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ENVIRONMENTAL QUALITY COUNCIL
Agency Oversight/MEPA Subcommittee
February 7, 2002
FINAL MINUTES
ADOPTED MAY 8, 2002

COUNCIL MEMBERS PRESENT

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

STAFF MEMBERS PRESENT

Mr. Larry Mitchell

AGENDA

Attachment 1

VISITORS' LIST

Attachment 2

SUBCOMMITTEE ACTION

- Approved December minutes.

I CALL TO ORDER

- *Approval of Minutes*

On consensus the minutes of the December meeting were approved as corrected.

II COMPREHENSIVE ENVIRONMENTAL CLEANUP AND RESPONSIBILITY ACT (CECRA), CONTROLLED ALLOCATION OF LIABILITY ACT (CALA) PROGRAM FUNDING DISCUSSION

For supplemental information see **EXHIBIT 1**.

Sandi Olsen, Department of Environmental Quality (DEQ), said that the Resource Indemnity Trust (RIT) tax income is derived from the resource and indemnity ground water assessment tax and the oil and natural gas taxes. It is split out several different ways. The interest is split into four different accounts, three of which support activities in the department. After statutory interest distributions are made from this account, the Environmental Quality Protection Fund (EQPF) receives 9% of the remaining interest. There are also funds that go into the reclamation and development account from that interest. There are also funds that go directly into the account from direct collection of taxes, as opposed to collection of interest. The department uses these accounts for reclamation and development funding for regulatory activities, which include management of mining programs. Some of the funds are used to pay off debt service on bonds. There are many other various uses for this fund, such as corrective action implementation at underground storage tank sites, and matching federal grants for things such as ground water remediation programs.

The EQPF is used to support the state superfund program. A portion of that is used to match a federal grant for overseeing voluntary cleanup. The EQPF is intended to be a cost-recovery fund, but they can only recover monies that are directly assessed to the site management. Because of the declining balance in this fund, the Legislature granted DEQ the authority to assess interest on outstanding payments that are due to the department. They have therefore increased the cost recovery, but there is more that needs to be done.

The Orphan Share account is separate and is funded from oil and natural gas taxes and the resource indemnity and ground water taxes. Those funds are used to reimburse potentially liable parties for their share of remedial expenses that have been attributed to parties who are not economically viable.

MR. STRAUSE asked at what point the oil and gas taxes are assessed. **Ms. Olsen** said that they are assessed at the time of production. **MR. STRAUSE** said that those wouldn't show up directly on the consumer bills. **Ms. Olsen** said that she wasn't aware that they would.

MR. STRAUSE asked what the ground water assessment program is. **Ms. Olsen** said that is handled by Montana Tech's Bureau of Mines and Geology. **MR. MITCHELL** said that the oil and gas taxes are distributed to many places, including the RIT. They are assessed at the time of production at various rates depending on the type of well. The ground water assessment program is administered by the Bureau of Mines and Geology in Butte. They receive around \$660,000 per year from the RIT to help support the efforts of ground water assessment within the state. There are 2 basic programs: water quantity and water quality.

REP. HARRIS asked if the DEQ had any difficulty matching federal grants. **Ms. Olsen** said that she is not aware of any trouble at this time, but if there were to be trouble it would be driven by a decline in the income of the account. **Curt Chisholm, DEQ**, said that they have not traditionally had trouble matching federal grants. Their use of RIT money is defined by appropriations made by the Legislature for programs in the department. **REP. HARRIS** asked if the DEQ faced any financial challenges in the areas of CALA and CECRA. **Mr. Chisholm** said that they are

concerned about the adequacy of funding for the state Superfund program. This program is funded by an appropriation from the EQPF. That fund receives revenue from RIT funds. That was projected to be about \$480,000 for this biennium. In addition to that, cost recovery money is added to that program funding. That was projected in excess of \$480,000. They are not sure if they will receive all the projected RIT money. The EQPF is projected to be in deficit by \$172,000 by the end of the biennium. The DEQ is nervous. **REP. HARRIS** asked if Montana pays its share of the Libby superfund site, will that create shortfalls elsewhere.

Mr. Chisholm said that the Governor's Budget Office analysts are examining the RIT fund as a potential source for paying the 10% share of cleanup for the Libby site. It has the potential to create shortfalls in other areas. **REP. HARRIS** asked if any of these challenges prevent an effort by DEQ to address the high rate of personnel turnover within the DEQ. **Mr. Chisholm** said that they definitely have a turnover problem. Part of that problem relates to the competition for the technically trained staff. It is difficult with the current pay rates to get experienced people that are needed. They are in the process of examining an alternative pay plan, which will probably cost more money than what they are currently paying. The idea is to equalize the salaries that are paid within the department and try to make it a performance-based pay plan. It will create a drain on the resources of the department, but they think that in time that will pay benefits.

REP. HARRIS asked if they can implement that pay plan without further authorization by the Legislature. **Mr. Chisholm** said that they are looking at the possibility. There are not a lot of alternative funding sources. **REP. HARRIS** asked if the DEQ has authority to charge direct costs to the responsible parties or will that require a further legislative authorization.

Mr. Chisholm said that they have that authority now. The tradition is to charge the department's direct involvement in oversight on the state Superfund programs. They are exploring the impacts of charging all costs that relate to the DEQ's cost in overseeing and implementing some of the state Superfund cleanups. **REP. HARRIS** asked if those would cover the resources necessary for staff to testify at a Superfund hearing. **Mr. Chisholm** thought that it would. It is the cost of doing business. **REP. HARRIS** asked if they had made the attempt to charge indirect costs. **Mr. Chisholm** said that they had not. They are charging for what has been traditional under the policy for a number of years. They need to make some changes as quickly as they can. They will charge what they should be reasonably charging under the current law. **REP. HARRIS** asked if the budget office will prepare a recommendation that the Subcommittee could look at.

Mr. Chisholm said that the DEQ could do that in concert with the budget office.

MR. STRAUSE asked if the DEQ was going to attempt to recover all the costs from the Libby site. **Mr. Chisholm** said that the Libby site is a federal site and doesn't fall under the state superfund program. The state is obligated to pay 10% of the cost of the cleanup. This is something that the Environmental Protection Agency (EPA) will recover on and they will co-recover for the state. That will be a small amount of money. **MR. STRAUSE** asked how the cost recovery process for this site would work. **Ms. Olsen** said that it would depend on if there are potentially responsible parties (PRP) that are economically viable. If there are not, the federal government funds its share out of past collections of the former superfund tax. Montana would have to fund its own share. If there is a PRP, the federal government will attempt to recover for both the state and the federal expenses. That recovery process varies from site to site. **MR. STRAUSE** asked if the DEQ had the authority to charge interest. **Ms. Olsen** said that they did. **MR. STRAUSE** asked about the cost of cleanup for the Zortman-Landusky site.

Ms. Olsen said that site had not been worked on by the DEQ Remediation Division.

MR. STRAUSE asked where that money would come from. **Mr. Chisholm** said that the mine is currently being reclaimed with state oversight, but it is not a state Superfund site. They are using Pegasus Mine bond proceeds for the reclamation. The reclamation cost shortfall was in a dispute with the tribes about on whose land part of the site sits. The expectation is that the the tribes and the BLM will request additional federal funding from Congress. **MR. STRAUSE** asked what happens if the tribes don't get the money. **Mr. Chisholm** said that the department maintains that they can satisfy the requirements of the Montana Metal Mine Reclamation Act with the bond proceed dollars that they now have. That option is not satisfactory to the tribal governments.

REP. HARRIS asked if the state is going to run short of RIT funding for current and anticipated remediation work. **John Tubbs, Department of Natural Resources and Conservation (DNRC)**, said that if all the cleanups move forward, the state doesn't have the necessary resources to do them. This is why the sites are done on a priority system. **REP. HARRIS** asked what doesn't get done and how serious is that situation. **Mr. Tubbs** said that they go on a priority basis. The federal sites get done first. The CECRA sites get done next.

Mr. Tubbs explained that there are several pots of money that are aimed at specific areas. One of those is the Orphan Share program. This program has had significant resources, but now appears that the fund is starting to be expended and will not have the large balances that it has carried in the past. This program is not having any particular trouble. There is a very successful abandoned mine program. The DEQ, Board of Oil and Gas Conservation (BOGC), and other local governments can access the Reclamation and Development Grants Program for reclamation projects. This program has provided some key match money for the DEQ on some of their projects. This is most useful for smaller projects.

There isn't always a shortfall in RIT interest and revenue, but the revenue is fairly constant. The difficulty is that not all the costs that are appropriated are fixed costs.

REP. HARRIS asked if one of the adverse consequences of a shortfall is that the DEQ can't pay staff well enough to keep them, therefore causing a high turnover rate. **Mr. Tubbs** said that he feels that is a separate issue from RIT funding, but overall, every agency is going through an effort to review how they pay their personnel. They may not have the financial resources to bring salaries up to market level. **REP. HARRIS** asked, if the department is able to find the funds to raise the salaries, will that make them unable to address certain hazardous waste sites?

Mr. Tubbs said that would be correct to the extent that they can't retain high quality professionals in the key programs. The RIT funds are a precious resource. It won't be the long-term answer to the salary issue. **REP. HARRIS** said that there are some very serious economic consequences in not dealing with the medium priority sites. **Mr. Tubbs** said that this was the conversation that was had during the Orphan Share discussions. The sites do need to be addressed. **REP. HARRIS** asked when the department will decide whether to implement a new pay plan. **Mr. Tubbs** said that the DNRC has decided to move forward with that. **Ms. Olsen** said that the DEQ is trying to go forward with it this spring. **Mr. Tubbs** said that it is a complex issue. First you have to decide to move forward, and then you have to find funding. There isn't enough money in the RIT funding to implement Pay Plan 20. There may be some federal resources.

REP. HARRIS said that when there is such a high turnover of staff, it is a major problem for the responsible parties because they are dealing with several different site managers in the course of a cleanup. This is inefficient and slows things down. The Subcommittee would welcome an update from the agencies about whether they will be able to fund Pay Plan 20 or not.

MR. STRAUSE said that even if a local government wanted to jump into a cleanup project there is a roadblock because of staff turnover. The agencies are trying to move the personnel budget out of the RIT and into the general fund; does that disguise the real cost of the cleanup?

Mr. Tubbs said that they never moved anyone from remediation out of the RIT. They moved the DNRC's Water Resources Division, Centralized Service Division, and the part of the conservation district programs out of the RIT. There are still many appropriations within RIT accounts that are not associated with CECRA or CERCLA. **MR. STRAUSE** asked how much is being taken out of RIT that isn't directly related to CERCLA and CECRA. **Mr. Tubbs** said that an example would be the MSU program for licensing waste water system operators. There are renewable resource grants, the ground water monitoring program, etc. There are a lot of things that are not associated with remediation that are funded with RIT monies.

Mr. Chisholm said that the supplemental funding that is required for Zortman-Landusky is 33 million dollars, this is the figure that the tribes agreed to. This is over and above the bond revenue that is currently available to do the reclamation. The idea is to seek a federal congress appropriation to pay for that difference.

III PETROLEUM RELEASE COMPENSATION FUND

For supplemental information see **EXHIBIT 2**.

Sandi Olsen, DEQ, said that the Petroleum Storage Tank Cleanup Act was passed in 1989. This act set up a state-funded insurance program for the purposes of remediating impacts associated with releases from petroleum storage tanks. The purpose of the act is to protect public health and safety, ground water quality, and other state resources from the effects of leaks, spills and other releases of petroleum products; to provide adequate resources for owners and operators to undertake and be reimbursed for corrective actions; to assist tank owners and operators in meeting federal requirements; for financial assurance; and to provide tank owners with incentives to improve petroleum storage tank facilities in order to minimize the likelihood of accidental releases.

This act is administered by the Petroleum Tank Release Compensation Board. The board consists of seven members appointed by the Governor, including a representative of the financial industry, an attorney, a representative of the petroleum services industry or the petroleum release remediation consultant industry, a representative of the Independent Petroleum Marketers, a representative of the general public, a representative of the service station dealers, and a representative of the insurance industry. The board duties include administering the fund; determining whether to reimburse claims; conducting meetings, hearings, legal actions and other business to administer the fund; and funding the department to assist in administration. The board is authorized to adopt rules necessary to administer the funds and to apply for, accept and repay loans from the Board of Investments.

The program deals with releases from underground storage tanks as defined in statute, above-ground storage tanks, many of which have underground piping, and petroleum storage tanks.

The act provides that, should there be a release from one of these types of tanks, the board may reimburse eligible owners and operators for 50% of initial cleanup costs up to \$35,000. Cleanup costs exceeding \$35,000 are reimbursed 100% to the owner and operator. To be eligible for reimbursement, the owner and operator must stay in compliance with the pertinent regulatory statutes and environmentally protective fire marshal standards that the board has adopted.

In determining eligibility, the board's staff seeks compliance information from DEQ staff and the Fire Marshall's office. If an owner and operator is eligible for funding, working with a consultant they complete the necessary investigation and planning, conduct remediation, and submit claims to the board for reimbursement. The statute requires the claims be reimbursed for the costs that are determined to be actual, reasonable, and necessary.

In 1993, the Legislature modified the act to provide 100% reimbursement for the remediation of a release for remediation from double walled tanks. In 1995, the act was amended to insure that a petroleum release remediation consultant industry representative could be considered for board membership. The act was also modified to limit reimbursements to claims which were no more than 2 years old.

The board and its staff operate independently of DEQ, although they were included in department budgets until 1999. At that point the relationship was changed and DEQ now provides staff and other services to the board. The board is formally attached to the DEQ as a decision-making body. This reorganization resulted in cost savings. The department is now working with the board to more clearly define roles and responsibilities. In 2000, the board undertook a process to ensure that it is not reimbursing cleanup costs that would have been covered by private insurance.

The board and its members provide for oversight of the program, establish criteria for eligibility and claims processing, and make final determinations as to whether or not sites are eligible and claims may be paid. The petroleum fund services section of the DEQ provides 5 staff to support the board. The petroleum release remediation section of the department is staffed by 19 people, most are in Helena. There are 6.5 FTE in field offices and Kalispell who are responsible for overseeing corrective actions under the Underground Storage Tank Act and under the Petroleum Storage Tank Cleanup Act.

Funding for the reimbursements come from a Petroleum Storage Tank Cleanup fee, set out in 75-11-314, MCA. This is a 3/4 cent per gallon fee collected by the Montana Department of Transportation (MDT). This year's revenue is projected at 6.4 million dollars. They are projecting to pay out 5 to 5.5 million dollars for cleanup this biennium. When annual fees are not adequate, the board can take a loan from the Board of Investments. The total appropriation this year is approximately 7.2 million dollars.

MR. STRAUSE asked if, as the older tanks have been replaced, has any trend developed as far as the cleanup costs. **Ms. Olsen** said that the costs are not going down. Inflation is a factor. The ten-year average costs for site cleanup was approximately \$55,000 per cleanup. The average of the last two years was approximately \$74,000 per site. There is a decline in the number of sites coming in.

REP. HARRIS asked if any calculations had been done in terms of whether they would be exceeding the revenue from the petroleum tax. **Ms. Olsen** said that the number of releases being reported is dropping off, however, they have not yet incurred all of the expenses for those releases. Over time there will be a period where the actual expenses for those releases will exceed the annual revenue. However, those sites will be cleaned up and the demand for cleanup will drop off. **Mr. Chisholm** said that they are not sure that the fund is solid. They are looking at a projected fund balance at the end of the fiscal year of \$50,000. They began the year with \$800,000. The appropriated expenditures were in the \$7 million range. The anticipated income from the fee generates \$6.4 million. They are operating in a deficit. At this point there are about 800 sites in the state that are still open. The problem is that they can't identify the status of each of those sites relative to the stage that they are currently in. Many of those sites are in a monitoring stage. At some point in time, they will have to redefine the expectations of the DEQ in terms of how long a site is kept open. **REP. HARRIS** asked if the board or the DEQ has thought about asking the Legislature for additional revenue. **Mr. Chisholm** said that the board has mentioned that as a possibility. They feel that if the fee that is already in statute were to increase by 1/4 cent, that would create about \$2 million per year for the fund. The board also can borrow money from the investment pool at any time they feel the fund is in need of additional cash. The DEQ is advising the board not do this at this point in time. The third option is to have the board pay claims up to the level of revenue for each fiscal year. This would send a signal to the regulated community that if they experience a spill and they aggressively try to clean it up, they may have to wait a considerable amount of time before they are reimbursed for their expenses. This could have a negative impact on cleanup actions being undertaken.

REP. BARRETT asked if any of the 800 remaining sites are state owned. **Mr. Chisholm** thought that some of them are owned by the Montana Department of Transportation (MDT). **Ms. Olsen** said that there are also some sites that have been abandoned and could be foreclosed on by local government. There are also some county-owned sites.

MR. STRAUSE asked if the regulations in place now will prevent this from happening in the future. **Ms. Olsen** said that she feels they have excellent control of minimizing the potential releases from underground tanks and piping.

REP. HARRIS asked if they had identified almost all of the releases at this point. **Ms. Olsen** said that they don't have the data to answer that question. The number of reported releases is dropping. **REP. HARRIS** asked how many of the open sites have approved work plans. **Mr. Chisholm** said that they are not sure about the stages that the various sites are at. That is the kind of profile that is needed. **REP. HARRIS** asked if they could count the number of approved work plans for the open sites. **Ms. Olsen** said that in theory all of the sites have approved work plans. Some work plans are not cradle-to-grave plans. They are not able to know if some of those have fallen through the cracks. **REP. HARRIS** said that there are some significant data shortages that are preventing them from evaluating their future costs in terms of running the program. What do they plan to do to address this? **Mr. Chisholm** said that they are going through the process of manually reviewing the files of all of the open sites to record precisely the status of those sites. **REP. HARRIS** asked if that would tell how much money is needed to do everything. **Mr. Chisholm** said that would be a separate exercise, but could be done using the information that they are gathering. **REP. HARRIS** asked when they will be able to say how much it will cost. **Mr. Chisholm** said that they would be able to have preliminary

discussions and recommendations late spring or early summer. **REP. HARRIS** said that the Subcommittee would be interested in the recommendation.

Tim Hornbacher, Petroleum Tank Release Compensation Board, said that he would protect this board because he has seen what this fund has done. It has saved people's lives, kept them from going bankrupt. We are now suffering from the sins of the past. The fund is well spent.

REP. HARRIS asked if the fund is going to run out of money. **Mr. Hornbacher** said that the fund is going to run out of money unless they can figure out how to cut expenses. There are still ongoing releases coming in all the time. 3/4 of a cent is a small price to pay to protect the environment.

Joe Murphy, Neil Consultants, said that in June 2001 he was appointed to the Petroleum Board as a representative of the consulting industry. When he accepted the appointment, he thought that he knew all the regulations and other information. He soon learned that he knew very little about the fund and how it operates. The fund was established approximately 13 years ago and was going to operate at a balance of between four and eight million dollars. The fund has dropped well below the \$4 million that was expected to be the minimum. There is an existing principle balance on a loan with the Board of Investments. This is being paid in annual payments. With the projected year-end balance of \$50,000, they are already operating in the red.

Because it is the owner's responsibility, they feel that with the fund status there is a strong potential that the ability of the owner to do cleanup is in jeopardy. The most important purpose of the fund is the protection of human health and the environment. Many of the sites potentially can impact human health. It is the board's opinion that those problems need to be addressed to ensure that the water supplies are not impacted. They feel that there needs to be attention given to whether or not the owners and operators can address their responsibilities.

REP. HARRIS asked if the note that is due will erase the ending balance of the fund.

Mr. Chisholm said that the board borrowed \$1.2 million in 1997. They paid that off in installments over the last 5 years and they still owe \$700,000. This means that there is an outstanding balance of \$700,000 against a cash balance of \$50,000. There is no expectation that the amount owed has to be paid off immediately. **REP. HARRIS** asked if they make an interest payment this year, does it wipe out the cash balance. **Mr. Chisholm** said that the interest and principle payment anticipated was included in the budget projections. **REP. HARRIS** asked how long the projection was to pay off the \$700,000 loan. **Mr. Chisholm** would find that information.

REP. HARRIS asked if the board is attempting to clamp down on expenditures. **Mr. Murphy** said that is one of the primary objectives. While there may be cracks in the system that would allow over expenditure to a certain level, he doesn't feel that is a gross problem. **REP. HARRIS** asked if the potential deficit would create a situation where there will be incentives to postpone necessary remedial action on cleanup of the existing sites. **Mr. Murphy** said that may be a potential problem. **REP. HARRIS** said that one option is to spend within the budget, but this may lead some owners to not be environmentally aggressive. What are the consequences of that course of action? **Mr. Murphy** said that the potential exists that if the corrective action is not addressed in an aggressive fashion, it could allow contamination to spread and become more costly to remediate in the future. His feeling is that the owners and operators who have paid their deductible amount have their hands tied in aggressively cleaning up the site. They get to

that point and want to see action done. Because of the status of the fund, there is an industry wide concern that if they attempt cleanup, it will further damage the fund's status.

MR. STRAUSE asked if Mr. Hornbacher is a retail dealer. **Mr. Hornbacher** said that he was. **MR. STRAUSE** asked if there is a retail dealers' association. **Mr. Hornbacher** said that there was and he was a member. **MR. STRAUSE** asked if he kept the association advised as to the financial problems of the fund and would there be support or opposition to a quarter cent fee increase. **Mr. Hornbacher** said that they are not asking for an increase. He said that the fund is like a new married couple who planned to have a baby, but instead had three at one time. He wouldn't be against the increase. The association is aware of the fund balance. **Mr. Murphy** said that there isn't a strong opinion in the association one way or another. The feeling is that if it is necessary to assist the owners and operators address their responsibilities, the association will be supportive.

Mark Johnson, RTI, wanted to underscore the importance of the program and fund. There needs to be an understanding of the importance of these sites when considering the new fee. There is more of an immediate impact to human health and the environment from these sites than mine sites. He feels this is the most threatening source of contamination that there is. Anyone that buys gasoline is a responsible party. The benefit of the fund is in keeping small operators in business. Many small communities only have one gas station. The whole system is one that is designed well and works well. It is an efficient use of the money.

MR. MITCHELL asked if the Legislature, since the inception of the fund, expanded or reduced the population of tanks that are eligible for reimbursement from this account. This may be another option for the Legislature. **Ms. Olsen** said that they have. There was an issue that was related to railroad property that had been leased. Historically, railroad contamination has been exempted from the fund. Under the statutory change, if property had been leased to a private entity and that entity had been responsible for contamination and then abandoned the site, the railroad would be able to seek reimbursement for that contamination. This hasn't driven a significant change in numbers. **MR. MITCHELL** asked if the federal government required financial responsibility for above ground tanks. **Ms. Olsen** didn't believe that there is any federal regulation for above ground tanks, except that it might trickle down through the Fire Marshall's Office.

IV COMPLIANCE AND ENFORCEMENT REPORTING

John Arrigo, DEQ, said that generally the compliance and enforcement report to the EQC has merit because it helps quantify the work of the department. It summarizes compliance and enforcement information and provides an important base that can be used by a variety of parties. In most instances, however, they are asked to develop customized reports for an individual inquiry. He thinks the report lacks in that it doesn't deal straight the value of the program resources and efforts that are expended to do the job. It does provide information to illustrate that the department does have an aggressive compliance and enforcement program and it helps to support their decisions. The timing of the report would be better to have the report submitted to EQC in the summer after the legislative session. He would lobby against continuing the reporting requirement, but whatever the EQC and the Legislature decides is what they will do.

The DEQ has to report on 20 different programs for the report. A conservative estimate is that it takes about 40 hours per program to include that program in the report. This is a total of 800 hours of work or 1/4 FTE. Given the constraints on staff, they feel that the time could be better spent. They are in the process of a database upgrade. In the future, it should be easier to produce the report.

They would like feedback on the format of the report as far as its read-ability and content. The report should be put on the internet to get better public access. Hopefully, the database upgrade will be web enabled. Real-time numbers would be more useful for the public.

Past studies and reports have made great recommendations on how the Legislature wanted environmental enforcement and compliance to work in Montana. Some of the major recommendations were that enforcement should be fair, consistent, and predictable. There should be accountability on who makes the enforcement decisions. There should be written policies and procedures. These are just a few examples. The reporting requirement made the agencies accountable. The DEQ has generally met the goals provided by the Legislature. They are always trying to improve, but he doesn't feel that the report reflects DEQ's successes and whether or not they have met the legislative mandates. One recommendation that he would have is that if the EQC wants a reporting requirement, it should be made simpler: don't ask for detailed numbers. Perhaps they could focus more on the trends.

Steve Baril, Montana Department of Agriculture (MDA), submitted written testimony, **EXHIBIT 3**. MDA reports enforcement and compliance assistance activities for the pesticide program and the ground water program. They will continue to provide information to the EQC and the Legislature, but they would like to know that the information provided goes towards a useful purpose. The reporting provides information about the consistency of Montana's environmental regulations. The information can be used by the agencies to help improve programs.

The enforcement report is expensive and time-consuming to prepare. They estimate 200 hours of staff time to present and prepare the report. They are trying to be efficient and plan ahead as they develop electronic data systems. The new systems will improve the capability of generating these reports. The enforcement report to EQC duplicates much of the information, but not all, that is in other program reports that they prepare, such as the quarterly reports for the Environmental Protection Agency (EPA).

The MDA has not received any feedback from the EQC or the Legislature as a result of the three reports that they have submitted. They continue to develop and upgrade their programs, but these changes are not a result of the reporting process. If the agencies continue to report, it is important that the process be meaningful.

Laurence Siroky, DNRC, said that the information that they provide the EQC is the type of information that they are looking at to make sure that there is compliance, but they don't go to the effort of formalizing that information. That effort could be spent elsewhere. He would recommend that the report identify trend issues or problems in enforcement and compliance, rather than simply reporting data.

Bob Lane, Fish, Wildlife, and Parks (FWP), said that they are not required to do reporting under the statute. He thinks that most of their programs don't seem to fit into the report. This

seems to be aimed more at regulatory reporting. The exception may be some commercial activities such as alternative livestock ranches, or game bird shooting preserves. They do have specific reporting requirements by statute to the Legislature on FWP programs.

REP. BARRETT said that the FWP's use of the environment does seem to put them in a different category. She would be more interested in seeing the FWP programs and how the programs are in compliance with the environmental laws. **Mr. Lane** said that something like the elk management plan would fit best under MEPA compliance in terms of if FWP doing an adequate analysis of the impacts and alternatives. He thinks that the focus should be on MEPA compliance. **REP. BARRETT** said that an environmental assessment would show a clear statement of purpose and need for the plan, what the plan is, and any environmental impacts. This is missing in a lot of the FWP plans. **Mr. Lane** said that they have not focused on that as clearly as they need to. Planning is fairly new to the department. They are trying to figure out how to fit MEPA into the planning.

MR. STRAUSE said that in the last biennium he didn't see anyone look at the reports in depth. A big part of that is the timing. Do the agencies agree that they could give the report to the EQC directly after the Legislative session? **Mr. Arrigo** said that timing is important. The EQC needs to get the report in time to do something with it. **MR. STRAUSE** suggested that for the next three meetings take time for each department to discuss the report with the Subcommittee. He does think that there could be useful information in the reports. He sees that trend information is missing. He sees that these reports would be helpful to the EQC and the agencies. He agrees that the specifics are not that important.

REP. HARRIS said that he found the report to be interesting reading. For example, in some areas complaints generated an enforcement initiative, but in others inspections generated the initiative. He found the information to be very useful. He would like the report to be as useful to the agencies as it would be to the public. All of the suggestions for improving the reports are valuable, but he would hesitate to dispense with them because they might get more useful information and more of a dialogue if people were to read them. He can appreciate the frustration that no one reads the reports. Perhaps posting the reports on the internet would prompt more interest and involvement. With some improvements these reports would be mutually useful for the EQC and the agencies.

MR. MITCHELL hoped that the Subcommittee would be able to make a recommendation to the full Council on this topic.

REP. BARRETT said that the reports are important. They don't go to waste; it is reassuring that the information is there. She would like to make it easier for the agencies.

REP. HARRIS said that putting the reports on the web site would show how many hits there are. The agencies may find that the reports are more widely read than they think. It may be a perception problem. **Mr. Arrigo** said that there is appropriate interest on a trends analysis, what do the numbers mean. The DEQ hasn't done a good job of pulling out those trends possibly because they are a new agency and possibly because of how the numbers are interpreted. If they can focus on where things are heading, it may be a more valuable report. They can probably get that information without having to crunch the numbers. **REP. HARRIS** asked if making a template would make sense, allowing the report to almost write itself. **Mr. Arrigo** said that they need to do a better job of analyzing the raw numbers and coming up with conclusions

and then putting in writing some of the non-numeric things. **REP. HARRIS** said that if the DEQ was to do a calculation to find that one inspector generates X number of violations, of those violations 96% return to compliance within a certain amount of time, the DEQ may be able to develop a formula that would show an increase in compliance relative to an increase in inspectors. This may not hold true in all areas. The raw numbers plus agency analysis would turn out some worthwhile information. **Mr. Arrigo** said that they need to do that, but the reporting requirement asked for trends, not analysis. Right now they don't have the time or direction to do that.

REP. HARRIS said that these reports might lend credibility to the warning flags that are going up about not having enough staff working in these critical areas.

Mr. Siroky said that another aspect is that some of the compliance issues could be seen as a partnership between public and private entities. He would encourage the Legislature to continue with grant programs, loans programs, and technical assistance efforts for the regulated community.

Mr. Baril suggested that the report could be due after the end of the state fiscal year. That is when the agency looks at what goals they have completed. It may be a logical time. We need to look at the reports and make them meaningful to the departments and the public. They haven't done a good job in that. The report becomes another requirement. Maybe there is a way to consolidate some of the reporting that they do and try to minimize it. **REP. HARRIS** thought that was a splendid idea. If they already have a federal reporting obligation, if it could be tweaked to meet the state requirements it would be a cost saving and a relief to staff.

The question was asked if this reporting requirement needed to be in the statute. **REP. HARRIS** said that they could repeal the statute and then ask for the information anyway. The reporting requirement is valuable, but they can make it a lot more useful.

REP. BARRETT said that perhaps rather than redoing the report every year, the agencies could add to the previous one in a narrative that explained the changes. This would show trends.

MR. STRAUSE said that all the changes that had been suggested could be done as the statute exists. He doesn't see that there needs to be any amendments. If the agencies decide that amendments are needed, he would like to hear back from them. He asked if it is possible to change the time that the report is submitted without changing the statute. **MR. MITCHELL** said that it was an agreement that EQC staff and the agencies came up with. If we can agree now, he doesn't know that it would require a statutory change. The idea at the time was that if the EQC received the report prior to the session, there may be some legislative initiatives that could be carried in the session. The problem was that the agencies were scrambling to meet the schedule.

REP. HARRIS agreed that **REP. BARRETT's** suggestion might be very useful.

Mr. Arrigo said that the DEQ is already talking about legislation. They know what the big ticket items are. The report doesn't necessarily give them those ideas.

REP. HARRIS said that there will be further Subcommittee deliberation on this issue. They will produce a letter or report to the agencies with the Subcommittee's suggestions.

**V SUBCOMMITTEE DISCUSSIONS AND DECISIONS ON SUBCOMMITTEE
WORK PRODUCTS**

MR. MITCHELL said that there are two more Subcommittee meetings remaining. He would like to know what the Subcommittee expects from staff in terms of work products. The work plan doesn't deal with any specific reporting. If the Subcommittee puts a report together that may have potential findings and policy recommendations, that would typically have been sent out for public comment. If that is the case, anything that needs to go out for public comment should be done between the May and July meetings. The Agency Oversight/MEPA work plan anticipated that somewhat. In May it lists, draft CALA briefing paper, decision on compliance and enforcement reporting, decision on public comment for Subcommittee documents and reports, MEPA handbook draft progress, progress report on MEPA recommendations follow-up. The July meeting lists final Subcommittee decisions on findings and recommendations, review of the revised MEPA handbook and the final CALA briefing paper. Staff will need some input on what the findings and recommendations may be.

MR. STRAUSE said that, with MEPA, the only thing he was looking at for recommendations was the fees and cost structure. This is an issue that should be considered. Also, based on information about the underground storage tank fiscal problems, he would like the Subcommittee to make a decision about whether there is any legislation that should be proposed on that. Another issue is the CECRA and CALA fund.

REP. HARRIS shared those thoughts. He doesn't see any way around a quarter cent fee increase for the petroleum fund. He doesn't see any problem with putting a four-year cap on it. The case was made earlier that there is no alternative.

REP. BARRETT asked how many of the sites are owned by the state and county.

REP. HARRIS thought that they would be relatively few. **REP. BARRETT** would like to find that out. She would hate to raise a tax on everyone if the state is not in compliance.

REP. HARRIS said that there may be a handful of MDT sites. Perhaps they could say that those sites don't get the benefit of the fund. He would guess that 98% of the sites are private sector.

REP. BARRETT said that the state and county sites need to get cleaned up, but it is a different perspective. For the next meeting she would like to find out how many of the 800 existing sites are state or county owned.

MR. STRAUSE said that whether they are state or county sites, the taxpayers are going to foot the bill. He would hate to see the MDT have to use some of its general fund monies to do this.

REP. HARRIS said that the other major item that he sees is a report documenting the staff turnover in the DEQ and some of the consequences of that. He would think it would be a 5 or 6 page report. The conclusion is that we are losing experienced people to other states. The high turnover is actually slowing the cleanup down. He would think that the cost attributable to the slow down would easily pay for a top staff professional. This is a problem and it needs to be put on paper.

REP. BARRETT said that it is a problem for all the state agencies. **REP. HARRIS** said that other committees may be looking at that problem. There are some serious economic consequences associated with this.

REP. HARRIS said that EQC's oversight of the Fish, Wildlife, and Parks Commission was convoluted. There is a possible legislative fix to clarify the EQC oversight with all environmental issues. Todd Everts, Legislative Environmental Analyst, already has a fix in mind.

MR. STRAUSE said that perhaps staff could give a short report on what the Subcommittee saw as the problem with the seasonal-rule issue and whether or not there is a simple legislative fix for that.

REP. HARRIS said that if the seasonal-rule exception to MAPA was worthwhile, it is worth making clear that it is a narrow exception and shouldn't get into substantive regulations. His idea would be to use the MAPA exception to seasonal rules for straight-forward and noncontroversial things. It shouldn't be used as a tool to circumvent MAPA.

MR. STRAUSE said that is what he was thinking. He just didn't know what legislation that would require or what unintended consequences there may be. As long as FWP has this exception, they are going to use it.

REP. HARRIS said that the EQC could send a letter to the agency saying that FWP should only use the exception in very narrow circumstances.

REP. BARRETT thought that this issue had already been dealt with. A letter had already been sent. The Commission is in charge and they have some changes. There is also the lawsuit that will play a role.

MR. STRAUSE is looking at it from a larger issue.

REP. HARRIS said he could go either way. He doesn't want the exception abused, but it may not require a legislative fix.

MR. MITCHELL said that the exception only applies to one agency and is for hunting and fishing rules that are adopted or statutorily required otherwise, and for seasonal recreational use of land and waters. The fix is to describe more concretely what a seasonal exception means. FWP did provide six examples of where they have used this exception. Those were the hunting requirements, fishing requirements, and others.

REP. HARRIS emphasized that he could go either way. It would depend on the Commission's point of view of where they will use the exception in the future. We just need some assurance that they are going to follow MAPA.

MR. MITCHELL said that the Commission has been sued over this issue. A judge could make the decision between now and the next session.

MR. STRAUSE said that if the judge says that it is okay, it won't resolve anything and may open the door further.

MR. MITCHELL recalls the Commission making comments about the next time around they will use the MAPA process. They didn't feel that they were incorrect, they just didn't want to go through the hassle again. He could ask for something in writing from the Commission and prepare a legislative repair to the seasonal exemption.

REP. HARRIS said that he would be satisfied with a written assurance that the Commission would only use the exemption in narrow circumstances. It wouldn't need to reference past controversy.

MR. STRAUSE said that would be fine with him.

REP. HARRIS said that another issue is the Milltown Dam. The EPA has an upcoming decision on this issue. He would like to have an informational hearing to talk to all the major players in this. It is an important interaction between the federal EPA and DEQ. Montana will have an important recommendation on it.

REP. BARRETT asked if it would be worth asking the Governor if it would be a benefit to have this.

REP. HARRIS asked for Ms. Sensibaugh, DEQ director, to comment.

Ms. Sensibaugh said that having a public hearing would not be of any benefit because the EPA is in the process where they have different phases and they have to, by statute, take and respond to public comment. An information meeting where the EPA could speak would be valuable.

REP. HARRIS asked if the DEQ would participate as well. **Ms. Sensibaugh** said that the EPA is the lead agency. One of the main impacts to the decision that the EPA will make is state and local acceptance. They need to know where the state is on which remedy they choose.

REP. HARRIS would also like to have the FWP there. There is an important fish resource component to the decision.

Ms. Sensibaugh said that if a fishery could be developed in the upper Clark Fork, it would take the pressure off some of the other fisheries, bring economic development to the state, etc. There is a bigger picture that needs to be looked at.

REP. HARRIS said that it would be his recommendation to hold such an informational hearing in Helena to see where things are and how they are proceeding.

There were no objections from other subcommittee members.

MR. MITCHELL asked if this would be a special subcommittee hearing or would it be more productive in front of the full Council.

REP. HARRIS thought that it would fall in the Subcommittee's jurisdiction. The Subcommittee could then report to the full EQC.

MR. STRAUSE said that if there is time in a full EQC meeting, he would like to have everyone hear the information. **REP. HARRIS** didn't object to that.

MR. MITCHELL said that the scope is important. A one-day Subcommittee meeting will have different information than a one-hour EQC meeting.

REP. HARRIS didn't think one hour was enough.

MR. STRAUSE also hoped it would be more than one hour. One hour wouldn't give enough information to be useful.

REP. HARRIS said that if the EQC wants to do it thoroughly, that is fine. Otherwise, it should be done in the Subcommittee.

MR. STRAUSE asked about the timing issue for the compliance and enforcement reports. Would there be something to review at the next meeting?

MR. MITCHELL said that he could put it together and send it out for review. He recalls that everyone was in favor of retaining the statute, but improving the analysis of the report.

REP. HARRIS said that the only unresolved matter is the timing. Part of it depends on the suggestion of a modest report after the fiscal year end and a more in-depth report later on.

MR. MITCHELL said that there is no penalty for violating that statute. He doesn't know how valuable a mini-report in December would be.

REP. HARRIS said that the Subcommittee could give that issue some thought.

MR. MITCHELL can continue with the other suggested improvements. Any other input can be added later. He would suggest that the outcome of that be a letter to the agencies from the EQC or the Subcommittee that says to keep the reporting requirement, but make it more mutually useful with these changes.

REP. BARRETT would like to use MDA's suggestion to use other reports as a basis and add a narrative.

VI OTHER BUSINESS

REP. HARRIS referred to a letter from Sen. Chris Christiaens dealing with the cleanup of methamphetamine labs. Meth labs are a potential Superfund site. The other issue is who will pay for cleanup.

Jan Sensibaugh, DEQ, said that there are two parts to this. The Department of Public Health and Human Services (DPHHS) is very involved because the landlord inherits a contaminated property. He is not only concerned with environmental contamination, but what is the public health risk of having additional people living in that house. There are no cleanup standards related to the constituents in meth labs. There is contamination to the individual property, and often they are dumping into the sewers leading to a city treatment plant. If it goes into septic tanks, then it is contaminating the drain fields. Montana has gone from never having to deal with this to getting at least one call a week from landlords affected by this. It is becoming an epidemic size problem.

The DEQ doesn't have any finances to assist these people. There are also no standards to look to in assisting them. She doesn't know if she wants this to be her problem. It could become a superfund size program to investigate and cleanup these sites, as well as developing cleanup standards. It is new and overwhelming right now.

REP. HARRIS asked if the federal government is in the dark with this as well. **Ms. Sensibaugh** said that they were. Right now it is in the law enforcement agency side of the federal government. **REP. HARRIS** asked if there is any federal funding to deal with this. **Ms. Sensibaugh** said that there is no source of funding. **REP. HARRIS** asked if any federal agency is taking the lead on this issue. **Ms. Sensibaugh** said that it is the Justice Department and the Drug Enforcement Agency. **REP. HARRIS** asked if they were providing any guidance to the states on how to handle this. **Ms. Sensibaugh** said that the law enforcement goes in and says that the property is contaminated and sends people to the state environmental and health agencies. This creates all sorts of problems. **REP. HARRIS** asked if the EPA or the DPHHS provided any health standards. **Ms. Sensibaugh** said that the EPA hasn't gotten involved at all. Public health is more involved with some of the federal health agencies, but with everything else going on with relation to the terrorism, this is not a top priority now. **REP. HARRIS** asked if it would be fair to say that no one can say how clean is clean. **Ms. Sensibaugh** said that was correct. **REP. HARRIS** asked how many meth lab cleanups Montana is facing. **Ms. Sensibaugh** said she did not know. She could find out. **REP. HARRIS** asked if the Attorney General had expressed an opinion. **Ms. Sensibaugh** said no, but the Attorney General and the Governor's new task force on alcohol, drugs, and tobacco is going to have a subcommittee address this issue. **REP. HARRIS** asked if it would be appropriate to look at this in May and invite the task force to share their preliminary thoughts and findings. **Ms. Sensibaugh** said that May might be early for the task force. They have just gotten organized and haven't even divided out into the subcommittees yet.

REP. HARRIS would like to work with staff and see if it might turn out to be worthwhile component of the May meeting, just to scope out the size of the problem. It may be necessary to get our congressional delegation to focus on this. Montana doesn't have the resources to take on the meth cleanup issue and it has major impacts on landlords. If the state doesn't get some federal money and guidance, it is going to be in big trouble.

VII MEPA COSTS AND FEES

MR. MITCHELL referred to background information, see **EXHIBITS 4, 5, and 6**. The statutes vary in terms of what fees are assessable and what they can be used for.

Jan Sensibaugh, DEQ, said this is a major issue for the DEQ. The DEQ doesn't do state-initiated actions. They do MEPA in response to permit applicants asking for DEQ to grant a permit. Most of what they do are environmental assessments (EA) in response to permit applications. For the most part, DEQ is not allowed to charge for those. There are two situations where they can charge for EAs, in the Hard Rock Act and the Major Facility Siting Act.

The problem that she sees is that when DEQ gets into doing an EIS there is a lot of data gathering and analysis that needs to be done. The current fee bill doesn't allow DEQ, based on the costs of the project, to get enough money to do the whole EIS.

They looked at two past EIS's. One was the Rock Creek EIS. It took 14 years to do. It was a very complicated process. It worked the way that MEPA is supposed to work, but the applicant paid a total of \$2,423,768 for the EIS. The applicant at the end said that they had paid enough and didn't want to pay anymore. The agency then had the obligation to go forward and finish the EIS, but they had no money to do that. The DEQ often has to hire a contractor because they

have minimal staff and can't do the work in-house. They try to allow staff to do as much in-house work as possible, but this often means that the EIS time frames become a problem. They also have to do the final review of any information that is developed for the EIS. They never track that time.

Recently there have been a couple of things happen where the DEQ has been tasked with coming up with the money to do EIS's. One was the coal bed methane (CBM) EIS, which is a programmatic EIS. Normally, the applicant has to pay for the EIS. In relation to CBM, there are a lot of applicants that are waiting to come in. These applicants are spread all over the state and DEQ didn't think it would be right to do the EIS on the applicant that came in first and charge them for the whole EIS that would benefit all the other developers. The state therefore took it on itself to do that EIS and to get money from the RIT to fund the state's portion of that. The issue of what is fair for the applicant to pay was a difficult issue. The other thing that happened was that DEQ has received a petition to designate the Gallatin River as an outstanding resource water. In order to do that the Board of Environmental Review has to direct the agency to do an EIS. The agency would then have to come up with the cost of producing that EIS. The board was reluctant to force the agency to pay for the EIS. At a minimum, it would cost \$250,000. These are examples of cases where the board has had to make financial decisions that she feels they shouldn't have been required to make.

The fee statute is an old statute. It doesn't allow the agency to recover the amount of money required to produce the types of EIS's that are defensible in the public arena.

John North, DEQ, said that he was involved with a lot of the major EIS's that were done. Essentially, in every one of those major projects the applicant would come to the department and enter into a Memorandum of Understanding (MOU), which was an agreement wherein the applicant agreed to pay for all of the costs of preparation of the EIS. A budget was established prior to entering into the MOU. The purposes for which the money could be used were not limited as they are in statute. The MOU said that should the agency, during the process, choose to impose the fee bill, any amount paid under the MOU would be creditable. The reason that the applicants did that was because they wanted the permit processed as quickly as possible, and they recognized that a good way to challenge a permit is to challenge the adequacy of the environmental document.

There are some problems that the DEQ sees with the statute. The first one is the limitation on what the fee can be used for. Another is that the DEQ is limited to a percentage of the cost of the project. Often times that bears no relationship to the complexity of the EIS that needs to be prepared. A third one is the time for decision. The fee bill was written in 1975 when EIS's were 20 to 25 pages long. It also says that an agency must determine if an EIS is necessary, and if it will be necessary to impose the fee bill within 30 days of the receipt of the application. This can't be done anymore; the public needs at least a 21-day comment period.

REP. HARRIS asked if the Legislature went along with all the changes, what constraints would remain to ensure the applicant that this will not get out of hand. **Ms. Sensibaugh** said that it sounds like when they did the MOU with the applicants, they put together a budget, time frame, scope of work, and the applicant had to sign that they agreed to that and they would pay that amount. **REP. HARRIS** said that if the statute removes all constraints, the applicant is at the mercy of the agency because the applicant will have to go along with everything that the agency asks for or there will be no EIS, and therefore no project. **Ms. Sensibaugh** said that in the Hard

Rock Act there is language that the department shall provide the applicant the opportunity to review the department's estimated expenses. The applicant may indicate which proposed expenses the applicant considers excessive. There could be language around that allowing the applicant to review and consult with the agency concerning the expenses. **REP. HARRIS** asked if there would be any consideration to having a bidding process for the consultants.

Ms. Sensibaugh said that is what they do now. In the Hard Rock Program there were concerns on the part of the applicant about consultants, so they would go through the RFP process, narrow it down to three, and the applicant would pick one of those. **REP. HARRIS** asked if there is any opportunity under the current scheme for the applicant to produce their own EIS. **Mr. North** said that from a legal standpoint, it could be done. The department would have to analyze it and make sure that it agrees with the conclusions and accuracy. **REP. HARRIS** asked if there are any inherent conflict of interest rules that prevent the applicant from doing its own EIS.

Mr. North said that there is a conflict of interest rule in the MEPA rules for contractors, but he thinks that an applicant could submit a document to the agency. **Ms. Sensibaugh** said that they would be interested in pursuing a system like that because it would take DEQ out of the up-front negotiations and any time frames. They do feel that DEQ would have to review and approve the document.

MR. STRAUSE asked for an estimation of what the Rock Creek EIS cost DEQ.

Ms. Sensibaugh said that they billed \$2,423,768 to the applicant; \$1,765,719 was to the contractor. There were the Department of State Lands (DSL), DEQ expenses of \$535,923 that were paid for program managers. **MR. STRAUSE** asked if that included the costs of other departments. **Ms. Sensibaugh** said that it didn't include the costs of other departments and it isn't a total cost because the duties that the staff were absorbed in the standard program costs. **MR. STRAUSE** asked if one of the amendments to MEPA dealt with time frames passed in the last session. **Ms. Sensibaugh** said that it did. **MR. STRAUSE** asked if that created an additional problem if the fee schedule has not changed. **Ms. Sensibaugh** said that it didn't. They are just working within it. They are still negotiating with applicants for an MOU. She doesn't think that is the right way to do things because that isn't what the statutory language allows DEQ to do, but it is what works. **MR. STRAUSE** asked if there is anything to prevent an applicant from saying the agency has to rule on the application within a certain period of time. **Ms. Sensibaugh** said that they could do that. That is what is scary. **MR. STRAUSE** asked why anyone hasn't. **Ms. Sensibaugh** feels that the applicants want to work with the DEQ to get their projects completed. It is better to work in a coordinated fashion to get this done. The applicants also need to make sure that they have a defensible document. **MR. STRAUSE** asked whose liability is it if it is not a defensible document. **Ms. Sensibaugh** said the DEQ would be liable. If in order to meet the time frames they take the information they have and put the document out, a public interest group can take the DEQ to court and force the agency to defend that document. If the DEQ is unable to defend that document, the court would send them back to augment the document. **MR. STRAUSE** said that his concern is that the DEQ wouldn't just be on the hook to pay for the inadequate EIS, but then the applicant could hold the department accountable for not doing an adequate EIS to begin with. **Mr. North** said that is a possibility, but he would contend that when DEQ made a reasonable effort under the circumstances, they would not be liable.

REP. BARRETT said that MEPA costs dearly, but that it doesn't just cost the agencies. We are only hearing one half of the story. We need to hear from the regulated community.

Ms. Sensibaugh agreed. The applicants do a lot of data gathering on their own. There is that side of the story too.

REP. HARRIS asked if the DEQ will prepare legislative recommendations that address this issue. If so, does that have to be approved by the Governor? Is the DEQ working with other agencies so that there is a coordinated effort for the recommendation? **Ms. Sensibaugh** said that none of the other agencies are concerned. They don't do enough applicant-initiated projects. This is something that they are concerned about, but she doesn't know if there will be legislative recommendations. If so, they would have to come through the Governor's office.

Bob Lane, FWP, said that FWP only had one EIS on the list and it dealt with an alternative livestock ranch. They are no longer permitting those. They don't foresee having any other EIS's from private applicants. The one EIS that they were involved in resulted in HB 477, where the applicant's assets couldn't be part of the basis for assessing the fee.

• ***Public Comment***

Al Kington, Helena, said that if there are any legislative proposals that come forth, he would hope that this Subcommittee would be forum to have input into those proposals.

Don Allen, Western Environmental Trade Association (WETA), said that it is important that if there is going to be legislation, the Subcommittee hears from the regulated community on this. There are some other aspects of this issue that need to be explored. They have the opportunity to discuss things with the DEQ and they would look forward to discussing the issues that were raised today.

REP. BARRETT would recommend that the Subcommittee hear from the public on this issue at the next meeting and continue this discussion. **MR. STRAUSE** agreed.

VIII **MEPA POTPOURRI**

• ***Public Participation Brochure***

MR. MITCHELL said that the issue of developing a public participation brochure was raised at a previous meeting. The idea was that it would be helpful if there was a brochure of some sort prepared by the agencies for use at public meetings and other places, explaining to the public how it can best participate in a MEPA decision. The agencies were left to their own devices on how to develop that. The agencies think that it is a bad idea if each agency comes up with its own brochure, but it would be a good idea to have one universal brochure developed for use by all agencies. It was suggested that the EQC write that brochure. **MR. MITCHELL** will do that if requested and then circulate it for the agencies to comment on. He is hoping to keep it to a simple explanation of what MEPA is and why public comment is solicited.

MR. STRAUSE said that one of the concerns that the agencies had is that they would get comments that were not useful. He would hope the brochure would include some guidelines as to the type of comments the agencies are looking for that would be helpful.

REP. BARRETT asked if public comment is defined by statute and how it is used by the agencies; if so, will that be in the brochure? **MR. MITCHELL** said that the MEPA rules address

what the agency is required to do in terms of comments addressing a draft EIS. They also address public comment received in response to an EA, which basically says the agencies don't need to do much with the public comment. In the case of an EIS, the agency must respond to those comments prior to making a final decision. EAs don't require public comment, rather it is up to the agency if comment is taken. How do you comment on an EA that you didn't know was being written is a bigger question.

REP. BARRETT said that there are plans out there that don't follow MEPA and maybe that is something that needs to be looked into.

Ms. Sensibaugh said that it sounds like the direction MR. MITCHELL wants to go in is the direction DEQ would be interested in. It is important to educate the public as to the type of comments they are looking for and what they can do with the right kind of comments.

Mr. Lane said that it is a good idea to have a common brochure. They have used brochures in other areas and they are very valuable. What comments they are looking for is the direction we should go.

• ***MEPA Information Requests***

MR. MITCHELL said that since the last meeting he has had three requests from agencies regarding how to interpret MEPA. Two were from DNRC's Forestry Bureau in terms of what does the 180th day deadline mean for an agency-initiated action. He explained to them that for an agency-initiated action for which an EIS is being written, those permit deadlines are not necessarily relevant. The statutory changes were more applicable to a private applicant that was expecting a decision. The other request dealt with the question of when does the clock start for a district court appeal of a decision. The law was changed to say that if you appeal an agency decision based on MEPA, that appeal has to be made to a district court within 60 days of the final agency decision. DNRC asked when that final agency decision was. The question deals with board issues.

Mr. North said that the same question came up with regard to an air quality permit appeal. The air quality statute says that the department's decision to issue a permit is not final until the time for appeal has expired without an appeal, or until the appeal is decided by the board. They feel they have a final agency action at the close of the appeal period or the end of the appeal process. The Board of Environmental Review heard these discussions, but took no position.

MR. MITCHELL said that the third request for information was from a former EQC member who was reading through an EA from DNRC. It was regarding cumulative impacts. There were some comments made in response to the EA that the department failed to consider cumulative impacts of re-routing a stream bed for an applicant. The response to the comment was that the statute doesn't require DNRC to consider those cumulative impacts because they didn't authorize them in the first place. The implication was that DNRC was interpreting the cumulative impacts requirement to mean that they only had to consider impacts from projects that the agency had previously approved. His interpretation of the statute is that DNRC is incorrect. The agency did agree that they had some faulty information and they corrected that.

• **MEPA Handbook Revision**

MR. MITCHELL hopes to start the revision between now and the May meeting. He hopes to have something to review by that time.

IX MONTANA ENVIRONMENTAL POLICY ACT LITIGATION UPDATE

MR. MITCHELL referred to **EXHIBIT 7**. The Pompey's Pillar Historical Association has now filed a MEPA case against DEQ on the air quality permit that was issued for the high speed grain elevator that is to be constructed near Pompey's Pillar. That is in Helena District Court. Judge McCarter will hear it on March 8th. It is challenging the adequacy of the initial EA that was done by the agency. The Northwest air quality permit has been settled. The Holnam Cement air quality permit is no longer a MEPA case, but he anticipates that it will be once that document is prepared. It is in the application status right now. The MEIC versus the Cattle Development Center Feedlot near Custer is set for summary judgement motion on March 1 to determine if it should go to trial. The CBM MEPA case (number 3) was settled with a stipulated agreement that has resulted in the production of the programmatic EIS. The other two CBM cases deal with discharge permits that have been issued. There is no change in the Golden Sunlight case. The Friends of the Marias versus DNRC has been settled. The judge dismissed the case. It was a complaint against the agency for issuing a permit. The plaintiffs are not prohibited from re-filing the MEPA case.

X ADJOURN

REP. BARRETT asked if **MR. MITCHELL** would give the Subcommittee report to the full EQC.

MR. MITCHELL said he would do so.

There was some discussion on the Milltown Dam issue and the possibility of an informational meeting.

MR. MITCHELL said that there is money in the budget for an extra Subcommittee meeting. They should clear it with Senator Bea McCarthy, Chair.

There being no further business, the meeting was adjourned.

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