

- Adopt EQC Operating Rules and Procedures.
- Review, revise, and adopt Council and Subcommittee Work Plans.

I. CALL TO ORDER AND ROLL CALL

The meeting was called to order at 1:05 p.m. by CHAIRMAN McNUTT, and the secretary noted the roll ([Attachment 3](#)).

II. ADMINISTRATIVE MATTERS

REP. HEDGES *moved* to approve the minutes from the EQC meeting on June 16-17, 2003. REP. BIXBY seconded the motion. The motion carried unanimously by voice vote. Todd Everts explained the publications awards received for the Electricity Law Handbook and the Legislator's Handbook Guide. He also presented the EQC Operating Rules and Procedures ([Exhibit 1](#)). REP. HEDGES *moved* to approve Exhibit 1 and REP. BARRETT seconded the motion. The motion carried unanimously by voice vote.

III. PUBLIC COMMENT: None

IV. TOTAL MAXIMUM DAILY LOADS (TMDLs)

Art Compton, Department of Environmental Quality (DEQ), presented a PowerPoint presentation on the History of Total Maximum Daily Loads (TMDLs) in Montana, the TMDL progress to date, and a review of the TMDL schedule ([Exhibit 2](#)).

John Youngberg, Montana Farm Bureau, explained that non-point source problems are difficult to deal with, and that's why the program is voluntary. He said that the TMDL is a target to shoot for, but is not a water cleanup requirement. MR. O'HAIR wondered since the public participation part of the TMDL is so slow, if it would be better to include that in the implementation part of the program. SEN. McGEE asked what would happen if DEQ misses the deadline. Mr. Compton stated that they will do their best not to let that happen, but if it does, the plaintiffs would ask that the Environmental Protection Agency (EPA) administration be held in contempt. SEN. McGEE wondered how many lawsuits over TMDLs have been filed. Mr. Compton explained that the EPA is the defendant, not DEQ; there has been no action against the Department. He said that a coalition of environmental groups filed the suits and the federal Department of Justice (DOJ) defended the case, with support from DEQ. He added that DEQ only provides 1/4 FTE per year; the federal defense is covering the majority. REP. CLARK asked if a person will be able to get a development permit when a stream section is on private land but is polluted. Mr. Youngberg said that they could get a permit for a point source if the TMDL is done and the non-point source has not met its load. He added that the local watershed group deals with the implementation portion. MR. STRAUSE wondered if the EPA has won the lawsuits in Montana. Mr. Compton stated that the one subject the plaintiffs lost has been resurrected. MR. STRAUSE observed that if it weren't for the lawsuits, the TMDLs would never get done.

Mr. Youngberg said that the TMDL Advisory Group made the following suggestions:

- Continue to do TMDLs on watershed basis
- Don't get caught up in perfection paralysis
- Move through the re-assessment of streams

- Utilize opportunities on work already done
- Prioritize
- Promote use of templates
- Don't hold up watershed due to one contentious section of stream
- Submit TMDLs in draft form this year
- Look at what other states are doing (such as Idaho)
- Utilize components of federal land use areas
- Keep pressure on EPA to follow new guidance
- Deal with pollutants, not pollution

Mr. Youngberg said that to the sawmills, it doesn't matter who is not getting it done. MR. O'HAIR added that the timber industry doesn't have until 2007 to work out the issue; sales are declining due to lawsuits, not just the market. SEN. TOOLE said that he would like to see the TMDLs move forward; the Canadian timber supply and trade policy is another issue.

V. ENERGY POLICY SUBCOMMITTEE REPORT

SEN. MCGEE, Subcommittee Chairman, went over the draft work plan ([Exhibit 3](#)) and explained that the end result will be to provide informational papers to the full Council. He added that they will be working with the Energy and Telecommunications Interim Committee to accomplish this.

VI. AGENCY OVERSIGHT SUBCOMMITTEE REPORT

REP. HARRIS, Subcommittee Chairman, gave a brief synopsis of the meeting held in the morning. He said that they had a brief hearing on meth labs, a DEQ Enforcement and Compliance activity report, discussed the MEPA permit application for burning tires (Holcim, Inc.), and the agency oversight over the bill on baled tires. MR. EBZERY asked if the main dilemma with MEPA is the statutory provision of the time frame. REP. HARRIS stated that is a problem raised by Holcim, as well as the issue of who will pay for the EIS. MS. PORTER added that other states don't require this extensive permitting or the Environmental Impact Statement (EIS). REP. BARRETT observed that public comment under MEPA isn't weighted.

VII. BIODIESEL PANEL DISCUSSION

1. The Basics of Biodiesel: Howard Haines, Engineering Specialist, DEQ, presented his remarks in the form of a PowerPoint presentation ([Exhibit 4](#)).

2. National Research and Development of Biodiesel: Dr. Shaine Tyson, National Bioenergy Center, National Renewable Energy Laboratory, Department of Energy, went through her remarks in a PowerPoint presentation to explain biodiesel research and development on a national scale ([Exhibit 5](#)).

3. National Policy Perspectives on Biodiesel: Charles Hatcher, Regulatory Director, National Biodiesel Board, also went through a PowerPoint presentation ([Exhibit 6](#)).

4. Montana Agriculture and Biodiesel: Steve Simonson, Sanders County Development Specialist, Peaks and Prairies Oilseed Growers Cooperative, said that the challenges with biodiesel are coproduct development and sustainable production levels. He further explained

the outline he presented to the Council ([Exhibit 7](#)), explaining alternative fuels in Montana, benefits to agricultural producers, the business opportunities, and the environmental aspects of biodiesel.

5. State Biodiesel Pilot Project: Dave Galt, Director of Transportation, Department of Transportation (DOT), stated that they offered to participate in the pilot project to look into the possibility of carbon emissions credit trading. He said that they have since found that it is not a possibility. **Susan Sillick, Research Bureau Chief, DOT**, went through her PowerPoint presentation to further explain the project ([Exhibit 8](#)). She explained the process including the technical panel, Phase 1 (Literature Review) and Phase 2 (Field Evaluation).

REP. HARRIS wondered how big a feed oil plant needs to be. Mr. Simonson answered that it needs to produce 4 million gallons annually, with about 173,000 acres of total production. He added that Montana farmers can produce that, but there is also an advantage to working with North Dakota and South Dakota, which is already taking place. REP. CLARK wondered if there is an incentive to get lands from CRP into oilseed production, and Mr. Simonson responded that there is. REP. CLARK inquired what funding it will take to get the plant going. Mr. Simonson explained that there will be the cost of the DOT study, as well as the loss of potential revenue with the tax displacement incentive.

SEN. McGEE asked about biodiesel use in aircraft. Dr. Tyson told him of a Baylor University FAA-regulated air test, and that they certified one type of aircraft for biodiesel. She added that the Dakotas certified another aircraft for B20 (20% biodiesel) use. Mr. Hatcher said that the major problem is the cold temperatures, that are not at all conducive to biodiesel. SEN. McGEE inquired about the use of biodiesel by the City of Phoenix. Mr. Hatcher stated that Arizona passed a law requiring school busses to use biodiesel, and Dr. Tyson added that all eight school districts in Phoenix are using B20. SEN. McGEE asked how many plants are currently producing biodiesel, and Dr. Tyson told him there are about twelve. MR. EBZERY wondered if any other states have mandated a percentage of biodiesel use. Mr. Hatcher responded that Kansas and Washington have passed state-agency mandates, while Montana, North Dakota, South Dakota, and Illinois have all had hearings to look into mandates as well. MR. EBZERY asked if biodiesel can succeed without mandates. Mr. Hatcher responded that it absolutely can; production has doubled in the last four years, and a mandate to use it might leave a bad taste. Mr. Haines interjected that biodiesel as B100 is also currently used in underground mines.

REP. HEDGES wondered about the biodiesel being used to heat homes and any potential cold flow problems. Mr. Haines said that B100 doesn't burn readily without applying pressure, and that the BTU content is less than heating oil. He said that the additives are inserted at the pipeline distributor location. Dr. Tyson stated that in boiler tests, B20 performs the best. She said a grant was provided to test a few homes and four elementary schools with B20 as the heating source, and there have been no problems. SEN. TOOLE asked if the cost analysis includes the protein meal coproducts or just the oil coproducts. Dr. Tyson affirmed that it assumes the sale of animal protein products. SEN. McGEE wondered about incentives to grow canola instead of wheat in Montana, and if crops can be mixed to make biodiesel. Dr. Tyson explained that the incentive is the profit market for the new crop (with secured contracts), and that most vegetable oils can be mixed together. She said that an oilseed plant could be flexible, or dedicated to one material only. Mr. Simonson suggested diversification, with not greater than 25% going into oilseed. He added that the wheat crop is better after an oilseed rotation.

Recess at 5:30 p.m. until October 9, 2003.

Reconvene at 8:07 a.m. October 9, 2003.

VIII. HOUSE JOINT RESOLUTION (HJR) 4

1. Bibliography of Water Information: Krista Lee Evans referred to various articles and summaries dealing with water that had been sent to the Council for their reference. **Exhibit 9** includes a cover letter from the Legislative Library along with a list of the holdings. It also includes the water policy resources from the Montana State Library. **Exhibit 10** includes the memo from Ms. Evans explaining her request to each of the executive branch agencies for which EQC has oversight, including DEQ, DNRC, and the Department of Fish, Wildlife and Parks (FWP). The exhibit includes the agencies' responses of their water information available. A water storage report submitted to the Legislature by Governor Judy Martz is included as **Exhibit 11**.

2. Discussion of Public Involvement in the HJR 4 Process: Ms. Evans distributed a letter from Rep. Michael Lange, the sponsor of HJR 4, with his recommendations to the Council (**Exhibit 12**). She also explained a few options for the Council including: holding public hearings, internet feedback forms, or postcards soliciting feedback. REP. CLARK observed that item #3 on Page 3 (Identify primary water policy issues facing the state) of the EQC Work Plan (**Exhibit 13**) is important and needs public involvement.

3. The basics of Montana Water Law: Judge Bruce Loble, Chief Water Judge, presented a document to the Council covering the basics of water law (**Exhibit 14**). He said that there are four primary water principles discussed in the document:

- First in time is first in right.
- Water has to be used for a beneficial purpose.
- Use it or lose it.
- You can't change a water right if it's going to adversely affect another user.

REP. CLARK wondered if a transferred water right has been 50% of the original use, if a person can continue with the earlier use, or has to take it at 50%. Judge Loble stated that the water right may have been reduced to a specific quantity. He added that the principles are not self-enforcing; as there becomes a greater demand on the resource, there will be greater need for legislation. REP. PETERSON asked about ponds, and Judge Loble replied that ponds are a non-consumptive use of water. REP. PETERSON wondered if current law protects water rights users regarding ponds, and Judge Loble stated that it probably does not. REP. CLARK asked about the kinds of water sources for establishing water rights. Judge Loble said that all sources are subject to appropriation. REP. CLARK inquired how the rights are affected if the quality of water has changed so that the quantity must be adjusted. Judge Loble stated that the water court's jurisdiction is water rights before July 1, 1973. REP. HEDGES asked if a subdivision doesn't have to pay a ditch assessment, if they lose the water rights. Judge Loble explained that the Legislature changed that for small landowners.

SEN. TOOLE inquired how a well affects surface rights. Judge Loble stated that the shallow ground water interacts with the surface water because a well creates a "cone of depression" that acts like a water vacuum. He said that it most likely has an effect, especially if the well is located near the water source, but that it is hard to prove. SEN. TOOLE asked if the water right holders would have a case in court. Judge Loble said that they would, if a demonstratable

effect of the well could be proven, but that it is a very expensive process. SEN. McGEE and Judge Loble then discussed flood water rights and it was explained that all water is subject to an appropriation, and that the state technically owns the flood water. When a stream floods a town, however, there are no water rights because there is no beneficial use being applied to it. REP. STORY and Judge Loble then discussed the Federal Reserved Water Rights Compact Commission. REP. CLARK wondered what would happen if a new consideration develops, such as a new species that needs a downstream flow. Judge Loble replied that it would be handled in accordance to the Federal Clean Water Act and the Endangered Species Act. He added that federal laws can trump state laws if necessary. SEN. ROUSH and Judge Loble discussed flood water rights, and the need to obtain the water rights before building a diversion for the water.

4. Panel Discussion on Primary Water Policy Issues

Jack Stults, Division Administrator, Water Resources Division, DNRC, elaborated on his written remarks, included as [Exhibit 15](#). He also distributed two maps displaying the adjudication status and controlled ground water areas ([Exhibit 16](#)). SEN. WHEAT asked why it is taking so long to adjudicate all of the water rights. Mr. Stults replied that the Department does not have enough resources, and they continue to be cut. He said that the 10 people now working on it will take about 25 years to complete the project. Judge Loble added that the court is operating efficiently, and that the process has been slowed purposefully. He stated that it is a huge project with many factors involved.

John Bloomquist, Helena Attorney, past water master, and previous member of the Water Adjudication Advisory Council, delineated the following points:

- No fundamental structural changes are needed now.
- HJR 4 is too huge to cover; have to focus efforts within a few areas.
- If the Legislature wants to advance Montana, they have to get a handle on water rights, distribution, and changes in use of water.
- New appropriations for changes of use are critical; it takes too long to get a decision on permitting from DNRC, which is not their fault.
- Don't spend time on adding new water storage, but enhance existing storage facilities.
- Adjudication issue is fundamental; need to get decrees out, reviewed, and adjudicated.
- Remarkable success has been noted with the compacting process, but they are now at a crossroads.

SEN. WHEAT asked if an inventory has been done on existing dams, and Mr. Bloomquist responded that it has. Mr. Stults added that the inventory has been done, and they know the condition and estimates for rehabilitation, as well as the potential for expanding the dams. He said that they have upgraded and continue to upgrade the dams. SEN. WHEAT wondered if the Council should focus on dam upgrades, and Mr. Stults suggested that the DNRC could look at alternative uses and additional capacity.

Holly Franz, Helena Water Rights Attorney, stated that the stability of water rights is a key issue of property ownership. She added that dam studies have already been done, so the emphasis should be on working with existing storage facilities. She distributed a copy of the *Montana Business Quarterly* addressing water rights ([Exhibit 17](#)) and "The Beginner's Guide to Augmentation Plans for Wells", [Exhibit 18](#). Ms. Franz stated that there is a need for predictability, and to enforce priorities; that is why it is so important to finish the adjudication process. She explained that there are enforcement issues that need to be determined, because

DNRC is not an enforcing agency. She stated that there is a lack of qualified water commissioners (ditch riders) in Montana that is also causing a problem. SEN. WHEAT asked if the water commissioners are under the Water Court or the DNRC. Ms. Franz stated that they are employees of the District Courts, but they work with the DNRC for training.

Stan Bradshaw, Trout Unlimited, explained that the adjudication affects everybody, and that there needs to be a more efficient system of administration. He stated that the policy issue that HJR 4 is trying to address is water shortage. Mr. Bradshaw added that the Drought Response Act helps, but is only a start. The two main issues he delineated are supply (ground water and surface water) and adjudication. He said that the measure of a water right is how it was historically put to use. The State has spent \$37.5 million to date on water rights adjudication, and more money is needed to finish the project. He stressed the importance of obtaining an accurate adjudication.

REP. HARRIS wondered about surface water rights regarding the diversion of water from the clouds. Ms. Franz said that atmospheric water is appropriable, and Mr. Stults added that the statute agrees and allows for weather modification, but there is a high cost for the research required to obtain a permit. He said that the permit is not a water right permit, but a weather modification permit. **Rich Moy, DNRC**, said that a permit as well as a license are required. SEN. McGEE and Mr. Stults discussed the unified system regarding aquifers and surface water. Mr. Stults stated that the DNRC recognizes that some are not unified; legally they are mostly unified, but scientifically they are isolated water sources. They also discussed coal bed methane and the implications of hitting water while drilling. REP. CLARK inquired how a request for a change in nonadjudicated water rights is handled. Judge Loble gave an example of a person who built a reservoir, but then had the water right abandoned. REP. CLARK wondered about placing a moratorium on changes until the adjudication could be accomplished, but Mr. Bradshaw explained that changes are the only way to move things along and enhance accuracy.

Judge Bruce Loble quickly expanded upon last page of Exhibit 14 regarding the adjudication of pre-July 1973 “existing” water rights. REP. BARRETT asked where the six water masters are located, and Judge Loble responded that they are in Bozeman.

5. Public Input

Bob Goffena, Musselshell River irrigator, expressed his frustrations with the water issues associated with his area of the river. He said that the river went dry and he couldn’t irrigate. He emphasized the deficiencies with the lack of adjudication, urging the Council to grant the resources to DNRC to complete a timely, accurate, and fair project.

Henry Bedford, Musselshell rancher, said that their area is the “poster child” of a de-watered system. He said that there are lots of claims on the upper river that are claiming huge water rights, with no history of use. He added that DNRC has a 1948 survey of the river that should be used to determine history of use.

Terry Heifs, Manager, Deadman’s Basin, read a letter on behalf of Richard Haxton, also expressing the urgency of completing the adjudication process and the problems they are facing ([Exhibit 19](#)).

6. Panel Discussion suggestions:

- **Jack Stults:** 1) better define the terms regarding surface and ground water interaction, including an analysis of other states; and 2) adjudication resources.
- **John Bloomquist:** 1) allocate personnel resources to get the adjudication done; and 2) address the new water permit/change of water use permit issues. He added that there shouldn't be an expectation of a 100% accurate system, but should get it as good as it can be. He stated that more resources need to be allocated, or more time given to complete the project.
- **Holly Franz:** 1) adjudication: find resources to make it quicker; and 2) look at tweaking the DNRC enforcement power. She also distributed a flyer on the Montana Water Law Conference ([Exhibit 20](#)), informing the Council that it might be a good educational opportunity.
- **Stan Bradshaw:** 1) Council should use the resources of the Adjudication Advisory Group and consult with Jim Gilman, DNRC Adjudication Manager; and 2) address the surface water/ground water issue. He said that a review should be conducted of the current water law mechanisms to determine if they are adequate, as well as reviewing how other states have addressed the issue. Mr. Bradshaw stressed the importance of assuring the accuracy of the adjudication.
- **Judge Loble:** 1) Council should direct the Water Court if the Legislature wants them to be more aggressive in challenging water rights claims; and 2) inform the Water Court if they see a problem. He stated that prior to adjudication, the burden is on the water user to prove their rights and historical use. After the adjudication, the burden of proof is on the objector.

MR. STRAUSE wondered about water conservation and Mr. Bradshaw and Mr. Bloomquist agreed that it is a tough issue to tackle and varies greatly upon location. They said that policymakers can't make a rule that would fit everyone's needs and desires. Mr. Stults added that conservation funding comes from the federal government and that policies are already in the law. Mr. Stults then addressed the mechanisms other states are using to fund the adjudication process. SEN. McGEE wondered how many adjudications have been done and what DNRC would need to speed up the process and ensure accuracy. Mr. Stults responded that 123,000 claims have been completed and estimated the need for 2-3 more attorneys and 5-6 paralegals and backup staff, if DNRC was put into the role of serving as an institutional objector. SEN. STORY wondered if there are computer system problems and Mr. Stults replied that it is not a fundamental structural problem. There is a new database and all of the information has not been converted yet. The Council then addressed the issue of the institutional objector and if DNRC should be the one to fill that role or not. Ms. Franz suggested that the Attorney General's office might be a better option. REP. HARRIS and Mr. Stults then discussed the user fees and the possibility of raising those; Mr. Stults cautioned about making this move however.

7. Discussion by EQC members on direction: The Council all voiced their opinions on what direction they would like the HJR 4 Work Plan to go. They thoroughly discussed the options of each topic of study, and the priority they thought it should receive. Ms. Evans reminded the Council that there is limited time and resources during the interim, so they needed to prioritize.

REP. PETERSON *moved* to make the Council's top priority the adjudication issues and the second the offstream water storage issue (including supply and distribution), and to also

address the change in use permitting process. SEN. TOOLE made a **substitute motion** to vote on only the adjudication first. The motion carried unanimously by voice vote. SEN. STORY directed the Council's attention to **Exhibit 21**, a letter from Alan Rollo and the Montana Watershed Coordination Council, bringing attention to the state's water issues.

REP. HARRIS **moved** to assign 0.5 FTE to the adjudication issues including ground water and surface water and 0.25 FTE to issues #4, 5, and 6 in HJR 4 regarding water storage. MR. EBZERY seconded the motion, which carried unanimously by voice vote.

SEN. WHEAT **moved** to adopt HJR 4 as discussed (covering issues #4, 5, and 6 on Page 2 of Exhibit 13). REP. PETERSON seconded the motion, which carried unanimously by voice vote.

IX. HJR 40 - WATER QUANTITY/PONDS STUDY

Larry Mitchell referred to Page 8 of the Work Plan (Exhibit 13) where the background is given and the study is explained. He also presented a table of HJR 40 interests and positions (**Exhibit 22**), the summary notes from the Montana Wetland Council meeting (**Exhibit 23**), and a list of the state education and outreach programs regarding ponds in Montana (**Exhibit 24**).

SEN. STORY said that the pond issue generated three pieces of legislation last session, so the risk of not looking at this issue, is that a bad bill could be passed next session that hadn't been researched as much as if the Council could come up with one. MR. EBZERY said that the EQC has credibility, but wondered if there are enough resources left to research and write a good bill. REP. BIXBY offered that they could look at making changes to the original bill, HB 505. Larry Mitchell said that he had spent about half of the 40 hours allocated, and wondered if they could work with the Department to revamp the bill. REP. HARRIS suggested that the Council ask the Montana Wetlands Council to study the issue and submit a report to the EQC. REP. CLARK asked if Mr. Mitchell could request information from the concerned parties regarding the consumptive designation issue for ponds, which Mr. Mitchell agreed to. Mr. Stults said that everyone believes that ponds are consumptive, so it is not a significant issue for debate. SEN. McGEE stated that he doesn't believe all ponds are consumptive.

X. HJR 43 - ZORTMAN-LANDUSKY WATER QUALITY

Larry Mitchell explained that HJR 43 is addressed on Pages 4-5 of the Work Plan (Exhibit 13). **Wayne Jepson, DEQ**, presented a PowerPoint to address reclamation status and water quality concerns with the mine (**Exhibit 25**). REP. HARRIS wondered about the option of declaring the mines a Superfund Site. Mr. Jepson responded that the EPA believed that the pollution was not significant enough to declare it a Superfund Site. MR. STRAUSE asked if all parties agreed on the preferred alternatives, and Mr. Jepson said that the Tribes are concerned that BLM identify more alternatives. MR. STRAUSE then inquired about any pollution remaining at the drainages. Mr. Jepson stated that the waste dump has been removed at King Creek, but there is no water to sample, and that it is also unknown at Swift Gulch. He said that they are testing ground waters as well as surface waters, and monitoring nearby wells. He explained that the results are variable, but the contamination typically remains shallow.

REP. BARRETT inquired about the EIS, and Mr. Jepson stated that it cost about \$400,000 (\$300,000 from the EPA, \$120,000 from the BLM) and took about 14 months to complete. He

XIII. OTHER BUSINESS

CHAIRMAN McNUTT noted that the public involvement decision with regard to HJR 4 was not addressed. SEN. WHEAT suggested to use the website as a method of feedback and REP. HARRIS brought up the option of teleconferencing. REP. HEDGES reminded the Council that radio stations will do public service announcements for free. It was determined that the Council wanted to narrow the feedback form to include HJR 4 only, and that Krista Lee Evans will draft a form for the Chairman and Vice Chairman to approve so it can be implemented, then evaluated at the next meeting.

XIV. ADJOURN

CHAIRMAN McNUTT adjourned the meeting at 5:48 p.m. The next meeting is scheduled for Wednesday and Thursday, January 14-15, 2004.