any legislative changes. MR. MITCHELL continued, to ask the agencies if they believe there are any changes necessary in rules as a result of legislative changes, to attempt to track any implementation difficulties the agencies may have with MEPA. That is all for MEPA.

MR. STRAUSE said that, in addition to the rule changes due to statute, he would like to know any rule changes based upon the EQC recommendations. MR. MITCHELL said that he intended to get a formal response from the agencies about how they wish to approach the recommendations.

MR. MITCHELL said that, for CECRA, the Subcommittee had agreed to do a review of the remediation process in the state, particularly for the controlled allocation of liability program; to see how it can be used more efficiently and made more user friendly; to see if there is a way to open it to smaller CECRA sites; to do a financial review of the program; to do a staffing review of the CECRA program.

REP. HARRIS said that MR. MITCHELL was also going to be in touch with some of the trade associations to solicit their input. Part of what the Subcommittee is going to do at the next meeting is going to be case studies of the program, including finding out about sites that were not able to use the program for various reasons.

MR. MITCHELL said that the Subcommittee was also going to see if there is any borrowing from the orphan share fund going on. He has asked the Legislative Fiscal Division to work on a fiscal analysis of the program over the last four years, so that the Subcommittee can see how that has changed over time.

(background noise)

IX NEXT MEETING

- *Research needs*
- *Proposed agenda*
- *Instructions to staff*

X ADJOURN

There being no further business, REP. HARRIS adjourned the meeting at 10:45.

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