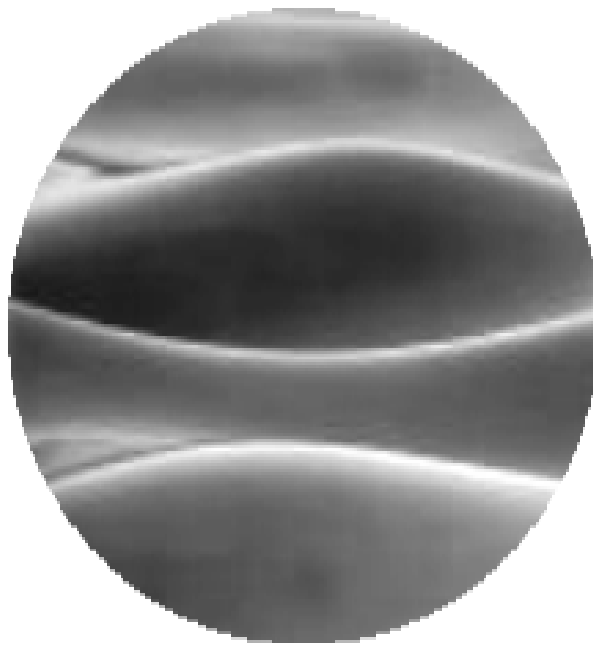


# **Montana's Water Policy -- 1997-98**



## **An EQC Communique to the Montana Legislature**

Environmental Quality Council  
State Capitol, Helena, MT 59620-1704  
406-444-3742

Fall 1998

## **Environmental Quality Council**

The Environmental Quality Council (EQC) is a state legislative committee created by the 1971 Montana Environmental Policy Act (MEPA). As outlined in MEPA, the EQC's purpose is to encourage conditions under which people can coexist with nature in “productive harmony”. The Council fulfills this purpose by assisting the Legislature in the development of natural resource and environmental policy, by conducting studies on related issues, and by serving in an advisory capacity to the state’s natural resource programs.

The EQC is bipartisan, meets 4-6 times a year, and has 17 members--6 state senators, 6 state representatives, 4 public members, and a representative of the governor.

## **Environmental Quality Council Members**

**House Members:** Representative Haley Beaudry, Representative Vicki Cocchiarella, Representative Kim Gillan, Representative George Heavy Runner, Representative Karl Ohs, Representative Bill Tash

**Public Members:** Mr. Bill Snoddy, Mr. Jerry Sorensen, Ms. Jeanne-Marie Souvigney, Mr. Greg Tollefson

**Senate Members:** Senator Vivian Brooke, Senator William Crismore, Senator Lorents Grosfield, Senator Bea McCarthy, Senator Ken Mesaros, Senator Barry Stang

**Governor’s Representative:** Ms. Julie Lapeyre

## **EQC Staff**

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	<h2 style="margin: 0;">TABLE OF CONTENTS</h2>	
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<b>1. THE EQC’S WATER-RELATED STATUTORY DIRECTIVES</b>	<b>1</b>
THE EQC’S BROAD ROLE	1
THE EQC’S PROGRAM-SPECIFIC ROLES	1
WATER-RELATED COMPONENTS OF OTHER EQC ACTIVITIES	1
<b>2. WATER POLICY DELIBERATIONS OVER THE 1997-98 INTERIM</b>	<b>3</b>
SUMMARY OF EQC WATER POLICY CONCLUSIONS AND RECOMMENDATIONS	5
<b>3. THE EQC’S BROAD WATER POLICY MANDATE</b>	<b>7</b>
ADEQUACY OF THE STATE’S WATER POLICY	7
IMPORTANT DEVELOPMENTS THAT AFFECT MONTANA’S WATER RESOURCES	12
EQC OVERSIGHT OF AGENCY ACTIONS RELATED TO WATER RESOURCES	20
COMMUNICATING WITH THE PUBLIC	25
<b>4. THE EQC’S PROGRAM-SPECIFIC MANDATES</b>	<b>27</b>
STATE WATER PLAN	27
RENEWABLE RESOURCE GRANT AND LOAN PROGRAM	32
WATER-RELATED RESEARCH	36
WATER DATA MANAGEMENT	41
<b>5. WATER-RELATED COMPONENTS OF FULL-COUNCIL ACTIVITIES</b>	<b>44</b>
FWP INSTREAM FLOW LEASING REPORT	44
HB 546 IMPLEMENTATION OVERSIGHT	44
GROWTH ISSUES	44
<b>APPENDIX</b>	<b>A-1</b>

### List of Tables

<b>Table 1.</b>	Subcommittee and Council Water Policy Topics Heard in the 1997-98 Interim	4
<b>Table 2.</b>	Summary of EQC Water Policy Conclusions and Recommendations	5

### List of Figures

<b>Figure 1.</b>	Issues, Options, and Subcommittee Actions Related to a Case Study of Water Rights and Subdivision Issues in the Gallatin Valley	22
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## 1. THE EQC'S WATER-RELATED STATUTORY DIRECTIVES



Montana's statutes specify two levels of Environmental Quality Council (EQC) oversight of water policy: 1) a broad oversight/evaluative/communicative role, and 2) several program-specific roles. The Council also has some general environmental and natural resource statutory authorities and duties, many of which relate to water resources.

### THE EQC'S BROAD ROLE. . .

The Council's broad water policy duties are listed below. The fulfillment of these duties over the 1997-98 Legislative Interim is the subject of Chapter 3 of this report.

#### **85-2-105. Environmental Quality Council -- Water Policy Duties.**

(2) On a continuing basis, the environmental quality council shall:

- (a) **advise** the legislature on the adequacy of the state's water policy and on important state, regional, national, and international developments that affect Montana's water resources;
- (b) **oversee** the policies and activities of the department [of natural resources and conservation], other state executive agencies, and other state institutions as those policies and activities affect the water resources of the state; and
- (c) **communicate** with the public on matters of water policy as well as water resources of the state. [Emphasis added]

### THE EQC'S PROGRAM-SPECIFIC ROLES. . .

The Council's four program-specific roles are listed below (subsections (a) through (d)). The fulfillment of these duties over the 1997-98 Legislative Interim is described in Chapter 4 of this report.

#### **85-2-105. Environmental Quality Council -- Water Policy Duties.**

(3) On a regular basis, the environmental quality council shall:

- (a) analyze and comment on the **state water plan** required by 85-1-203, when filed by the department [of natural resources and conservation];
- (b) analyze and comment on the report of the status of the state's **renewable resource grant and loan program** required by 85-1-621, when filed by the department;
- (c) analyze and comment on **water-related research** undertaken by any state agency, institution, college, or university;
- (d) analyze, verify, and comment on the adequacy of and information contained in the **water information system** maintained by the natural resource information system under 90-15-305; and
- (e) **report** to the legislature as provided in 5-11-210. [Emphasis added]

### WATER-RELATED COMPONENTS OF OTHER EQC ACTIVITIES. . .

In addition to the Council's water-specific statutory roles described above, the Montana Environmental Policy Act (75-1-324, MCA) confers broad, general duties on the Council, summarized as follows:

- gather and analyze information related to environmental quality and environmental conditions and trends in Montana;

- evaluate state programs and activities regarding their achievement of state natural resource and environmental goals and recommend improvements;
- review environmental programs to identify conflicts and suggest solutions.
- respond to legislative requests and make responses available to others;
- provide information to legislative committees, administrative agencies, and the public;
- assist legislators who are preparing environment-related legislation; and
- analyze natural resource legislative proposals and others that might impact natural resources;

Water-related components of other Council activities that may be relevant to the Legislature are described in Chapter 5 of this report.

≡≡≡	<b>2. WATER POLICY DELIBERATIONS OVER THE 1997-98 INTERIM</b>	≡≡≡
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The members of the Environmental Quality Council (EQC) created a Water Policy Subcommittee at their September 1997 meeting and charged the Subcommittee with (among other actions) assisting the Council in meeting its water-related statutory mandates. The EQC asked the Subcommittee to prioritize HB 546 oversight and to address and research other water-related issues as they saw fit. (HB 546 further directed Montana’s Department of Environmental Quality (DEQ) to monitor and assess water quality and develop water quality improvement strategies (referred to as Total Maximum Daily Loads or TMDLs) to address waters that are threatened or impaired.) The Subcommittee was to provide recommendations for Council consideration at the end of the Interim.

Water Policy Subcommittee members included:

**Rep. Bill Tash (Subcommittee Co-Chair)**  
**Rep. George Heavy Runner**  
**Rep. Karl Ohs**

**Sen. Bea McCarthy (Subcommittee Co-Chair)**  
**Sen. Vivian Brooke**  
**Mr. Bill Snoddy**

In its requests to the Subcommittee, the Council added that the four program-specific updates (as well as an update on water leasing) should occur in front of the full Council and that the Subcommittee’s approach to HB 546 (the Total Maximum Daily Load, or TMDL, bill) implementation oversight should seek to involve the full Council where appropriate.

The EQC’s Water Policy Subcommittee approved its work plan in January 1998, which included the following goals for the Interim:

- **Plan for, and pursue, a productive Interim, but retain flexibility to address issues as they arise.**
- **Ensure the Council has the information and products necessary to achieve its water-related statutory goals in a timely manner over the Interim.**
- **Enable Subcommittee members to better explain water quality regulation in general, and TMDL implementation specifically.**
- **Propose legislation to the Council, where appropriate, to address water-related policy issues.**

The Subcommittee employed a collaborative approach in its deliberations and to arrive at its recommendations to the Council.

The Subcommittee and the EQC met approximately every other month during the 1997-98 Interim. The major water-related topics heard by either the Subcommittee or the Council are listed in **Table 1** (see next page).

The following chapters describe the information, issues, and recommendations the Subcommittee and Council agreed should be forwarded to the 56th Legislature. Recommendations are summarized in **Table 2** and highlighted in relevant text sections.

**Table 1. Subcommittee and Council Water Policy Topics Heard in the 1997-98 Interim**

<u>Month</u>	<u>Water Policy-Related Topics Heard by . . .</u>	
	<u>Water Policy Subcommittee</u>	<u>EQC</u>
September 1997 (Helena)	Subcommittee Organizational Meeting	MEPA Training/Project Update Water Inf. System Update* State Water Plan* (proposed Wetland Chapter) Update
November 1997 (Missoula)	Water Quality/TMDL Training Examples of TMDL Efforts at Varied Scales Septic/TMDL Issues	3 Instream Flow Programs EQC tour of liner-board facility
January 1998 (Helena)	Wetlands Portion of State Water Plan* (cont.) Dam-Related Issues Return Flow Studies Fish Eradication Policy HB 546 Implementation Update 303(d) (Impaired/Threatened waters) Listing/Delisting Septic Regulation/Impairments	BMP Mini-Seminar (part 1) DEQ response to recent issues
March 1998 (Helena)	State Water Plan* General Update FWP Instream Flow Leasing Report 1998 303(d) List HB 546 and Interagency Coordination Statewide TMDL Advisory Group Update More HB 546 Policy Issues	BMP Mini-Seminar (part 2)
May 1998 (Great Falls)	Subcommittee Feedback on Proposed DOT Bill More HB 546 Policy Issues What will Qualify as Sufficient Credible Data? DEQ Presents HB546-Required "Schedule" Hilger Area Mine/Water Issues (unscheduled)	Water Research* Update Blackfoot River Landslide Bull Trout Management Superfund/Fuel Tank Issues
June 1998 (Dillon)	Subcommittee as State Water Plan Advisory Group on proposed Ground Water Chapter Gallatin Valley Water Right/Subdivision Issues	HB 546 Demonstration Tour: (Upper Beaverhead Valley) Dialogue w/Watershed Groups/ Conservation Dist. reps. Ren. Res. Grant/Loan* Update FWP Fisheries 2000 Update
July 27, 1998	Subc./Council Co-Chair Field Trip to Hilger Area to Discuss Mine/Water Issues	
August 1998	Further State Water Plan Advice to DNRC Draft Recommendations for: Water Policy, HB 546 Oversight, and FWP Leasing Reports	(no Council meeting in August)
September 1998	Decisionmaking on Reports	Subcommittee Report Update
October 1998	Respond to Comments on Report	Adopt Subcommittee Reports
December 1998	(no meeting)	Council Critique of Interim

\* Denotes a topic upon which the Council is statutorily required to analyze and comment (see Chapter 4).

The Council came to the following conclusions and recommendations based on its water policy deliberations over the 1997-1998 Interim. These statements are also interspersed throughout the report, by topic.

## Table 2. Summary of EQC Water Policy Conclusions and Recommendations

- Conservations districts and watershed groups associated with them need to be recognized for their efforts to resolve natural resource issues at the local level, and in dealing with the policies that are passed to them by the Legislature. And they are able to do so with very little financial resources to work with.
- Holding legislative committee meetings out of Helena is a very productive way to view water-related issues and program implementation in Montana, and to discuss local impacts and responses to state policy with a wider variety of Montana's citizens. It also provides broader general access to the Legislature by providing an opportunity to hear from citizens and agency representatives that would not normally travel to Helena to attend a legislative meeting. In addition to holding meetings outside of Helena, committee tours of natural resource uses and conditions in varied areas of Montana were beneficial, to see how legislation was working on the ground.
- Agency attempts to coordinate better within their own divisions and with other agencies are positive and important steps, but there is continued room for improvement.
- The Subcommittee recommended that DNRC water rights staff work with EQC staff to identify mechanisms and means to make the MEPA process associated with water permits more useful and credible.
- The Subcommittee endorsed the cooperative efforts in the Gallatin area to develop a combined water-related project application list, and the MACD effort to provide Board of Realtors-accredited courses related to water and rural issues.
- The Subcommittee recommended water rights information be incorporated into the next version of DNRC's *Guide to Stream Permitting*.
- The Subcommittee endorsed DNRC's efforts to enhance public access to the computerized water rights system.
- The Subcommittee recommended that the next Environmental Quality Council develop a policy for the 1999-00 Interim regarding when and how to respond to requests for site-specific Council oversight of natural resource issues, especially those that would involve Council member travel to a specific site. Consideration should be given to:
  - Whether the requestor has participated in available processes to address concerns
  - Whether there appear to be "real" policy issues that may be applicable to other Montanans and solvable;
  - Whether all parties subject to an issue or concern are willing to and available to participate in a discussion
  - Whether legislative involvement could affect or be affected by pending litigation in the matter; and
  - Whether EQC and/or agency staff are available to assist in distilling facts and issues.

The next Council should also ensure a standard approach for how such issues are raised to the Council.



**Table 2. Summary of EQC Water Policy Conclusions and Recommendations (cont.)**

- Future Councils (or a designated Subcommittee) should strongly consider continuing to serve as the State Water Plan Advisory Council. Subcommittees could serve as the focal point for review and comment in the development of the Plan sections, with full EQC involvement for final discussion and approval of each plan section.
- As suggested at the Great Falls Watershed Conference in December, funds are needed to cover administrative costs of local watershed groups. Funds are available for projects, but not general operations. The Subcommittee supports local watershed groups and conservation districts having the resources necessary to continue this important work. (See also related policy consideration in *HB546 Oversight Report*.)
- The Subcommittee encourages appropriate entities work with the agricultural industry to enhance development of realistic and practical BMPs for voluntary application within the industry. (See also related policy consideration in *HB546 Oversight Report*.)
- The Subcommittee recommends the next EQC, in collaboration with the Department of Environmental Quality's Remediation Division, and the Department of Revenue, should make a priority of undertaking a study to determine the need for and utility of tax and other types of financial incentives to encourage voluntary clean-up and redevelopment of contaminated sites within Montana. The incentive should be structured in a way to be sure that only persons with no prior connection to the property and who did not contribute to the contamination receive the incentive. The Subcommittee also recommends this concept be introduced to the 1999 Legislature as a Council-sponsored Study Resolution.
- Consistent with the EQC's statutory requirements, the Subcommittee recommends ongoing evaluation of whether water research funding and study topics adequately represent Montana's needs for information related to its water resources. This should involve continued EQC staff and Council member coordination and communication with the Montana State University system Water Center, and continued participation the Ground Water Assessment Steering Committee, and continued participation in professional water association annual gatherings, to assist in this evaluation. Where appropriate, reasonable monitoring in key watersheds could be encouraged.
- The Subcommittee endorses the current efforts by staff of the Montana Water Information System program to replace the Palmer Drought Severity Index maps and to develop a mobile computer lab to support local training on the use of computer tools to access and use water-related information (e.g. GIS, databases, and the Internet).

Note: Additional water-related findings and recommendations are within two other EQC 1998 Reports; 1) *Montana Department of Fish, Wildlife & Parks' Water Leasing Study*, and 2) *Montana's Revised Water Quality Monitoring, Assessment, and Improvement Program -- HB 546 and TMDLs in Practice*. Both reports may be requested from the EQC office. Recommendations in those reports are specific to those two topics, and are not repeated here.



### 3. THE EQC'S BROAD WATER POLICY MANDATE



Section 85-2-105, MCA requires the Environmental Quality Council (EQC) to:

- (a) advise the legislature on the **adequacy** of the state's water policy and on **important . . . developments** that affect Montana's water resources;
- (b) **oversee** the policies and activities of the department [of natural resources and conservation], other state executive agencies, and other state institutions, as those policies and activities affect the water resources of the state; and
- (c) **communicate** with the public on matters of water policy as well as water resources of the state.  
[Emphasis added]

## ADEQUACY OF THE STATE'S WATER POLICY

The EQC felt that one way to communicate their conclusions related to the adequacy of Montana's water policy was to describe some aspects they felt were positive components of state policy, and others where, based upon their personal knowledge and information gathered over the Interim, there may be some cause for concern.

### Things that are Working Well

- The Council applauds **conservations districts and associated watershed groups** for their efforts to resolve natural resource issues at the local level and in working with the policies passed to them by the Legislature, especially considering the limited financial resources they have to do so.
- The Council concluded that holding **legislative committee meetings out of Helena** is a very productive way to view water-related issues and program implementation in Montana and to discuss local impacts and responses to state policy with a wider variety of Montana's citizens. It also provides broader general access to the Legislature by providing an opportunity to hear from citizens and agency representatives that would not normally travel to Helena to attend a legislative meeting.
- In addition to holding meetings outside of Helena, **committee tours** of natural resource uses and conditions in varied areas of Montana were beneficial to see how legislation was working on the ground.

### Topics of Concern

- **Agency attempts to coordinate better** within their own divisions and with other agencies are positive and important steps, but there is continued room for improvement.

## Recent Court Challenges/Actions Related to Montana's Water Policy

Legislation sets natural resource policy, but the judicial branch of government is one entity involved in the determination of its adequacy. The following is a summary of relevant court cases where either state or federal judicial scrutiny has been focussed on water policy and/or its implementation in Montana.

The descriptions below were current as of early fall 1998. Please contact EQC staff to discuss the current status of these topics.

- **U.S. Environmental Protection Agency (EPA) challenged for not reviewing changes to Montana's water quality standards (American Wildlands v. Carol Browner)**

Three environmental groups filed a lawsuit against the EPA on June 27, 1998, regarding review of Montana's water quality standards. The plaintiffs alleged that the EPA violated the Clean Water Act (CWA) when it failed to review and approve (within 60 days) or disapprove (within 90 days) 1993, 1994, 1995, and 1997 revisions to Montana's water quality statutes and standards. The complaint references a recent court decision from Alaska that stated that, under the CWA, the EPA must review and approve or disapprove each new and revised state water quality standard before it takes effect. The EPA and the Montana Department of Environmental Quality (DEQ) disagree with the court's interpretation. As of December 1998, DEQ staff report there has been no appeal of the Alaska case.

The lawsuit requested a court order: 1) finding the EPA in violation of the CWA, 2) requiring the EPA to review and approve or disapprove revisions to Montana's water quality standards, 3) declaring Montana's standards ineffective or unenforceable until approved by the EPA, and 4) requiring the EPA to promulgate water quality standards for any disapproved portions of Montana's existing standards that are not corrected by the state within 90 days of the EPA's disapproval notice to the state.

Plaintiffs also requested the court to issue temporary restraining orders and preliminary and permanent injunctions as may be appropriate and necessary until final water quality standards that meet the requirements of the CWA are adopted by or for the State of Montana.

Implications: The Court may render the current Montana water quality standards not effective until affirmative approval by the EPA. Statutory changes made between 1993 and 1997 may not currently be valid. If the EPA disapproves any of the new/revised Montana water quality standards, those revisions might be declared invalid on the date of the EPA's disapproval. There has been no indication as to what injunctions or restraining orders would be necessary if the plaintiffs were to prevail. Significant concern has been expressed by the regulated community regarding the broad scale of potential economic and social impacts of the plaintiffs prevailing in this case.

- **TMDL lawsuit challenges Montana’s §303(d) list and TMDL progress** (Friends of the Wild Swan, Inc. v. Browner (1997))

Plaintiffs alleged that the EPA violated the Clean Water Act (CWA) by: 1) failing to promulgate a list of “threatened” and “impaired” waters for the State of Montana when Montana did not meet the appropriate deadlines to file such a list, and 2) by failing to promulgate Total Maximum Daily Loads (TMDLs) for each body or segment of water on the §303(d) list, as required by the CWA when a state has not made progress toward developing TMDLs. Plaintiffs also alleged that the EPA violated the Montana Administrative Procedures Act (MAPA) by approving “deficient” §303(d) lists submitted to the EPA by the State of Montana--the lists were deficient because they represented an assessment of only a fraction of Montana streams and failed to identify all threatened and impaired waters.

Plaintiffs requested that the court issue a declaratory judgment that the EPA is in violation of the CWA with respect to §303(d) lists and TMDLs for the State of Montana. Plaintiffs also requested the court to mandate the EPA to identify and prioritize a §303(d) list of all threatened and impaired waters in Montana and to establish TMDLs for those waters on the list within three years from the date of judgment.

Implications: Montana could lose primacy over promulgation of its §303(d) list and TMDL development, or less drastic, Montana could be required to meet specific, court-ordered deadlines for §303(d) list promulgation and TMDL development with close scrutiny and monitoring from the EPA. (Note: This case is further discussed in the Council’s *HB 546 Oversight Report to the Legislature*, available from the EQC office.)

- **Challenge to the permitting provisions of the Montana Water Use Act**, as amended by Senate Bill (SB) 97 (Confederated Salish and Kootenai Tribes v. Bud Clinch)

The Confederated Salish and Kootenai Tribes (Tribes) have sued the Montana Department of Natural Resources and Conservation (DNRC) and the State of Montana, challenging 1997 amendments to permitting provisions of the Water Use Act. Specifically, the Tribes assert that the DNRC has no authority to grant water use permits on the Flathead Indian Reservation until the Tribes water rights have been quantified.

In January 1998 the Montana Supreme Court accepted original jurisdiction (i.e. allowed a case to bypass the appeals court) of the case and classified the case for oral argument. Oral argument is scheduled for January 6, 1999.

Implications: Possible invalidation of the 1997 amendments at issue in this case and reiteration of the Montana Supreme Court’s 1996 decision in Ciotti that the DNRC has no authority to issue water use permits on the reservation until the Tribes’ reserved water rights have been quantified.

- **Confederated Salish and Kootenai Tribes have treatment-as-state status under the federal Clean Water Act (Montana v. EPA, 137 F.3d 1135 (1998))**

In response to a state challenge, the 9th Circuit Court of Appeals upheld the treatment-as-state status granted to the Confederated Salish and Kootenai Tribes (Tribes) by the EPA under the Clean Water Act. With treatment-as-state status, the Tribes have the right to set water quality standards for surface waters on Indian and non-Indian land within their reservation. The 9th Circuit decision upholds a 1996 ruling by U.S. District Court Judge Charles Lovell in Helena.

When the Confederated Salish and Kootenai Tribes set water quality standards on the reservation, the Tribes adopted the same standards as those in existence for the State of Montana. The Tribes' standards have remained the same, while the state's standards were revised somewhat in 1995 and 1997. The EPA, not the Tribes, asserts enforcement authority over NPDES permitting and Clean Water Act compliance on the reservation.

The state appealed the decision to the U.S. Supreme Court, which rejected the appeal without comment.

Implications: The Tribes may continue to set water quality standards on the reservation, which includes areas owned by non-Indians.

- **Mandated reconsideration of potential bull trout listing**

In 1994, an Oregon U.S. District Court ordered the U.S. Fish and Wildlife Service (FWS) to reconsider the agency's decision that bull trout were "warranted" for listing under the federal Endangered Species Act (ESA), but "precluded" due to other agency priorities. In response, on June 10, 1997, the FWS proposed listing the Columbia River population segment of bull trout as threatened under the ESA, initiating a one-year maximum time period within which to make the listing decision. On June 5, 1998, the Columbia population segment was listed as threatened and the St. Mary's (the area on the east side of Glacier National Park) population segment was proposed as threatened. According to the FWS, listing decisions are based solely on biological information.

Implications: The FWS must now prepare a formal Recovery Plan for the listed bull trout population segment (Columbia River). Agencies and others will have to consult with the FWS to discuss proposed projects which may have an effect on bull trout before project implementation. (See also discussion under "Endangered Species", p. 12 of this report.)

- **Westslope cutthroat trout lawsuit**

Several environmental groups petitioned the U.S. Fish & Wildlife Service (FWS) in May 1997 to list the westslope cutthroat trout as a threatened species under the federal Endangered Species Act. On March 3, 1998, the groups filed a lawsuit against the federal government citing the failure by the FWS to review the petition within the required deadline of 90 days after submission and plaintiffs requested a court order requiring the FWS to respond. A decision on whether westslope cutthroat should be listed is supposed to be made by January 1999.

Implications: This case is similar to the cases brought against the federal government which eventually secured listing of the bull trout as a threatened species. As a result of this and possible future litigation, westslope cutthroat trout may be listed as a threatened species throughout its historic range in Montana.

- **Water Court fees for adjudicating late claims**

The Montana Water Court issued an order requiring water masters and water judges to keep track of all time spent adjudicating late water right claims (claims not filed by the statewide adjudication deadline of April 30, 1982). Late claimants will be assessed \$25 per hour for adjudication of their claims. In addition, claimants will be responsible for general associated expenses, such as travel expenses, and telephone, postage, and copying charges that exceed \$10. The Water Court will not issue a final ruling on the claim until the late claim costs are paid, and the claim will be terminated if the costs are not paid within a reasonable amount of time.

Implications: Persons filing late claims that require significant processing time and expense may have high costs to pay before obtaining clear title to their water right, or may lose it if they cannot afford the processing expense.

- **Burden of proof on objector in water rights adjudication** (Burkhartsmeier Land Company, Case No. 40G-2)

The Water Court held that a properly filed water right claim establishes a prima facie (presumed true unless refuted) case for the claimant which meets the minimum threshold of evidence necessary to shift the burden of production to an objector. An objector must produce enough evidence to overcome the claimant's prima facie case by a "preponderance of the evidence" (meaning more probable than not). The claimant is then given an opportunity to introduce additional evidence in support of the claim.

Implications: When no objector presents contrary evidence, a claimant's properly filed claim will generally satisfy a claimant's burden of proving the water right. The Water Court cautioned, however, that it is not a rubber stamp and the Court is not compelled to accept a claim if no objection is filed.

## **IMPORTANT DEVELOPMENTS THAT AFFECT MONTANA'S WATER RESOURCES**

Given the Council's statutory requirement to "advise the legislature on . . . important state, regional, national, and international developments that affect Montana's water resources," the Water Policy Subcommittee decided early in the Interim that each of their meetings should contain an agenda item related to important developments. During these agenda items, EQC staff, Subcommittee members, and meeting attendees shared information on recent issues, actions, or events that relate to Montana's water resources. Over the summer months (1998), EQC staff collated all topics that had been discussed, then polled Subcommittee members and Council Co-Chairs regarding which topics they felt were important

enough that the Legislature should be advised of them. The Council member feedback formed the basis for the outline and topics provided below.

The descriptions below were current as of early fall 1998. Please contact EQC staff to discuss the current status of these topics.

### **HB 546 -- TMDL Bill Implementation**

HB 546, one of the major pieces of natural resource legislation in the 1997 Session, further directed the Montana DEQ to monitor and assess state waters and develop water quality improvement plans (i.e. TMDLs) for those waters deemed threatened or impaired. The Legislature provided over \$1.4 million in funding and authorized nine new FTEs to implement revisions to the program. The state already had a list of about 800 waters that were considered to have water quality problems, though there had been criticism on how that list had been constructed. A lawsuit was filed against the EPA concerning Montana's alleged lack of progress in water quality assessment and TMDL development (see separate discussion of lawsuit, p. 9).

As a result of the legislation and the need to show progress to ensure continued state primacy over water-related programs, the DEQ is working to move a major program revision forward. (This topic is covered in detail in the Council's HB 546 Oversight Report, available from the EQC office.)

### **Endangered Species**

On June 10, 1998, the U.S. Fish and Wildlife Service (FWS) announced the **listing of bull trout as threatened in the Columbia Basin**. According to Montana Department of Fish, Wildlife and Parks (FWP) staff, the impacts to Montana are potentially huge, but are somewhat unknown. The real impact will depend upon how the FWS enforces the listing, with enforcement generally driven by complaints and lawsuits.

Significantly, the FWS listed the entire Columbia basin (including much of Montana west of the Divide) as one "distinct population segment." This means that to fully recover the bull trout, recovery must occur throughout the basin, even though chances might be higher for recovery, say, in portions of Montana compared to portions of Oregon. FWP staff note, however, that the FWS has stated that even though the species would have to be recovered throughout the listing area to be de-listed, the FWS could propose rules that would reduce the requirements for "incidental take" permits, thereby allowing for reduced regulation in areas showing progress.

In general, a listing invokes a requirement for federal agencies to obtain consultation approval (under Section 10 of the ESA) for federally-initiated actions, state fish and wildlife agencies to obtain "Section 6" approval, and other entities proposing actions that could invoke "harm" to obtain an incidental take permit, which normally requires the preparation of a habitat conservation plan. Plum Creek is currently working on a Habitat Conservation Plan, that, if approved, would allow for blanket incidental take permits for the activities covered in the Plan.

One of the most important components of the listing is the determination of activities that would or would not constitute a violation of the Act. According to the Rule,

the Service believes the following actions would not be likely to result in a violation . . . provided the activities are carried out in accordance with any existing regulations and permit requirements --

- (1) Actions that may affect bull trout in the Klamath and Columbia River basins and are authorized, funded or carried out by a Federal agency when the action is conducted in accordance with an incidental take statement issued by the Service pursuant to section 7 of the Act;
- (2) Possession of Columbia River basin bull trout caught legally in accordance with authorized State fishing regulations . . .;
- (3) State, local and other activities that have been approved by the Service through development of Conservation Plans and special rules . . .

With respect to both the Klamath River and Columbia River bull trout population segments, the following actions likely would be considered a violation . . .

- (1) Take of bull trout without a permit, which includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting any of these actions, except in accordance with applicable State fish and wildlife conservation laws and regulations within the Columbia River bull trout population segment;
- (2) To possess, sell, deliver, carry, transport, or ship illegally taken bull trout;
- (3) Unauthorized interstate and foreign commerce . . . and import/export of bull trout . . .;
- (4) Introduction of non-native fish species that compete or hybridize with, or prey on bull trout;
- (5) Destruction or alteration of bull trout habitat by dredging, channelization, diversion, in-stream vehicle operation or rock removal, or other activities that result in the destruction or significant degradation of cover, channel stability, substrate composition, temperature, and migratory corridors used by the species for foraging, cover, migration, and spawning;
- (6) Discharges or dumping of toxic chemicals, silt, or other pollutants into waters supporting bull trout that result in death or injury of the species; and
- (7) Destruction or alteration of riparian or lakeshore habitat and adjoining uplands of waters supporting bull trout by timber harvest, grazing, mining, hydropower development, or other developmental activities that result in destruction or significant degradation of cover, channel stability, substrate composition, temperature, and migratory corridors used by the species for foraging, cover, migration, and spawning.

Other activities not identified above will be reviewed on a case-by-case basis to determine if a violation . . . may be likely to result. (Federal Register, p. 31673)

The wording in the rule is broad. Interpretive guidance has not been prepared, so the extent of its sweep is unclear. According to FWP staff, the FWS has only one person assigned to bull trout consultation and recovery in Montana. As a result, the FWS is focussing current efforts on Forest Service lands, where the agency feels they can get the biggest conservation "bang for the buck" in Montana. With any listing, the FWS encourages development of pooled conservation plans, rather than a plan for each incidental take permit needed. Questions loom as to: potential impacts to 310 projects, water diversions, the extent of "adjoining" associated with "uplands" in subsection (7) of the rule, the definition of discharge of "silt" in subsection (6), etc. There may be answers to many of these interpretive questions by investigating implications associated with other species listings, but Montana has many questions at this point.

There are actions Montana is taking, however. The Governor's Bull Trout Restoration Team has drafted a Bull Trout Restoration Plan which will receive public review in late fall 1998. The Restoration Team will reconvene to address the comments and compile a final draft. Once the plan is finished, the Team will probably be disbanded. The draft plan calls for establishment of a Steering Committee to oversee and coordinate implementation of the plan. According to FWP staff, that committee would likely serve as a state bull trout recovery team.

FWP staff also note that since the bull trout is now federally listed, the official recovery criteria will be determined by the FWS through their federal recovery planning process. The FWP hopes the FWS will recognize and use Montana's Restoration Plan as the basis for the Montana portion of a federal recovery plan. That would provide assurances to the state about what would be required to delist the fish, and



would ensure that the FWS's standards are not more stringent than the state's standards. The FWS is supposed to have a draft recovery plan completed within 18 months of listing, and a final within 30 months of listing, but often these deadlines are not met. FWP will be proceeding as if the Montana plan will become the basis for the federal recovery plan.

The FWP is also moving forward under a special section of the ESA (for state fish and wildlife agencies only) to get their fisheries-related projects approved under the Act. They are also moving forward on their **westslope cutthroat trout recovery plan**, with the hope that early movement will avoid a "warranted for listing" finding from the FWS next year. The range for this species is, basically, the west slope of the Rocky Mountains, plus the upper Missouri drainage. FWP staff note that, if this species is listed, the list of items considered "take" will probably be similar to that for bull trout. The FWP has drafted a conservation agreement and management plan for westslope cutthroat trout, but reviewers commented the draft falls short regarding formal commitments to implement and fund the items in the plan. As a result, the FWP is trying to formulate a strategy to formalize commitments for funds and resources needed to implement the plan.

In the summer of 1998, the FWP was also considering moving forward on a **Yellowstone cutthroat trout plan** (from the Yellowstone River headwaters to just above Billings) which may have had even more likelihood of approval since there had been no court action on this species yet. As of August 14th, however, the Yellowstone cutthroat trout was petitioned for listing under the ESA. The FWS, therefore, has 90 days from August 14th to review the petition and decide whether a status review is warranted. FWP staff feel a status review will likely be initiated, with a decision a year from listing of whether listing of this species is warranted.

In general, the FWS appears to be trying to support state-initiated conservation efforts, as long as court decisions "do not force their hand" in these matters. Interestingly, the **grayling** in Montana was headed for the ESA list, but the state has made efforts toward its conservation, has seen some success, and the petitioners have not, as yet, further pursued the issue in court. FWP staff agree that the proposed amendments to the ESA (i.e. Congressional S1180 in 1998) would assist them in obtaining additional state authority in managing listed species.

On another note, when the FWS listed the Klamath and Columbia stocks, the **St. Mary's (and two other non-Montana bull trout stocks) were proposed for listing**. A final rule on these should be provided in a year (by June 1999), though the St. Mary's would likely have less widespread implications to Montana than the Columbia listing.

Federal ESA listing decisions and implementation policies were one of the major multi-state legislative interests discussed at the July meeting of the **Legislative Council on River Governance** in Boise. The Council decided to collaboratively draft a letter to the U.S. Senate Majority Leader (Sen. Lott), encouraging Senate floor debate on S1180, the **proposed amendments to the federal Endangered Species Act**. (See also the "Multi-State Activities" section for further discussion of this group.)

### **Potential Electrical Utility Deregulation Impacts on Water Rights**

- On December 7, 1997, the **Montana Power Company (MPC) announced it would sell** its 17 hydroelectric dams and coal-fired power plants, get out of the generation business, and instead focus on marketing, transmission, and distribution of electricity. This was in response to

Montana's 1997 legislation related to electric industry deregulation. Soon after this announcement, water right holders upstream of one of MPC's generating facilities raised concern regarding water rights, as MPC would be selling senior water rights along with the dams. Irrigators who had junior water rights upstream of the dams in question were concerned that the new owners would put out a call, requesting the irrigators to leave more water in the river, allowing more water through the dam.

In response to these concerns, Governor Racicot met with the DEQ and DNRC in February 1998 to determine how to communicate these concerns to the Federal Energy Regulatory Commission (FERC). The group decided to request FERC to evaluate in its EIS process on the proposed relicensing of MPC's Missouri River projects the impacts of such a call. This EIS is expected to be completed by late summer of 1999.

The Legislature's Transition Advisory Committee on Electric Industry Restructuring also reviewed this issue.

### **Relevant Multi-State Activities Related to Water**

- The **Western Governors Association passed a resolution in June 1997 related to TMDLs** and states' ability to accomplish these mandates of the federal Clean Water Act (CWA). The resolution stated that the Association supports the goals of the CWA. The Governors note, however, that the states do not have the resources available to accelerate TMDL program implementation deadlines required by the settlement of lawsuits filed against the EPA. They urged the EPA to work cooperatively with the states to develop and implement these TMDL programs. The Governors suggested the President's fiscal year (FY) 1999 budget allot for: 1) realistic and stable long-term funding of TMDL projects that cover the entire spectrum of activities necessary to achieve the CWA's goals, 2) a holistic approach that provides funding for the many interrelated components of successful TMDL programs, and 3) recognition of the importance of coordination among TMDL programs and other federal agencies' programs and funding sources, such as Endangered Species Act requirements, the Farm Bill programs, the Safe Drinking Water Act, and federal land management planning requirements.
- On May 29, 1998, Senator Lorents Grosfield, Representative Bill Tash, two EQC staff members and DEQ Director Mark Simonich attended a **meeting in Denver sponsored by the National Council of State Legislatures (NCSL)**. The purpose of the meeting was to hold a dialogue on important federal policies between key members of state legislatures in the EPA's Region 8 consisting of North and South Dakota, Montana, Wyoming, Utah, and Colorado and key EPA program officials charged with implementing congressional policies. EPA Administrator Bill Yellowtail, a former Montana legislator, initiated the dialogue in an effort to include the concerns of state legislatures in the traditional federal to state executive branch discussions on important federal initiatives. Presentations were held on issues including new federal air standards for the regional haze rule, the federal Clean Water Action Plan, upcoming federal compliance deadlines for underground storage tanks, state environmental self audit legislation, and federal funding of state grants for federally delegated environmental programs.

One key issue that was identified from the meeting is the need for the EPA to provide accurate and timely responses to legislators during the consideration of legislative initiatives that may run

contrary to federal law or environmental policy and thereby jeopardize state program delegation or **primacy**. Also, legislators want an increased involvement in the budgeting process when state agencies and the EPA negotiate performance partnership agreements and grant funding for federally delegated programs.

EPA Regional Assistant Administrator, Max Dodson discussed President Clinton's new **Clean Water Action Plan** proposal which would budget \$538 million in new resources for FY 1999, an increase of 35%. Included in the package is an increase from \$105 million to \$200 million for Section 319 nonpoint source program grants. Also, the EPA is attempting to focus attention on water quality improvement through an increased effort in funding local watershed planning and the development and implementation of water quality improvement strategies (i.e. total maximum daily loads, or TMDLs) for impaired and threatened waters. A new initiative to develop a federal regulatory program that would better control runoff pollution from large agricultural confined animal feeding operations (CAFOs) is part of the proposed package.

Administrator Yellowtail and the regional legislators generally concluded that continuing a dialogue on these and other issues could be beneficial in providing legislators and the EPA with a better understanding of the respective concerns of each state in the implementation and funding of federally delegated environmental programs.

- In 1998, legislative leaders created a new multi-state entity, the **Legislative Leadership Council on River Governance**. Spurred by concerns over excessive executive branch and federal agency treading into the policy components of state natural resource decisions, the legislative leadership of Oregon, Washington, Idaho, and Montana decided to create an ongoing forum for state legislators to discuss critical regional issues in a bi-partisan manner. Topics identified to be of common interest at the first meeting included: endangered species recovery policy, water quality issues, water use, electrical deregulation, and transportation. The second meeting focussed primarily on endangered species policy. The adopted purpose of the Council is to

. . . assert state legislative duty and authority over natural resources and river governance, and to unite states for a proactive agenda of legislative action and communications

The membership is determined by the legislative leadership of each state; bi-partisan participation is encouraged. The group is facilitated by staff of the Council of State Governments, with state staff providing support to their respective state delegations. The Council has held two meetings so far; the next is planned for Spokane in the winter of 1998-99. Three 1997-98 EQC members (Rep. Cocchiarella, Rep. Tash, and Sen. McCarthy) were included in the six-member Montana delegation to the Council.

## **Relevant Federal Activities Related to Water**

- On October 18, 1997, Vice President Gore announced a set of **Clean Water Initiatives** to celebrate the 25th anniversary of the Clean Water Act. The initiatives directed federal agencies to develop a comprehensive Action Plan within 120 days to improve water pollution control efforts across the country. President Clinton also addressed the new initiatives in his 1998 State of the Union address. His budget proposal for FY 1999 included \$145 million of new funding for a new Clean Water Action Plan to prevent polluted runoff, as well as protect and restore critical

watersheds. Updates of action items and proposed budget items for the Clean Water Action Plan can be accessed at a new EPA web page: (<http://www.epa.gov/cleanwater>).

- Also associated with the Clean Water Action Plan, the federal Environmental Protection Agency (EPA) released for public comment a **draft strategy for additional controls on animal feedlot runoff**. The draft called for new water pollution control requirements, immediate inspections and increased enforcement for larger animal feeding operations. The EPA intends to foster a dialogue between the regulated community and other members of the public on how to better protect public health and the environment as well as encourage voluntary actions. News articles following the issue of this draft indicated concern among livestock owners about the implications of these new regulations. An EPA and U.S. Department of Agriculture joint draft was expected in July, with final regulations slated for November 1998. Updated information on this plan can be accessed through the EPA web page: (<http://www.epa.gov/owmitnet/afo.htm>).
- In October 1997 the **Western Water Policy Review Advisory Commission** (Commission) **presented a draft report** for public review, culminating two years of research, field investigation, public discussion, and Commission deliberation. The Commission was appointed by President Clinton under the Western Water Policy Review Act of 1992. The directive of the Commission was to undertake a comprehensive review of federal activities in the nineteen western states which directly or indirectly affect the allocation and use of water resources and to submit a report of findings to the congressional committees having jurisdiction over federal water programs.

Through a process facilitated by the Montana DNRC, the EQC Water Policy Subcommittee submitted comments on the Commission draft at a November 1997 meeting. The comments submitted indicated that the reviewers did not dispute the stated objectives in the report, but had specific suggestions related to certain aspects of the draft. An amended Commission report was sent to the President in early March 1998 and the final report was presented in late June. The document outlined recommendations for suitable water management, new approaches to river basins and watershed governance, and other changes in federal water resource policy. Included in these recommendations is an emphasis on restoring degraded watersheds, encouraging water transfers from farms to cities to accommodate population growth, and charging full-market value for water from new irrigation projects. Information on the Commission's products can be found on the Internet at (<http://www.den.doi.gov/wwprac>).

## **Dam-Related Issues**

- Staff of the Montana Department of Natural Resources and Conservation (DNRC) provided an update on the management and **conditions of Montana's dams** at the January 1998 Water Policy Subcommittee meeting. A leak in the East Fork Dam in 1996 brought dam stability issues to the 1997 Legislature's attention. The state owns 39 water projects, 22 of which are storage projects, as well as 300 miles of canals. The DNRC hopes to continue systematically turning inactive projects over to private ownership, having already completed transfer of canal projects that are not supported by a storage structure. Water projects generally have a projected life of between 50-75 years, and many of those owned by the state are reaching the end of this span.
- **A leak was discovered in the Tin Cup Dam**, southwest of Darby in the Selway-Bitterroot Wilderness Area, on May 9, 1998. This dam, constructed in 1906, is owned by the Tin Cup Water

and Sewer District. The earth fill dam's seepage around its outlet pipe again brought the topic of Montana's dam sufficiency to the forefront. Because of concern for public safety as well as a need for funds and resources which exceeded the capabilities of the District, the U.S. Forest Service assisted District-hired contractors in stabilizing the dam. The spillway channel was lowered 10 feet and a rock buttress was constructed on the downstream side of the dam. Phase 2 of this project began in late August and is continuing.

## Land Use-Related Issues

- Montana's **stream access** law allows travel for water-related recreational purposes within the mean high water lines of most of Montana's streams. In the spring and summer of 1997, some property owners in the Ruby River area reportedly began raising funds to finance a legal challenge of Montana's stream access law in federal court. Advocates of stream access formed a counter-challenge group and raised awareness of the issue by holding a protest float on the Ruby. The issue was twofold: stream access in general, and the more specific concern of access to rivers at county bridges. In June of 1998, the Department of Fish, Wildlife and Parks (FWP) issued a request for an Attorney General's opinion on stream access from road rights-of-way at bridges. As of July 1998 the opinion had not been issued nor (regarding the broader issue) was a legal challenge filed. (On a related topic, in the late summer of 1998, the counter-challenge group began discussing with sportsmen's groups, legislators, and the FWP the viability of proposed river management legislation similar to that introduced to the 1997 Legislature that would allow broader FWP involvement in river recreation management.)
- On March 30, 1998, a **major landslide entered the Blackfoot River**, blocking 200 yards of river two miles upstream from River Junction Campground, southeast of Ovando. The landslide involved 15 acres owned by a timber company. Montana Department of Environmental Quality (DEQ) officials later determined that the landslide occurred naturally and not directly by human activity. State officials planned to stabilize the slide by planting willows and other riparian greens, but otherwise leave the landslide alone. Meanwhile, the state alerted river floaters by placing warning signs at access points upstream from the landslide.
- During the 1997 Legislative Session, a group of legislators asked the Montana Consensus Council (MCC) to assess trends, issues, and concerns related to development pressure and management along **Montana's stream corridors**. Several EQC members were among the 80 individuals interviewed for the "situation assessment" (what the MCC called the product of their efforts) which followed. In conducting the assessment, the MCC concluded that various entities have different definitions for stream corridors.

The MCC concluded in July 1998 that a statewide consensus building process would not be appropriate at this time because there lacked agreement over: 1) the feasibility of consensus, 2) the scope of issues that need addressing, and 3) the urgency of addressing stream corridor issues. Nevertheless, interviewees endorsed consensus building in general. The MCC concluded that perhaps such a process could be invoked when more agreement can be garnered or when subcommittees are working on specific issues within the larger stream corridor picture.

Based on the inquiry, the MCC suggested three options for how to proceed: 1) rely on existing voluntary, incentive-based efforts, 2) seek new partnerships, and 3) develop legislative proposals.

The situation assessment was made available for public comment until August 7, 1998, and MCC staff sought additional comment through October 1998. Responses included the following repeated, refined, or new themes:

- Support voluntary, incentive-based efforts;
  - Promote new watershed-type councils as appropriate;
  - Use the Streamside Management Zone law and the BMP approach (Best Management Practices) to forest practices as a model for mining, agriculture, and other land uses;
  - Develop legislative proposals to address specific needs and opportunities; and
  - Realize that some stream corridor issues (i.e. certain riparian habitat issues) related to endangered fish species will probably have to be resolved in the courts.
- Staff of Montana's congressional delegation, as well as state and federal agency representatives, met in May 1998 to hear concerns from landowners regarding the U.S. Army Corps of Engineers' **permitting process for river related (i.e. bank stabilization) projects on the Yellowstone River**. One item discussed was the Governor's Yellowstone River Task Force's effort to lead a cumulative effects study on the river. As of July 1998 there had been no change in the permitting process.
  - The filing of Chapter 11 bankruptcy protection by a Montana mine in 1998 raised the issue of **bonding adequacy for mine reclamation** and the relationship between bonds and water-related commitments at Montana mines. In September 1998 DEQ staff provided additional information on this topic, noting that water treatment bonding at the mine was on more solid ground than the reclamation (dirt work) bonding, as the water treatment bonding is under a Consent Decree (based on cash/trust funds), and reclamation bonds are sureties (i.e. essentially insurance policies). DEQ staff added that not all of the cash for water treatment was in place; the mine company makes one payment a year, and there is a financial assurance bond in place to cover a missed payment.

### **Fisheries-Related Issues**

- Montana's **fish eradication policy** became an issue in the Spring of 1998 when the Department of Fish, Wildlife and Parks (FWP) proposed an eradication project to eliminate nonnative fish and introduce westslope cutthroat trout to a portion of Cherry Creek, a tributary to the Madison River, in southwestern Montana. The proposed action was a component of the statewide fisheries management plan (Fisheries 2000). Several public meetings were held to discuss the proposal. In July 1998, following the meetings, a decision notice was released announcing the initiation of the fish eradication plan. The elimination of nonnative fish was set for August 11th-16th. This project was stopped on August 11th when the owner of the land where most of the fish-kill was planned explained he was unaware that the eradication efforts were set to begin this year. He felt there remained several controversial issues which needed to be addressed before moving forward with the project. Poisoning of nonnative trout was canceled for Cherry Creek for 1998.
- As of early 1998, nearly 300 individual Montana waters had been tested for **whirling disease**, and the associated parasite detected at over 60 individual sites. Recent research of the disease focuses on the effects of water temperature on its transmission, trout species susceptibility, and the possibility that light initial infections may provide resistance to more severe cases. In addition, the economic impacts of whirling disease are being investigated, and disease monitoring in Montana's waters continues. Whirling disease was found in the Blackfoot River in the fall of 1997. This discovery was made accidentally when several cages of young rainbow trout in a metals-pollution

study were found to be mildly to severely infected. Previous tests of the Blackfoot indicated that this disease was not present in either 1995 or 1996. Updated information on whirling disease in Montana is available at two web sites: Montana's Whirling Disease Task Force web page, "<http://whirlingdisease.org/index.htm>" and Montana's Water Center web page, "<http://btc.montana.edu/watercenter/docs/whirling.html>".

- The Department of Fish, Wildlife and Parks (FWP) is pursuing a unique planning process to create a guide for managing the **fisheries of Canyon Ferry, Holter, and Hauser Reservoirs**. A unique aspect of this planning is that a working group guided by the Montana Consensus Council, and consisting of upstream and downstream fishing and business interests, will be collecting data, holding public forums, and providing input to the department in the initial stages of the planning process before a draft plan is created. The group will address the controversial issue of the management of walleye and trout in Canyon Ferry, and similarly affected Holter, and Hauser Reservoirs. Currently, an interim Canyon Ferry plan treats walleye as an illegally introduced species. Public information meetings were held July 15th and in mid-September.
- The **Bull Trout Restoration Team** (established by the Governor in 1994) continued its work in 1997 and 1998 to produce a restoration plan for bull trout. The Team's Scientific Group provided guidance on technical issues, including: habitat requirements and land use impacts, removal and suppression of introduced species, and the use of hatcheries and transplants in restoration. In early fall 1998, the Team completed a draft restoration plan and will seek public review on it in early December. After incorporating comments and producing a final plan, the Team will probably be disbanded. The plan, however, recommends the creation of a Steering Committee to coordinate implementation of the plan. (Additional information on this topic is provided under Endangered Species, beginning on p. 12).

## **EQC OVERSIGHT OF AGENCY ACTIONS RELATED TO WATER RESOURCES**

### **EQC Oversight Activities**

The EQC, in its role of general oversight of state agencies' programs related to water and other natural resource issues, conducted several inquiries into program implementation, including:

- Requesting that the DEQ respond to recent issues related to reorganization of the impact analysis bureau, mid-point progress on compliance and enforcement reporting, and other topics;
- Fulfilling a public request for a Council/Water Policy Subcommittee Co-Chair field trip to review water- and mine-related concerns in the Hilger area;
- Tracking (along with the EQC's Growth Subcommittee) DEQ's efforts to address jurisdictional issues in the review of subdivisions;
- Responding to an outstanding request to look into water right and subdivision issues in the Gallatin Valley area; and
- Implementing the first round of natural resource agency compliance and enforcement reporting, newly required via passage of HB 132 in 1997.

In addition to these activities, some topics discussed by the Subcommittee related both to the Council's broad oversight responsibilities, as well as potentially to water resources. Notably, the Subcommittee expressed concern over the Interim regarding **DEQ's loss of its subdivision review staff**, and noted that

there appeared to be continued issues regarding the program's ability to keep up with programmatic and statutory requirements for subdivision review.

## **A Water Policy Case Study**

In their Gallatin Valley water rights case study, the EQC's Water Policy Subcommittee used an individual citizen's concerns to investigate the general interaction of four sets of state policies: water rights and permitting, 310 permitting, MEPA, and subdivision review at the local and state levels. EQC staff provided a chronology of issues related to state and local policies in the situation, and the Subcommittee provided a forum in June for the requestor and related agency staff to air their views. Issues, options, and Subcommittee/agency actions related to this case study are described in **Figure 1** (next page).



**Figure 1. Issues, Options, and Subcommittee Actions Related to a Case Study of Water Rights and Subdivision Issues in the Gallatin Valley**

**Issues/Opportunities Identified**

**Options Discussed**

**Action Taken**

1) MEPA played a less than helpful role in the water use permit process; there is a heavy reliance on the objector process to elicit information and analysis; 1995 MEPA amendments that require an assessment of impacts to private property (i.e. water rights) were not incorporated into EA.

The Subcommittee could recommend that DNRC water rights staff work with EQC staff to identify mechanisms and means to make the MEPA process associated with water permits more useful and credible.

The DNRC requested MEPA training from EQC staff; training occurred November 17, 1998 and included a dialogue on how to better integrate MEPA into the water use permitting process. DNRC requested follow-up EQC staff assistance and training in 1999.

2) There is no prohibition to realigning a waterway, except for the general prohibition against an "adverse effect" downstream; the 310 process does not include a review of potential effects on water rights.

The Subcommittee could recommend that EQC staff develop legislative options for prohibiting realignment of a waterway until after relevant downstream water rights are considered.

This option was not pursued.

3) Subdivision development occurs before water rights are completely secured.

The Subcommittee could direct EQC staff to evaluate existing permitting statutes and proposals for coordinated permitting to see where there may be gaps regarding approval of subdivision development before water rights are assured. If there is insufficient existing authority to ensure a viable project (or one consistent with state or local permit conditioning), legislative options could be developed.

Department of Commerce staff advise that local jurisdictions have the authority to condition development to prohibit breaking ground until after all relevant permits are obtained. EQC staff effort is ongoing regarding legislative proposals for coordinated permitting.

4) There was conflicting evidence as to the availability of the requested amount of water, raising concerns about how DNRC's evidentiary test (i.e. preponderance of evidence) is carried out in deciding whether to issue a permit.

The Subcommittee could request that the DNRC provide a written summary of their interpretation of the preponderance of evidence test, including examples of when flows are insufficient to meet the test, and a description of how uncertainty is incorporated.

The DNRC provided a written response (available from the EQC office); no further action was taken.

5) There are general issues related to ensuring water right/ditch access in areas being subdivided.

The Subcommittee could direct EQC staff to evaluate the proposed subdivision-related legislation from the Montana Water Resources Association (MWRA) to see if the proposal resolves issues identified in this case study, and/or whether additions or changes could be made to it to more fully address the issues.

The Subcommittee recommended that MWRA, Board of Realtors, and Department of Commerce staff meet to discuss the MWRA irrigation/subdivision legislative proposal, determine if legislation is needed to address issues, and if so, whether the proposal needs revision. They also recommended that the group discuss whether some type of mandatory disclosure related to water rights would assist in resolving issues and to consider the portion of the proposal dealing with situations where it may be best to sever water rights from the land before subdividing.

**Figure 1. Issues, Options, and Subcommittee Actions Related to a Case Study of Water Rights and Subdivision Issues in the Gallatin Valley**

**Issues/Opportunities Identified**

**Options Discussed**

**Action Taken**

6) Additional general information for landowners is needed related to water rights and the need to protect them.

The Subcommittee could endorse the efforts of the Gallatin area agencies to develop a combined water-related project application list and determine whether water rights are appropriately addressed in that list and related processes. Also, the Subcommittee could suggest that water rights information in *A Guide to Stream Permitting in Montana* discuss prohibitions to adversely affecting a downstream water right holder and how to access water right information. The Subcommittee also noted that the *Code of the New West* publication developed in Beaverhead County to inform landowners of issues associated with purchasing rural lands in Montana could assist in this regard. The Subcommittee could ask EQC staff to check with the Department of Commerce to determine whether the similar publication they are contemplating would satisfy this need.

The Subcommittee endorsed the cooperative efforts in the Gallatin area to develop a combined water related project application list. The DNRC will pursue incorporating water right information into the next publication of *A Guide to Stream Permitting in Montana*. The Department of Commerce plans to produce a *Code of the New West*-type publication this biennium, but it will be less of a priority than any guidance they will need to reissue due to legislative changes. The Subcommittee also endorsed the Montana Association of Conservation Districts' effort to provide Board of Realtors-accredited courses related to water and rural issues. They discussed whether such training should be mandatory, but declined to make such a recommendation.

7) Even if water use permits are conditioned to allow use only in certain ways or at certain times and measuring devices are required concerns may continue if there is limited agency oversight or monitoring of whether conditions are met.

The Subcommittee could request an update from DNRC regarding rule proposals related to measuring devices, to determine whether concerns over monitoring/reporting of permit conditions are addressed to the satisfaction of the Subcommittee.

DNRC staff reported that the Task Force they convened to discuss potential rules for measuring devices recommended the department not develop rules, but follow existing informal policy. The Subcommittee took no further action on this issue.

8) (same issue as above)

The Subcommittee could check with other states regarding when water commissioners are invoked and funding mechanisms to do so. The results could be compared to Montana's system to see if any opportunities became evident.

Attendees at the August Subcommittee meeting provided some information on how other states and Montana differ. The Subcommittee decided not to further pursue the issue.

9) The case study provided an opportunity to learn about water permitting and investigate related policy issues "on-the-ground".

The Subcommittee could document issues and results in its *Water Policy Report to the Legislature*.

Done.

10) The water use permit in this case referenced only the higher of two seasonal flows, due to a flaw in the computer system.

The Subcommittee could recommend the DNRC make corrections to its computer system (to enable seasonal flow restrictions on a water permit to show up on the Permit) a priority for staff attention.

The DNRC noted the problem was not with the computer. The permit was reissued with both flow amounts.

**Figure 1. Issues, Options, and Subcommittee Actions Related to a Case Study of Water Rights and Subdivision Issues in the Gallatin Valley**

**Issues/Opportunities Identified**

**Options Discussed**

**Action Taken**

11) It appeared in this case that existing water rights information was not introduced into the deliberations until the objector process, although an applicant is required to submit such information with an application.

The Subcommittee could recommend that enhanced access to the computerized water rights system be made a priority, and request an update from representatives of the Water Information System and DNRC on obstacles and opportunities for doing so.

DNRC staff note this is a high priority for them and described recent efforts. The Subcommittee took no further action.

12) There may be other options to address issues.

The Subcommittee could direct EQC staff to forward options and background to others to gather additional suggestions.

The Subcommittee did not wish to further pursue this option.

13) Record keeping could be improved, and there was a mistake on the permit (see also issues #10 and 11).

The Subcommittee could investigate whether a legislative audit of the water permitting program had ever been done.

EQC staff contacted Audit staff, who noted they did not recall conducting an audit of the water permit program.

14) If the fish and wildlife flow applied for was really to fill a fire protection pond, shouldn't the process acknowledge that? Is that type of use non-consumptive, as required by the Upper Missouri Basin closure?

The Subcommittee could request information from DNRC on the relationship between dry hydrants, non-consumptive use, and water rights, including whether fire flows are non-consumptive.

The DNRC responded (available from EQC office). The Subcommittee took no further action on this issue.

15) Current statutes require an analysis of potential impacts to "agricultural water use systems"; is the implementation of this requirement adequate?

The Subcommittee could direct EQC staff to check with the Department of Commerce to see what assistance/guidance they provide to local governments regarding assessing impacts on agriculture under the Subdivision and Platting Act and see if there is room for improvement.

Guidance has not been provided since the statutory change was encoded (1995). Department of Commerce staff plan to issue related guidance after the 1999 Session. The department feels existing local mitigation authorities are broad. (See also actions under issue #5.)

16) Additional enforcement authority may be needed to relieve the need of a water right holder to pursue issues in court to protect water rights.

The Subcommittee could investigate additional enforcement authorities for the DNRC or others related to water rights and conditioned water permits. This could also involve reviewing the "complaint" process to see if that could be improved.

The Subcommittee did not wish to pursue this option.

## **General Council Conclusions and Recommendations Regarding Oversight**

The Subcommittee discussed the pros and cons of legislative oversight of site-specific natural resource issues. They concluded that, on the one hand, it is important to be able to view issues on-the-ground and discuss the consequences of state policies with the entities that are affected by them. It also provides an opportunity for investigating the interaction (or lack of) of multiple policies on Montana citizens; a typical legislative discussion may not deal with interacting policies. However, the Subcommittee concluded the Legislature must be careful which case studies they choose to pursue, as they cannot respond to all such requests, and fairness is a concern. They recommended the following:

- The next Environmental Quality Council should develop a policy for the 1999-00 Interim regarding when and how to respond to requests for site-specific Council oversight of natural resource issues, especially those that would involve Council member travel to a specific site. Consideration should be given to:
  - Whether the requestor has participated in available processes to address concerns
  - Whether there appear to be "real" policy issues that may be applicable to other Montanans and solvable;
  - Whether all parties subject to an issue or concern are willing to and available to participate in a discussion
  - Whether legislative involvement could affect or be affected by pending litigation in the matter; and
  - Whether EQC and/or agency staff are available to assist in distilling facts and issues.

The next Council should also ensure a standard approach for how such issues are raised to the Council.

## **COMMUNICATING WITH THE PUBLIC**

The following activities fulfilled the EQC's water-related statutory mandate to communicate with the public on water-related topics:

- EQC staff have partnered with others to produce guide books on the Montana Environmental Policy Act and on Montana's water quality and water quantity policies. They are made available upon request, free of charge. A portion of the Subcommittee's HB 546 Oversight Report has been constructed as a "primer" on this major revision to Montana's water quality program.
- This Interim, information for the Legislative Services Division and the EQC is available on the Internet for the first time.
- Council and Subcommittee agendas are posted to the computerized State Bulletin Board and mailed to the Council's 250+ person mailing list two weeks in advance of meetings.
- Council staff regularly prepare responses to information requests from Legislators, agency staff, and the public.
- The Council and its Subcommittees held three out-of-town meetings; in Missoula, Great Falls, and Dillon.
- The Council invited interested persons to join their HB 546 Implementation Tour in the Upper Beaverhead Valley in June.
- All Council/Subcommittee meetings are open to the public. Public comment is encouraged.
- The Subcommittee/Council chose to respond to certain issues raised by members of the public; communication was maintained with those raising the issues.
- Many Subcommittee/Council meetings involve panel discussions, targeted commentors, previous solicitation of options from known interested parties, and other mechanisms to solicit and incorporate public comment into Council deliberations.

- EQC staff and members attend various non-Council meetings and functions and provide relevant information regarding water policy and resources when requested. When resources permit, EQC staff respond to requests to moderate or speak at conferences and seminars related to water policy.
- This report was made available for a three-week public review and the final version will be available free of charge to those wishing copies.



## 4. THE EQC'S PROGRAM-SPECIFIC MANDATES



Section 85-2-105(3), MCA requires the Environmental Quality Council (EQC), "on a regular basis," to:

- (a) analyze and comment on the **state water plan** required by 85-1-203, when filed by the department [of natural resources and conservation];
- (b) analyze and comment on the report of the status of the state's **renewable resource grant and loan program** required by 85-1-621, when filed by the department;
- (c) analyze and comment on **water-related research** undertaken by any state agency, institution, college, or university;
- (d) analyze, verify, and comment on the adequacy of and information contained in the **water information system** maintained by the natural resource information system under 90-15-305; and
- (e) **report to the legislature** as provided in 5-11-210. [Emphasis added.]

This section of statute requires the Council to "analyze and comment" on four water-related programs and report to the Legislature. Each of the four topics was the subject of an agency update to the Council during the 1997-98 Interim. Each presenter was asked to provide the following information within their update:

- **history/mandate (how you got to where you are/what it is you're supposed to accomplish)**
- **major accomplishments/current status (where you are)**
- **goals (where you're headed)**
- **challenges and issues (specifically those related to state policy)**
- **requests of the Council/potential Council role (if any) in future efforts**

Relevant components of each of these updates are provided below, along with what analysis and comment the Council has made so far. Each writeup also includes a series of staff- or presenter-generated options for further Council analysis and comment and the resulting recommendations.

### STATE WATER PLAN

Section 85-2-105(3), MCA, requires the EQC to:

- (a) analyze and comment on the state water plan required by 85-1-203, when filed by the department.

Section 85-1-203, MCA, also describes necessary components and procedures of the State Water Plan process:

- (2) The department shall formulate and adopt and amend, extend, or add to a comprehensive, coordinated multiple-use water resources plan known as the "state water plan". . . . The state water plan must set out a progressive program for the conservation, development, and utilization of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses. Before adopting the state water plan or any section of the plan, the department shall hold public hearings in the state or in an area of the state encompassed by a section of the plan if adoption of a section is proposed.
- (3) The department shall submit to the environmental quality council . . . and to the legislature at the beginning of each regular session the state water plan or any section of the plan or amendments, additions, or revisions to the plan that the department has formulated and adopted.
- (4) The legislature, by joint resolution, may revise the state water plan . . .

(7) In developing and revising the state water plan as provided in this section, the department shall consult with the environmental quality council . . . and solicit the advice of the committee in carrying out its duties under this section.

## **Background**

From 1987 to 1994, the Department of Natural Resources and Conservation (DNRC) used a tightly structured planning process to develop sections of a statewide water plan. The collaborative, consensus-based planning process consisted of a governor-appointed Water Plan Advisory Council (WPAC), public meetings to identify relevant issues for study, broad-based steering committees appointed by the WPAC to analyze the identified issues, public hearings on the Steering Committee and WPAC recommendations, and Board of Natural Resources and Conservation (BNRC) adoption of the final plan sections. This phase of the water planning process produced chapters on the following issues: instream flow, water storage, the connection between water quantity and water quality, drought management, agricultural water use efficiency, water resource data management, and the relationship between state water rights and the authority of the Federal Energy Regulatory Commission.

The DNRC decided that during the 1993-1994 Interim, instead of analyzing a specific water issue, it would analyze the process itself and therefore created the State Water Plan Review Working Group. Using extensive public involvement, the Working Group produced a 17-point decision summary outlining suggestions on the State Water Plan process. The primary recommendation was that the DNRC continue developing the State Water Plan, addressing both statewide and watershed issues. The DNRC approved the 17-point decision summary regarding the water plan evaluation and the Legislature's Water Policy Committee (responsibilities of which are now assigned to the EQC) endorsed this document and the implementing legislation during the 1995 Session. The legislation, HB 192, failed. However, its concept of removing the BNRC from the state water planning process was, in effect, approved by the passage of SB 234 that eliminated the BNRC altogether.

Overall since 1987, eight bills have evolved from the state water planning process; seven were passed into law. The remaining bill, which would have ensured compliance with existing water well construction standards, was based upon protecting the customer. The Board of Water Well Contractors and the drillers opposed the bill and it died.

### **Current DNRC Water-Related Activities:**

Mr. Rich Moy, Chief of the Water Management Bureau in the DNRC, presented an update on the State Water Plan and the DNRC's activities regarding water policy at the March 12, 1998 EQC meeting. Mr. Moy stated that there are currently three State Water Plan issues at varying stages of development: 1) development of a comprehensive ground water plan, 2) a wetland strategy, and 3) integration of surface and ground water management. The first issue is the closest to completion, and will likely be considered for legislation during the 1999 Session. The second issue is further from completion and will not be covered during the 1999 Legislative Session. Finally, the third issue is still in the discussion stage.

Mr. Moy updated the Council on current focus areas of the State Water Plan and other efforts of his bureau:

- Currently, most of the DNRC's effort has been spent working in local watersheds. Staff are actively involved with the following watershed areas or groups: the Bitterroot Water Forum, the Upper Clark Fork Steering Committee, the Big Hole Watershed, the Flathead Basin Commission, the Sun/Muddy Creek Task Force, the Blackfoot Challenge, the Upper Yellowstone Task Force, and the Upper Tenmile Watershed. The DNRC provides a variety of services to these groups, as detailed in a summary distributed by Mr. Moy at the meeting (see **Appendix, p. A-1**).

- Several years ago, a collection of entities (including DNRC staff) formed the Montana Watershed Coordination Council (MWCC) to assist in ensuring that natural resource agencies active in Montana work together to provide more effective assistance at the local watershed level. A 1995 interagency Memorandum of Understanding (MOU) defines goals and procedures for watershed-related interagency coordination and cites the Coordination Council as an important player in this coordination.
- The DNRC is working on several projects in river basins, including work on the master manual for the Missouri River Basin Association, assisting the Northwest Power Planning Council on issues affecting the Columbia River Basin, and producing GIS data in several other areas. GIS data is currently assisting decision-making along the Milk River.
- The DNRC has recently become involved in providing coordination for two rural water supply systems, the Fort Peck Rural Water District and the Rocky Boy Central Pipeline. Mr. Moy stated that continued DNRC involvement is in question.
- The DNRC wrote grants and obtained funding for several groups, including a water quality improvement strategy (TMDL) grant for the Flathead, grants for return flow studies for Flint Creek and the North Fork of the Blackfoot, and an arsenic study for the Missouri River Basin.
- The DNRC is working in water education and coordinating with the Montana Watercourse to produce seminars, publications, and resource documents.
- The DNRC is knowledgeable in drought-related studies and is providing staff support to the Governor's Drought Advisory Council.

Mr. Moy explained to the EQC that because most of the State Water Plan focus areas are dedicated to assisting local watershed groups, there is no specific document summarizing this work. However, there are technical reports available. Mr. Moy added that no specific State Water Plan report has been submitted to the Legislature for the last two sessions.

**Water-Related Challenges facing the DNRC (as presented by Mr. Moy) include:**

(Please Note: The following topics are not specific to the State Water Plan. However, since the Plan has become broader in focus, and because these challenges may be of interest to the Legislature and others, they are provided below.)

- **Meaningful and accurate adjudication.** Questions exist as to the accuracy of the final decrees. The issue is how accurate an adjudication does the Legislature want to see? The DNRC has just completed their "comments" on claims in the Bitterroot drainage -- how will the Water Court consider these comments, and will they influence the Court's decisions?
- **TMDLs - how they relate to water rights.** A lot of "impairments" (i.e. causes for water bodies to be placed on the Department of Environmental Quality's (DEQ) 303(d) list), are related to nonpoint source pollution. Many return flows from irrigated agriculture create nonpoint pollution. The statute states there may be no effect on water rights, so there needs to be some assurance nonpoint issues can be addressed and water rights protected, specifically those dealing with flood irrigation. (Note: This issue is included as a "policy consideration" in the Council's HB 546 Oversight Report.)
- **The need for funds to support the administrative costs of local watershed groups.** As groups of local people begin solving local problems, these organizations are becoming effective modes of governance, but have limited funds for administration. About 40-50 groups are in various stages of development in Montana. About \$5,000-\$7,000 per group is an estimated figure needed to cover administrative costs.



DNRC will request additional funds from the 1999 Legislature to allow them to assist watershed groups and conservation districts with administrative expenses. (Note: This issue is also included as a policy consideration in the Council's HB 546 Oversight Report.)

- **Effects of development and population growth on surface water and ground water quality.** These issues need to be tracked as more people move into Montana's mountain valleys.
- **Funding for rural water supplies.** Funding is lacking, and there is little help from the federal government.
- **Statewide wetland strategy.** It is challenging to develop a statewide wetland strategy that is effective and provides incentives at the local level to help agricultural users and others participate in wetland conservation.
- **Influence on large federal reservoir operations.** The state would benefit from more influence on the operation of large federal reservoirs, specifically Hungry Horse and Libby Reservoirs. Mr. Moy noted that there is discussion that the Northwest Power Planning Council jurisdiction should be expanded so that states could have more control over how these reservoirs are operated.
- **Infrastructure.** Deteriorating water supply infrastructure will continue to be an issue for the next 10-15 years. There is a need to rehabilitate infrastructure at both private and federal dam and irrigation projects. According to Mr. Moy, this is a major issue.
- **Federal Energy Regulatory Commission (FERC) related issue.** With Montana Power Company (MPC) selling its hydropower facilities on the Missouri River, the DNRC's concern (as a water supply entity) is the effect a new owner might have on existing water rights. The DNRC worked with the Governor on wording to request FERC to consider in its final EIS the effects of a call on junior water users. MPC has never made a call on the junior water users. Since the priority dates on some of the power projects are very early (i.e. 1898, 1905, 1908, etc.), if MPC or its successor starts making calls, there could be significant impacts on the junior water users. Local economies have evolved over the last 50-60 years around these water projects.

The DNRC is also looking at a similar issue with Washington Water Power (WWP), which is a non-Montana-based utility with a huge water right (50,000 cfs from the lower Clark Fork Basin). It is, by far, the largest water right in the State of Montana--2.5 times larger than any other Montana water right and 5 times larger than any water right on Montana's portion of the Missouri River system. The company's actions can significantly affect water use, but their right is somewhat junior (i.e. 1950, 1951, and 1959 totaling 35,000 cfs, and 1976 for an additional 15,000 cfs). DNRC is trying to work with WWP to allow them to continue operating as they have operated historically (i.e. without making a call to junior water users), and encouraging the FERC to incorporate this relationship in its license renewal. DNRC has also been encouraging WWP to begin objecting to new provisional water use permits that would adversely affect their water right. Historically, WWP had not objected to any permits.

## **Council Analysis and Comment -- State Water Plan**

Topics discussed by the Water Policy Subcommittee following this presentation included:

1. A member of the Subcommittee asked why the failure of the proposed portion of the State Water Plan dealing with oversight of proper well construction standards was not listed as a concern. Mr. Moy responded that he did identify ground water contamination as a concern and that the intent of the bill that didn't pass was to protect the ground water consumer.

This same Subcommittee member asked whether there have been any effects of unregulated wells on the quality of surface water. Mr. Moy responded that there are problem areas, primarily in the more populated valleys, such as the Missoula Valley. He added that the statutes allow for the creation of local water quality districts; some are in existence, others are being considered. For small communities or farm lands, ranchers and farmers need to become more proactive to protect their water quality.

The Subcommittee member asked how a watershed group could protect their ground water without being able to regulate how ground water wells were constructed. Mr. Moy responded that a group could look at the force of statute (i.e. the Controlled Ground Water Area statute or creation of a water quality district). They could also choose to be more actively involved in subdivision review, could work with the Montana Bureau of Mines and Geology (MBMG) on their ground water assessment and more site-specific ground water studies (to build a case that is an issue). They could also seek to close a basin to ground water appropriation permits. Even though local watershed groups may not have authority, the people on a group can represent enough of a power base that they can influence decisions and affect what happens in the watershed.

Another Subcommittee member asked whether Mr. Moy thought that even though the well-related legislation did not pass--was there enough on the books to protect the customer? Mr. Moy responded in the negative, but noted the issue was sensitive, was a hard fight in the Legislature, but DNRC lost.

Mr. Moy commented that the well-related bill that passed in the Upper Clark Fork basin last legislative session was a positive step toward better ground water protection. Here, the burden is on the applicant to hire a ground water hydrologist and show there will not be an impact on surface water. A Subcommittee member agreed that this shift in the burden of proof was a good piece of legislation. He added that well-head protection laws are intended to protect from the co-mingling of ground water and surface water; it is a violation to use a well as a conduit for surface waters.

2. The question was raised by a Subcommittee member whether watershed groups can really emerge, given that they are primarily voluntary and do not have financial resources and legal expertise at their disposal. Mr. Moy responded that there are resources available to these groups. DNRC attempts to help any interested groups. If DNRC is unable to help, they will request assistance from DEQ, Conservation Districts, or the Natural Resource Conservation Service. Mr. Moy felt government was becoming more effective in assisting these groups solve their problems.
3. Regarding Mr. Moy's request, one member felt that the Subcommittee should recommend to the full Council that the Subcommittee serve as the Advisory Committee for the State Water Plan chapter that is being drafted. Later in the meeting this suggestion was revisited, and other Subcommittee members concurred.

As a result of the proposed decision to recommend to the Council that the Water Policy Subcommittee serve as the State Water Plan Advisory Committee, Mr. Moy commented that the issue he would be working with with the Subcommittee would be the Comprehensive Ground Water Plan. One Subcommittee member questioned whether the frequency and consistency of membership of the EQC Subcommittee made it an appropriate choice. Mr. Moy believed it did. Another member commented that this was an opportunity to better coordinate between water quality and water quantity. The Subcommittee began in this capacity at their June meeting.

**The Water Policy Subcommittee as State Water Plan Advisory Committee for 1997-98.** As noted above, the Water Policy Subcommittee granted a request by DNRC that they serve as the State Water Plan Advisory committee for the 1997-98 Interim. They received updates from DNRC on the status of the proposed Plan chapter, the efforts of the work group creating the chapter, public comment. The Subcommittee took particular interest in the topics related to liability for cleanup, the potential for financial incentives to encourage voluntary cleanup (i.e. a state "Brownfields" program), and interagency coordination. At its October meeting the EQC

endorsed the proposed Plan chapter and its recommendations, and requested preparation of a related study resolution (see Recommendations, below).

## **Council Recommendations**

- Future Councils (or a designated Subcommittee) should strongly consider continuing to serve as the State Water Plan Advisory Council. Subcommittees could serve as the focal point for review and comment in the development of the Plan sections, with full EQC involvement for final discussion and approval of each plan section.
- As suggested at the Great Falls Watershed Conference in December, funds are needed to cover administrative costs of local watershed groups. Funds are available for projects, but not general operations. The Subcommittee supports local watershed groups and conservation districts having the resources necessary to continue this important work. (See also related policy consideration in HB 546 Oversight Report.)
- The Subcommittee encourages appropriate entities to work with the agricultural industry to enhance development of realistic and practical BMPs for voluntary application within the industry. (See also related policy consideration in HB 546 Oversight Report.)
- The Subcommittee recommends the next EQC, in collaboration with the Department of Environmental Quality's Remediation Division and the Department of Revenue, should make a priority of undertaking a study to determine the need for and utility of tax and other types of financial incentives to encourage voluntary clean-up and redevelopment of contaminated sites within Montana. The incentive should be structured in a way to be sure that only persons with no prior connection to the property and who did not contribute to the contamination receive the incentive. The Subcommittee also recommends this concept be introduced to the 1999 Legislature as a Council-sponsored study resolution.

## **RENEWABLE RESOURCE GRANT AND LOAN PROGRAM**

Section 85-2-105(3), MCA, requires the EQC to:

(b) analyze and comment on the report of the status of the state's renewable resource grant and loan program required by 85-1-621, when filed by the department.

The purpose and policies of Montana's Renewable Resource Grant and Loan (RRGL) Program are described in statute as follows:

**85-1-601. Purpose and policies.** (1) The legislature finds and declares that in order that the people of Montana may enjoy the benefits of the state's water and other renewable resources, the state shall establish this long-term renewable resource grant and loan program providing financial and administrative assistance to private for-profit, private, nonprofit, local government, state government, and tribal government entities for renewable resource grant and loan projects.

(2) The purpose of the renewable resource grant and loan program is to further the state's policies, set forth in 85-1-101, regarding the conservation, development, and beneficial use of water resources and to invest in renewable natural resource projects that will preserve for the citizens of Montana the economic and other benefits of the state's natural heritage.

(3) The legislature recognizes the value of Montana's renewable resources; therefore, it is appropriate that a portion of the taxes and other revenue from nonrenewable resources be invested in the replacement of nonrenewable resources with the development of renewable resource projects that will continue to provide tax and other revenue and will preserve for the citizens the economic and other benefits of the state's natural heritage.

(4) The conservation, development, management, and preservation of water and other renewable resources are high priorities because a large portion of Montana's present and future economy is based either directly or indirectly on the wise use of these resources.

(5) Developments supported by this part may not significantly diminish the quality of existing public resources, such as land, air, fish, wildlife, and recreation opportunities.

(6) This renewable resource grant and loan program supports, in part, the implementation and development of the comprehensive, coordinated, multiple-use water resources plan known as the "state water plan". In making funding recommendations for grants and loans, the department shall give preference to projects that will implement state water plan priorities if, in all other respects, the proposed projects are equal in public benefit and technical feasibility.

The objectives of the RRGL Program are described in statute as follows:

**85-1-602. Objectives.** (1) The department shall administer a renewable resource grant and loan program to enhance Montana's renewable resources through projects that measurably conserve, develop, manage, or preserve resources. Either grants or loans may be provided to fund the following:

- (a) feasibility, design, research, and resource assessment studies;
- (b) preparation of construction, rehabilitation, or production plans; and
- (c) construction, rehabilitation, production, education, or other implementation efforts.

(2) Projects that may enhance renewable resources in Montana include but are not limited to:

- (a) development of natural resource-based recreation;
- (b) development of off stream and tributary storage;
- (c) improvement of water use efficiency, including development of new, efficient water systems, rehabilitation of older, less efficient water systems, and acquisition and installation of measuring devices required under 85-2-113; and development of state-tribal, state-federal, and state-tribal-federal water projects; and
- (d) advancement of farming practices that reduce agricultural chemical use.

(3) The renewable resource grant and loan program is the key implementation portion of the state water plan and must be administered to encourage grant and loan applications for projects designed to accomplish the objectives of the plan.

The statutes also require the department to solicit and consider the views of interested parties in its evaluation of proposed projects (85-1-611, MCA). The DNRC is required to submit a copy of the report to the EQC. (In the past, the DNRC submitted their report to the Water Policy Committee (WPC), but the WPC was eliminated in 1995 and its responsibilities transferred to the EQC.) The Council must analyze and comment on the report when filed by the DNRC.

## Background

Originally, the DNRC filed its RRGL program report just prior to legislative sessions, after the Water Policy Committee (WPC) had concluded its interim business. For this reason, historically, the WPC did not analyze or comment on the report.

The 1991-1992 WPC recommended in its report to the 52nd Legislature that the DNRC submit its draft report to the WPC at an earlier date. The DNRC complied with this request and submitted a draft report to the WPC at its October 1994 meeting. The WPC recommended that the next interim's WPC (responsibilities now held by the EQC) continue to work towards efficient and earlier participation in the review and prioritization process.

Additionally, the WPC remained concerned about the continued use of trust funds, through the grant process, to fund general operating expenses of state agencies. The Committee recommended that this issue be studied during the 1995-1996 interim if the 1995 Legislature did not take substantive action. HJR 28, which requested a study of Resource Indemnity/Ground Water Assessment Trust (RIGWAT) issues, failed during the 54th Legislature.

At their June 1998 meeting, the EQC heard a presentation from Mr. John Tubbs, chief of the Resource Development Bureau in the DNRC, on the RRGL Program and the 62 applications that the DNRC received for the 1997-1998 Biennium. Mr. Tubbs reported that the DNRC changed the format of the application process to allow sufficient time for EQC review before the legislative session.

Several types of projects in the RRGL Program are not subject to the legislative process. One of these, the Emergency Grant and Loan Program, covers projects which would likely incur damage to property or liability to the project's sponsor if they were required to wait for legislative review. Each biennium, the DNRC has requested \$125,000 of appropriation authority (funded through interest monies from the RIT tax) to support this program. As emergencies arise, the DNRC is able to respond with grant money, as well as loans. The Emergency Grant and Loan Program has \$10 million in emergency loan authority. This biennium, an emergency grant was issued for the City of Harlem to address a water intake facility pipeline collapse. The DNRC also issued one emergency loan for the East Fork Rock Creek Dam west of Phillipsburg to address unsafe conditions at the state-owned dam.

Mr. Tubbs stated that another program which is not reviewed by the Legislature is the private loan program, which provides loan funding for water projects. Ninety-nine percent of these loans are for purchases of sprinkler irrigation systems. Water associations have started to take advantage of this program. The DNRC is able to look at the revenue stream that an association presents and use this as the security. They are then able to loan up to \$300,000 at a fixed rate with a typical term of 15 years.

The last program which does not go before the Legislature provides private grants. Between 1994 and 1998, over \$200,000 was received. These funds are to be used to assist private individuals, partnerships, or corporations in meeting regulatory requirements. The grant is limited to \$5,000 or 25% of the project cost, whichever is less. The program has been successful in delivering assistance to rural entities with significant problems, allowing them to move forward towards regulation compliance. This legislative session, the DNRC will request \$100,000 for this program.

The core of the RRGL program involves requests by government agencies for grants and large loans backed by the Coal Severance Tax Trust. The DNRC coordinates with other grant and loan programs within the state government which fund water, waste water and solid waste facilities. These program representatives have coordinated to produce one common application which allows an applicant to apply for multiple sources of funding. Sixty-two applications have been submitted for this biennium (see **Appendix, p. A-2**). Of these, only one-third to one-half of the projects will be able to be funded. All but two of the grants approved by the 1997 Legislature have been contracted.

Mr. Tubbs explained that a point system is used to rank the projects. Key reviewers contact additional experts. If there are projects on the list which the EQC believes have strong benefits, the Resource Development Bureau is interested in the Council's suggestions. Points can be lost if the financial plan is not properly prepared, if the project would create adverse environmental impacts, or if the plan lacks clear project management goals and implementation. Reviewers also look very closely at the technical feasibility of the project. The greatest designation of points goes towards public benefits and is earned by projects which conserve, manage, or protect Montana's renewable resources. Points are also earned by projects which enhance renewable resources. Citizen support is considered. Tie breaker points are assigned to projects which support the State Water Plan.

After applications are ranked by the key reviewers, selected applications are reviewed by the Director and are sent to the Governor's Office. The selected applications then go into the Executive Budget Office and are reviewed before the Long Range Planning Committee, Subcommittee for Appropriations, and Senate Finance and Claims. All the project sponsors have the opportunity to give presentations before the final decisionmakers.

### **Challenges facing the Renewable Resource Grant and Loan Program (as presented by Mr. Tubbs) include:**

One challenge which may impact the Renewable Resource Grant and Loan (RRGL) Program is the possibility of legislative changes in Resource Indemnity Trust (RIT) tax funding during the 1999 Legislative Session. RIT interest revenue provides \$2 million per biennium for renewable resource grants. These revenues are allocated for grants at the beginning of the biennium before allocations are made to other accounts and programs. RIT interest earnings are lower than expected this biennium. As a result, FY 1999 ending fund balances in several accounts receiving these funds are projected to be negative. This includes the RRGL State Special Revenue Account which, in April, had an estimated ending fund balance of \$1,540,380. Even though the Renewable Resource Grant funds

are deposited into this account, the \$2 million allocation must be used for grants. Therefore, the negative ending fund balance does not affect any of the authorized grants.

The Office of Budget and Program Planning and the executive agencies that receive RIT funding have made significant progress in reducing the projected deficits. Agencies have reduced appropriations and in some cases increased revenues from non-RIT sources. With continued action this fiscal year, all but the RRGL account will balance. As of early fall 1998, a negative fund balance in the RRGL account of \$785,000 was expected to still remain by January 1999.

Because of the funding shortfall in RIT accounts and other long standing concerns over the use of RIT funds, Mr. Tubbs anticipates several bills seeking to amend the allocation of these funds. The DNRC does not believe that the Renewable Resource Grants will be impacted by new legislation; but in a legislative session anything can happen. The DNRC is leading an effort to develop legislation that would shift agency expenditures out of RIT accounts and increase allocations to grants and other programs. The intent of the DNRC proposal is to replace agency appropriations, which grow over time, with fixed allocations that can be maintained by this funding source. If successful, there will be increased revenues for grant programs, the orphan share program and other programs. Of interest to the EQC, the department is working with the Montana Bureau of Mines and Geology to establish a fixed allocation of RIT interest to provide full funding for the Ground Water Assessment Program for the first time since its creation.

#### **Mr. Tubbs' requests of the Council included:**

1. **Feedback.** Mr. Tubbs requests input from the EQC regarding the 62 applicants. Any recommendations from the Council for projects they believe have strong benefits, especially those which relate to the State Water Plan, are helpful.
1. **Support for grant programs.** RIT revenues represent only a small part of all state revenues, but RIT provides a critical funding source for natural resource efforts. The EQC has supported many different grants over the years that have provided funding to successful local and state efforts that protect and enhance Montana's natural resources. The DNRC hopes for continued support for these grant programs as the 1999 Legislative Session approaches.

### **Council Analysis and Comment -- RRGL Program**

Topics discussed by EQC following this presentation included:

1. One Council member asked if criteria were used to consider whether the project had a land use planning element. Mr. Tubbs responded that a planning element was included in project management points. Evaluators look at the alternative analyses to see if the applicants have considered the bigger picture.  
  
This same member asked whether the Growth Subcommittee could request that additional criteria, such as annexation possibilities, be incorporated into the point system. Mr. Tubbs stated that although it would be too late for this evaluation period, this issue could be brought to the table during the legislative process. The statute could be modified to specifically require that type of criteria. He suggested that the Growth Subcommittee and the Long Range Planning Committee look into this idea.
2. A Council member stated that most of the grant and loan applications have gone toward existing infrastructure. Many small towns around the state do not have subdivisions in their areas and are struggling to provide infrastructure. Mr. Tubbs responded that the infrastructure projects need to have a strong

connection to managing, protecting and improving water resources to score high on the evaluation. The communities which do well in the Resource Development Bureau's program are the ones that are installing water meters, lining lagoons, and protecting water quality.

3. One Council member asked if there was a \$100,000 maximum for grants. Mr. Tubbs explained that there is no statutory maximum for a grant. As program policy, the Resource Development Bureau has recommended a \$100,000 maximum for each project. Those projects requesting more funds need to go before the Long Range Planning Committee and justify why they should be funded more grant dollars than recommended.
4. A Council member remarked that the Municipal Waste Water Treatment System in Dillon has applied several times to the Long Range Planning Committee for funding assistance. They feel their problem is that their water and sewer rates are low and that these lower rates cause them to lose points in the application review process. Mr. Tubbs remarked that while they do conduct an affordability analysis, they do not penalize a community for low rates.
5. A Council member asked how many of the 62 applications were repeats--projects which did not get funded during the last session. Mr. Tubbs remarked that the number is likely small due to the length of time between submitting an application and receiving state funds.

## **Council Recommendations**

None.

## **WATER-RELATED RESEARCH**

Section 85-2-105(3), MCA, requires EQC to:

(c) analyze and comment on water-related research undertaken by any state agency, institution, college, or university.

The Council fulfilled this role in the following ways:

- EQC staff attended and provided a presentation at the 1997 annual meeting of the Montana Chapter of the American Water Resources Association (AWRA) (gathering of water-related researchers) in Butte.
- EQC staff made calls to agencies involved in water-related research, seeking their insight regarding the status of water research. Responses included recommendations for additional TMDL-related research and concern over the reduction in U.S. Geological Survey (USGS) monitoring stations.
- The EQC requested and commented on presentations from two prominent water-related university research programs--the Montana University System Water Center, and the Ground Water Assessment Program at Montana Tech.
- An EQC staff representative is a member of the Ground Water Assessment Steering Committee and has provided some analysis and comment on that research program at Steering Committee meetings.
- At the direction of the Council, EQC staff have provided follow-up regarding issues raised from the above activities, or requests made during the presentations.

The two programs that were invited to present updates are described below.

## **Program 1: Montana University System Water Center**

**Background.** As a result of two studies evaluating water research--one in 1988, and the other in 1990--the Legislature's Water Policy Committee (WPC) recommended that the University System restructure the Water Center to provide better services in water research and education and to improve communication with water users. The WPC closely followed Montana State University's restructuring of the Water Resources Center during the 1993-94 Interim. Following this restructuring, Dorothy Bradley, the new director, presented her plans for the Center to the WPC. She said that a useful Water Center would be one that provides a valuable interface between academic and other elements of society.

Presently, the Water Center's goals are threefold: 1) to provide useful service, research and information to all sectors in the state, 2) to develop problem-solving partnerships with the university system, government, and private sector, and 3) to serve as a switchboard for Montana water information.

Dorothy Bradley provided a progress report and perspective on the state of Montana water research at the May 1998 EQC meeting. She reported that when Congress set up 54 water centers at land grant institutions in 1964, each institute was given a small federal grant to pursue state-specific research and education programs. For the past three years, the funds were allocated among four regions, thus diminishing funding for Montana-specific research. However, recent congressional action indicates that state funding will be resumed, in which case the Center expects to receive \$80,000 for Montana water research.

The Water Center has met all of the objectives outlined in its 1989-92 Summary of Recommendations (see **Appendix, p. A-5**). Ms. Bradley believes this indicates that the university system has demonstrated its own "commitment to important state issues" as outlined in the Water Policy Committee's 1990 restructuring recommendations. Other accomplishments include establishment of the Whirling Disease Initiative, the Drinking Water Assistance Program, the Septic Suitability Study for the Gallatin Local Water Quality District, and the *MONTANA WATER* web page, all outlined in brochures which were distributed at the meeting. Ms. Bradley provided a summary sheet explaining three Montana research projects funded through the Water Center Regional Competitive Grant Program. The programs offered by the Water Center--particularly *MONTANA WATER*--are

regularly used by government, university, and private parties. Information gathered and produced by the Center is also shared at a variety of meetings including AWRA, Rural Water, and the Watershed Coordinating Council.

Two challenges face the Water Center in advancing Montana-oriented water research. The first is finding support when there is no state appropriation for that purpose. Furthermore, the University faculty compete for private and national grants. Most require a state match and those dollars are difficult to secure as well. A second challenge is coordinating with the various entities who are involved in water research and outreach, so as to correlate projects, share information, and avoid duplication. These entities include the USGS, U.S. Bureau of Reclamation, U.S. Bureau of Land Management, and state government.

Ms. Bradley suggested ways the EQC could assist in advancing water research:

1. **Setting priorities.** Much of the current research is reactive and often involves people scrambling for money when a problem arises. If the Council prioritizes where research most deserves to be focused, investigators will follow that direction and have an additional advantage in finding support for that focus.
2. **Advocacy.** Former EQCs (and the former Water Policy Committee) indicated they would support state funding for the Water Center if the university system took the first initiative. Ms. Bradley feels MSU has



done exactly that. The Water Center is well equipped to manage an expanded water research program, but would stand little chance of securing state funding without the EQC acting as an advocate.

3. **Fostering Partnerships.** There are attractive possibilities for expanding partnerships with the university system and the EQC. With help from the EQC, its staff and state government, university students and Water Center staff have written materials and constructed web presentations on topics including water rights and quality, TMDLs, I-122, whirling disease and mixing zones.

Ms. Bradley concluded her report stating that there is extraordinary capability and infrastructure within the university system to do state-oriented research. TMDLs and source water delineation are two subjects where these resources are available. University teams, student labor, and private sector mentorships are untapped resources waiting to be coordinated. Ms. Bradley feels these resources are underutilized due to lack of state funds.

## Council Analysis and Comment -- Montana Water Center

Topics raised by the EQC following this presentation included:

1. A Council member asked about the ability to quantify and identify the kinds of people utilizing the Water Center, and how these resources fulfilled their needs. Ms. Bradley reported that the *MONTANA WATER* web page tracks "hits", and identifies state of origin, as well as whether the user is from education (edu), government (gov), etc. The EQC member stated that it would be helpful to the Council to know what type of users seek this information, and how this information is used, if advocating for the Center. After the meeting, Ms. Bradley forwarded to the EQC a report of use of the web page, including; most popular pages, most downloaded files, weekday vs. weekend use, queries by location (state and city), etc. This information is on file at the EQC office.
2. A Council member asked whether the septic suitability study in Gallatin County was modeled after other studies and whether it was being used elsewhere in the state. Ms. Bradley explained that Kalispell, the Bitterroot area, and Madison County have expressed interest in the results, and the possible transfer of the approach. Another project, which involves assembling detailed, local natural resources data in a common database to track septic problems, is the brainchild of Professor Steve Custer and Water Center and Gallatin County staff.
3. A Council member asked whether the MONTANA WATER web site contains drought information. Ms. Bradley responded that the web does not address drought issues, and due to the shortage of funds, MSU eliminated its climatologist position several years ago. Volunteers have been continuing the data set, but a coordinated information base on droughts is not available at this time. Soil moisture content is a particular component that has been discontinued.

Mr. Jim Stimson, coordinator of the Montana Water Information System (MWIS), added that the MWIS is one of the partners in the drought monitoring program with the DNRC. They maintain a page on the web which addresses drought issues and is very user friendly. A precipitation index replacement for the Palmer Drought Severity Index Maps continues to be the missing piece of information in this program.

4. Ms. Bradley requested more directives from the EQC. Co-Chair Mesaros stated that this would be taken under consideration.

After the May EQC meeting, EQC staff (acting upon the Co-Chair's commitment to consider additional guidance for the Water Center) coordinated a meeting between EQC staff, Ms. Bradley, Mr. Stimson, and two University faculty members. The group discussed ways to facilitate the requested Council direction to the Center. One suggestion was to try to determine in a more focussed manner the water research status and needs of the state and to communicate that to the Council in the event they wished to make recommendations to the Center or otherwise address Ms. Bradley's requests.

In response to these discussions, Ms. Bradley circulated an e-mail questionnaire to over 100 Montana university system water faculty on the Center's network, seeking to address the state of water research in Montana. The questionnaire asked the following three questions:

- I. What are your three top candidates deserving university water research?
- II. What are your current areas of water research?
- III. What are your primary sources of research funding?

A list of potential topic areas was generated from the responses to the e-mail (see **Appendix, p. A-10**). Two observations made by Ms. Bradley from the results of this inquiry are 1) minimal financial support has come directly from Montana supporting water research, and 2) there is substantial agreement regarding priority research needs.

## **Program 2: The Ground Water Assessment Program**

**Background.** The Montana Ground Water Assessment Act, section 85-2-901 et seq., MCA, systematically funds efforts to evaluate Montana's ground water resource. Its major purposes are:

- to improve the quality of ground water management, protection, and development decisions within the public and private sectors by establishing a program to systematically assess and monitor the state's ground water and to disseminate the information to interested persons; and
- to improve coordination of ground water management, protection, development, and research functions among units of state, federal, and local government by establishing a ground water assessment steering committee.

Since the 1994-1995 Biennium, the Assessment Act has been funded by diverting 14.1% of proceeds from the \$666,000 per year generated by the Resource Indemnity and Ground Water Assessment Tax (RIGWAT), formerly the Resource Indemnity Trust (RIT) tax. However, the Ground Water Assessment Act programs experienced a serious funding short-fall in FY 1994 due to lower than expected revenues to the RIGWAT and an error within the Metalliferous Mines Tax law.

As a result, the programs received \$262,000 less than expected, causing personnel layoffs and a total stoppage of field work. The steering committee chair and the Montana Bureau of Mines and Geology staff made a series of detailed presentations to the Water Policy Committee, EQC, Revenue Oversight Committee, and Legislative Finance Committee. These efforts resulted in the Governor signing a grant agreement to ensure the Assessment Act programs would receive full funding for FY 1995, and to eliminate the deficit from FY 1994. In the following legislative session, the Legislature passed SB 46 correcting the error in the Metalliferous Mine Tax law. However, the Legislature did not modify the 14.1% basis or the funding cap of \$666,000 used in determining the amount of money the programs were to receive annually.

Mr. Tom Patton, program leader for the Montana Ground Water Assessment Program, and Jim Stimson, Chairman of the Ground Water Assessment Steering Committee, presented a status report to the EQC at the May 8, 1998 Council meeting (see **Appendix, p. A-13**). The Ground Water Assessment Program consists of the Ground Water Monitoring and Ground Water Characterization efforts under which about 720 water wells are measured quarterly and aquifer characterizations are on-going in the Lower Yellowstone River Area, Flathead Lake Area, and the Middle Yellowstone River Area. Work has just begun in the Lolo-Bitterroot Area and work in the Upper Clark Fork Area will begin within the next two years. The Ground Water Assessment Program also includes the Ground Water Information Center (GWIC) databases which store ground water information contained on drillers' logs and that are collected by the Monitoring and Characterization programs.

Staff at the Ground Water Information Center (GWIC) make information readily available by updating records in databases on a daily bases. They also respond to approximately 140 to 150 calls for information each month. The GWIC has information for almost 155,00 wells; water level measurements from about 5,500 wells; and high-quality site-visit data for about 3,500 wells.

Since July 1996, 1,280 customers have made a total of about 3,000 calls to the GWIC for information. Persons served include the general public, water well drillers, industrial/commercial clients, engineering/technical firms, and government regulators and scientists. Information supplied by the data base is most often used to determine drilling depths, conduct ground water research, and address issues surrounding subdivision of land.

The greatest challenge for the Ground Water Assessment Program is to effectively plan for income that arrives more than 10 months after the Steering Committee sets a budget. Program income is based on percentages of RIGWAT and Metalliferous Mines Tax receipts which are collected each year between March and May. Because the tax receipts fluctuate with the economic conditions for those commodities, the program has not received full funding since FY 1995. In June 1997, for example, the Steering Committee set the program budget to be \$495,000 based on information available from the previous legislative session, and previous performance of the tax. In FY 1998, economic conditions in the oil and gas and metalliferous mines industries were such that the program had received only \$396,000 by June 30th. The shortfall of almost \$100,000 prevented collection of water-level measurements and delayed the start of field work in the Lolo-Bitterroot study area. Two program employees were asked to work for other Montana Bureau of Mines projects not related to the Assessment Program, effectively cutting the Ground Water Assessment Program by about 2.0 FTE in the final quarter of the year.

Chronic shortfalls in income occurred each spring for FYs 1996, 1997, and 1998. The annual work slowdown each year, enacted so that expenditures could remain below the amount of money received, severely handicapped progress in the program.

Mr. Patton's request of the EQC on behalf of the Ground Water Assessment Program was:

1. **Stable funding.** It would be helpful if the Council would support a constant and stable source of funding for the Ground Water Assessment Program should legislation be proposed to restructure the way programs are funded by the Resource Indemnity Trust Tax. Full stable funding for the Ground Water Assessment Program would include up to \$666,000 annually (dependent on unobligated cash carryover between fiscal years and the funding cap already in statute).

## **Council Analysis and Comment -- Ground Water Assessment Program**

Topics discussed by EQC following this presentation included:

1. The Council discussed with Mr. Patton the difference between statewide well information and the areas of more intensive Characterization Study. Mr. Patton explained that each well in the Characterization Study area was usually visited only once. Wells in the statewide monitoring network were visited quarterly to obtain time-dependent water-level data. Mr. Patton noted that the designation of the three main study areas was the result of the Ground Water Assessment Steering Committee's priorities developed pursuant to the Montana Ground Water Assessment Act.
2. A Council member raised the question regarding coordination between the GWIC and other institutions. Mr. Patton remarked that the GWIC routinely sends data to various groups and that coordination is a Steering Committee issue addressed at each meeting.

## Council Recommendations

- Consistent with the EQC's statutory requirements, the Subcommittee recommends ongoing evaluation of whether water research funding and study topics adequately represent Montana's needs for information related to its water resources. This should involve continued EQC staff and Council member coordination and communication with the Montana State University system Water Center and continued staff participation in the Ground Water Assessment Steering Committee and in professional water association annual gatherings, to assist in this evaluation. Where appropriate, reasonable monitoring in key watersheds should be encouraged.

## WATER DATA MANAGEMENT

Section 85-2-105(3), MCA, requires the EQC to:

(d) analyze, verify, and comment on the adequacy of and information contained in the water resources data management system maintained by the department [DNRC] under 90-15-305 ...

Subsection 90-15-305(2), MCA, describes the functions of the water information system:

The Montana water information system shall make available and readily accessible, in a usable format, to state agencies and other interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and the existing and potential demand.

## Background

As Montana's water issues continue to be a source of controversy, reliable and accessible information becomes ever more important. Effective and efficient water data management, including the gathering, storing, and dissemination of water data, is necessary for a valid long term water policy that ultimately serves all Montanans.

In 1986, the Montana Water Information System (MWIS) was created and fully integrated into the Natural Resources Information System (NRIS). The former Water Policy Committee played a major role in the creation of the MWIS. That same year, DNRC delegated its responsibility to "establish and maintain a centralized and efficient water resources data management system" to the MWIS.

The MWIS provides a central contact point for locating and obtaining all types of water data. Statutory authority for the MWIS was transferred from DNRC to NRIS in 1997. The MWIS can be accessed through the State of Montana home page, "mt.gov", or directly at "[nris.mt.gov/wis/wis1.html](http://nris.mt.gov/wis/wis1.html)" .

Mr. Jim Stimson, Coordinator of the MWIS at the Montana State Library presented an update at the September 1997 EQC meeting (see **Appendix, p. A-17**). He restated that the MWIS was created to address the need for accessible and usable information on Montana's natural resources. Use of the Internet has greatly aided the ability to provide this information. Information requests have increased accordingly, from 500 staff mediated requests issued annually by phone or mail a few years ago, to 5,000 requests made by users who accessed information through the web pages in July of 1997. A recent survey distributed to MWIS users indicates a high demand for information on wetlands, surface water quantity and quality, ground water quality, and geology related to ground water studies.

Several goals were set for the 1997-1998 biennium. In response to the results of the user survey, additional information was uploaded to the Internet focusing on wetlands, surface water quantity and quality, and ground water and related geologic data. This information was improved by redesigning web pages to retrieve desired topics more directly through highlight options and button features. Water supply and drought monitoring issues were also

addressed by working with the DNRC to access information from the National Weather Service from which a map could be generated. Mr. Stimson has continued to coordinate with several committees, increasing data sharing and reducing duplication of effort among such groups as the Watershed Coordination Council, Wetlands Coordination Council, Volunteer Water Monitoring Advisory Group, and Drought Monitoring Committee.

MWIS staff are continuing their efforts to enhance the content and accessibility of the system by:

1. Improving water supply/drought monitoring capabilities by providing maps monitoring precipitation and soil moisture conditions statewide with the continued assistance of DNRC and the National Weather Service.
2. Supporting development of base-level information on Montana's wetlands by revitalizing efforts to complete the National Wetland Inventory for Montana and creating a wetland clearinghouse web page to notify users that this information is available.
3. Developing easy-to-use GIS applications to support and improve management of water-related information. This includes providing the capability for Internet users to develop and print out their own maps using GIS information, and the possibility for Intranet use of information within an agency. Currently this software exists on a six-month trial basis.

#### **Challenges and Issues facing the Water Information System include:**

1. Replacing the Palmer Drought Severity Index maps. Improved data availability and funding to calculate the replacement index locally are needed. Water information staff will continue to work with the DNRC and other cooperators on this issue.
2. A mobile computer lab is needed to support training of state agency personnel and citizen groups on the use of geographic information systems, databases, and the Internet for water-related applications like  
  
volunteer water monitoring, watershed management, and TMDL education and outreach. NRIS is exploring grant and contract opportunities to help meet this need.

Council members were invited to visit the NRIS site at the library.

#### **Council Analysis and Comment -- Water Data Management**

A Council member questioned how many potential users would have the necessary software to be able to use the information. Mr. Stimson explained that the only software needed was a web browser or Microsoft Explorer capable of reading Java script. Should the individual requesting information have no access to Internet software, Montana Water Information System could pull the data up and send a hard copy to the individual.

#### **Council Recommendations**

- The Subcommittee endorses the current efforts by staff of the Montana Water Information System program to replace the Palmer Drought Severity Index maps and to develop a mobile computer lab to support local training on the use of computer tools to access and use water-related information (i.e. GIS, databases, and the Internet).



There are other EQC efforts in the 1997-98 Interim that the reader of this report may be interested in. These are described below.

### **FWP INSTREAM FLOW LEASING REPORT**

The EQC is required to "complete" the final study report for the Department of Fish, Wildlife and Parks' water leasing study. Since this is a separate, and narrow, water-related topic (with proposed legislation) it has been produced as a separate report. This report will undergo a three-week public review during September and October, 1998. Persons wishing copies may contact the EQC office (444-3742).

### **HB 546 IMPLEMENTATION OVERSIGHT**

The Water Policy Subcommittee made a priority of oversight of the implementation of HB 546 (the TMDL bill), passed in the 1997 Session. This oversight effort and related conclusions and recommendations are described in a separate HB 546 Oversight Report. Persons wishing copies may contact the EQC office (444-3742).

### **GROWTH ISSUES**

The EQC also made a priority of looking into issues and policies related to growth, planning, and land use in Montana and created a separate Growth Subcommittee to carry out this inquiry over the 1997-98 Interim. Many topics in this (and other Water Policy Subcommittee reports) overlap with topics related to growth planning and development. The two Subcommittees have coordinated on such issues.

Persons interested in an update on the deliberations of the Growth Subcommittee may contact EQC staff at 444-3742 for further information.

*Electronic copies of the appendices for this report are not available. For paper copies, please contact the EQC Office.*