



# ENVIRONMENTAL QUALITY COUNCIL

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CHRISTOPHER HARRIS  
DONALD HEDGES  
JIM PETERSON

SENATE MEMBERS  
DANIEL MCGEE  
WALTER MCNUTT  
GLENN ROUSH  
ROBERT STORY  
KEN TOOLE  
MICHAEL WHEAT

PUBLIC MEMBERS  
THOMAS EBZERY  
JULIA PAGE  
ELLEN PORTER  
HOWARD STRAUSE

COMMITTEE STAFF  
KRISTA EVANS, Research Analyst  
LARRY MITCHELL, Research Analyst  
REBECCA SATTLER, Secretary  
TODD EVERTS, Legislative Environmental Analyst

## ENVIRONMENTAL QUALITY COUNCIL MINUTES

Date: July 19, 2004

Room 102, State Capitol Building

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file at the Legislative Environmental Policy Office.

### **COUNCIL MEMBERS PRESENT**

SEN. DANIEL MCGEE  
SEN. WALTER MCNUTT  
SEN. GLENN ROUSH  
SEN. ROBERT STORY  
SEN. MICHAEL WHEAT

REP. DEBBY BARRETT  
REP. NORMA BIXBY  
REP. PAUL CLARK  
REP. CHRISTOPHER HARRIS

MR. THOMAS EBZERY  
MS. JULIA PAGE  
MS. ELLEN PORTER  
MR. HOWARD STRAUSE

### **COUNCIL MEMBERS ABSENT**

REP. DON HEDGES  
REP. JIM PETERSON  
SEN. KEN TOOLE  
MR. TODD O'HAIR

## **STAFF PRESENT**

KRISTA EVANS, Research Analyst  
LARRY MITCHELL, Research Analyst  
TODD EVERTS, Legislative Environmental Analyst  
CYNTHIA A. PETERSON, Secretary

## **VISITORS**

Visitors' list (Attachment 1)  
Agenda ([Attachment 2](#))

## **COUNCIL ACTION**

- The EQC adopted the draft study report entitled “Hydrogen, Wind, Biodiesel, and Ethanol, Alternative Energy Sources to Fuel Montana’s Future?”
- The EQC requested DEQ to make a presentation on the proposed SEP policy and rules at the September meeting.
- The EQC requested staff to monitor the PCB issue at the Big Springs Fish Hatchery in Lewistown, Montana.
- The Subcommittee will review the proposed rules relating to ponds and give their comments to Mr. Jack Stults. The EQC will not request legislation regarding ponds.
- The EQC postponed action on Metal Mine Bonding until September.

## **CALL TO ORDER AND ROLL CALL–ADOPTION OF EQC MINUTES**

The meeting was called to order at 1:05 p.m. by Chairman McNutt, and the secretary noted the roll ([Attachment 3](#)). The Minutes of the May 13, 2004, meeting were approved.

## **ADMINISTRATIVE MATTERS**

### **• EQC Budget - Todd Everts**

Mr. Todd Everts, Research Analyst, Legislative Services Division, updated the Environmental Quality Council (EQC) members on its budget and reported that 48 percent of the total budget is remaining. Mr. Everts requested updated e-mail addresses from the EQC members.

## **SUBCOMMITTEE UPDATES**

### **• Energy Policy Subcommittee - Sen. Dan McGee**

Sen. Dan McGee thanked the members of the Energy Policy Subcommittee and reported the Subcommittee has produced a useful and beneficial product. Sen. McGee submitted a draft report entitled “Hydrogen, Wind, Biodiesel, and Ethanol, Alternative Energy Sources to Fuel Montana’s Future?” ([Exhibit 1](#)). Sen. McGee explained the draft was sent out for public

comment, and no comments were received. Sen. McGee pointed out the study contains five recommendations from the Subcommittee (see Exhibit 1, p. 5, 66).

Sen. McGee moved that the full EQC adopt the draft study report entitled “Hydrogen, Wind, Biodiesel, and Ethanol, Alternative Energy Sources to Fuel Montana’s Future?”. The motion carried unanimously.

Sen. McGee reported the Energy and Telecommunications Interim Committee (ETIC) is proposing legislation that would transfer energy oversight from EQC to ETIC.

Mr. Everts elaborated and submitted the statutory provisions on the State Energy Policy - Goal and Development Process contained in Mont. Code Ann. § 90-4-1001 ([Exhibit 2](#)). The proposed legislation will repeal §§ 90-4-1002-1003. Mr. Everts explained ETIC would like the ability to have oversight and policy development for energy, and the elimination of these sections would not preclude EQC from pursuing elements of energy policy regarding environmental elements, conservation, and renewable elements.

Sen. McGee cautioned against the two interim committees getting caught up in a “turf battle,” and pointed out that the EQC is a diverse group which includes citizens in its membership, and ETIC only consists of legislators. Therefore, Sen. McGee suggested the question is whether energy-related issues are better served by a broad-based council or a legislative committee. Sen. Story agreed with Sen. McGee and shared his concern about turf battles.

Chairman McNutt suggested the EQC members review Exhibit 2 and discuss the issue again at the September meeting of the EQC.

- **Agency Oversight Subcommittee - Rep. Christopher Harris**

Rep. Harris explained the Agency Oversight Subcommittee addressed the issue of clean up of property contaminated by methamphetamine labs. Rep. Harris explained lack of a clean up standard and procedure has caused confusion. Rep. Harris stated the Agency Oversight Subcommittee is suggesting legislation to address the problem, but noted Sen. Wheat and Mr. Strause were not supportive of the legislation because it contains an immunity provision. Rep. Harris noted the proposed legislation does not purport to address every aspect of the methamphetamine problem.

The second issue the Agency Oversight Subcommittee addressed is Supplemental Environmental Projects (SEP) engaged in by DEQ. In particular the Agency Oversight Subcommittee reviewed the Yellowstone Mountain Club violation and the SEP they agreed on. Rep. Harris explained on one hand DEQ is following EPA policy, but that DEQ believes it has considerable flexibility in adhering to that policy. The Subcommittee agreed that while flexibility is important, the policy has to be perceived as fair. The Subcommittee is recommending EQC request Jan Sensibaugh, Director, Department of Environmental Quality, to present a policy outline at the EQC’s September meeting. Rep. Harris also spoke about the Montana Department of Administration’s (DOA) asbestos violation and the Montana Department of Transportation’s Spill Prevention, Control, and Countermeasure Plan (SPCCP) violation. Rep. Harris explained how DOA’s fine was transferred from the Building Maintenance fund to the General Fund.

The final issue addressed by the Subcommittee was the PCB issue at the Big Springs Fish Hatchery. Rep. Harris explained how it was determined the contamination occurred from paint used at the hatchery in the 1950s. Rep. Harris noted the remedies being considered and stated nothing has been decided at this point, but suggested the EQC should monitor the situation closely as it could result in an expensive cleanup or abandonment of the hatchery.

- **Questions and Comments from the Committee**

Rep. Barrett commented that if laws are so strict even the state cannot comply with them, the public cannot be expected to comply with the laws. Rep. Barrett expressed her concern that the regulations could be too strict.

Mr. Mitchell stated an explanation of DEQ's proposed 2005 legislative package would be given at the EQC's September meeting, and included in that package would be a bill that would give DEQ authority to implement SEPs. Chairman McNutt formally requested DEQ to make the presentation on the proposed SEP policy and rules at the September meeting.

Sen. McGee asked if anyone was ill or whether anyone had died as a result of the contamination at the fish hatchery. Rep. Harris replied this is recognized as a serious health risk, but as of yet, they have not discovered anyone who is ill. Rep. Harris identified the major issue as continuing to produce PCB-contaminated fish.

Chairman McNutt formally requested staff to monitor the PCB issue at the Big Springs Fish Hatchery in Lewistown, Montana.

#### **HJR 40 - ARTIFICIAL PONDS AND WATER RIGHTS**

Sen. Story reported the Subcommittee had not addressed the issue because Mr. Jack Stults, Division Administrator, Water Resources Division, Department of Natural Resources and Conservation, had suggested the agencies and the interested parties could do more work on their own before the Subcommittee meets to address the issue.

Mr. Stults submitted a copy of Ms. Holly Franz's proposal ([Exhibit 3](#)). Mr. Stults also submitted DNRC's Draft Rules ([Exhibit 4](#)). Mr. Stults explained the rules are the result of a culmination of legislation requiring DNRC to implement rules defining what is acceptable on an application for a new water right or to change a water right. The rules include concepts consistent with ideas to improve the way DNRC addresses ponds, especially with respect to closed basins. Mr. Stults noted the proposed rules define "pond" as consumptive and also provide a definition for "nonconsumptive use." The rules also identify the way ponds will be addressed in closed basins.

#### ***(Tape 1; Side B)***

Mr. Stults did not think there was a strong basis for EQC to propose legislation, and added many of the issues have to do with actually placing ponds in the ground and putting them to use, rather than the permitting process. Mr. Stults stated the primary mechanism for enforcement in Montana is a water right decree issued by district court and enforced by a local water commissioner. Mr. Stults noted there are fewer problems in decreed basins with water commissioners.

- **Questions from the EQC**

Rep. Harris noted the second sentence of the definition of “pond” is actually a description and should be placed elsewhere. In addition, Rep. Harris pointed out the need for a semi-colon following “supply” in (42)(i).

Sen. McGee wanted to know if the proposed rules provide for a definition that a pond is consumptive for the first time. Mr. Stults replied while DNRC’s policy has always been that ponds are consumptive, this is the first time they have made the statement outright. Mr. Stults agreed it is a policy decision, but also referred to it as an undeniable fact. Sen. McGee pointed out that this is a policy decision and the correct venue is the Legislature. Sen. McGee inquired whether the proposed rules were promulgated because they were unsuccessful in getting the language placed in statute. Mr. Stults replied the language is not in reaction to the debate about ponds and is simply a statement of fact. Sen. McGee spoke about the existing process provided for in law and that agencies do not create law. Sen. McGee strongly suggested that if ponds are to be regulated, it should be done by law rather than rule. Sen. McGee recalled a bill in the last session that would have designated ponds as consumptive and that the bill was defeated. Mr. Stults explained that legislation had been amended to have exceptions, and then had exceptions to the exceptions. Mr. Stults thought people had problems with the proposed legislation last session because it had triple negatives. Sen. McGee stated his decision to vote against the bill had nothing to do with triple negatives, and had everything to do with designating every pond as a consumptive use. Sen. McGee stated he believes in private property rights and that people should not be required to get permission from a government agency. In addition, Sen. McGee spoke about water evaporation occurring everywhere and not just out of ponds. Since there is no consensus on the issue of evaporation from ponds, Sen. McGee suggested an attempt is being made to state in rule what cannot be stated in statute. Sen. McGee did not feel ponds were a consumptive use of water and did not feel ponds need to be regulated by the state. Mr. Stults responded having the language in rule does not extend or expand the regulatory authority of the department.

Sen. Story stated it is a property right issue in closed basins, and in those basins there is concern about ponds being created. Sen. Story recalled that ponds can be filled one time, and if they are filled a second time, then they are using another person’s water. Sen. Story inquired what the difference would be between “pit” and “pond” and wondered why a pond would be considered consumptive when a pit is not. Mr. Stults explained the difference is in the way they are processed, and a pond is a mechanism for capturing and storing water, and a pit is more of a natural occurrence. Sen. Story suggested they may have to work on the definition for “pit.”

Rep. Clark requested clarification and asked if the water was minable, meaning anyone could take the water. Mr. Stults agreed. Rep. Clark wondered if they were clear what sources of water they were talking about. Rep. Clark wondered how many ponds would need to be created in a certain area before it would become a problem. Mr. Stults replied there are some areas where there are enough uses on the stream where people have to call for water. Mr. Stults stated water has to be administered by priority date.

Rep. Clark asked if someone who is using the water for a nonconsumptive use would have to do anything to curb their use of the water if there was a call for water. Mr. Stults replied the decision rests with the district court judge, and the judge has authority to shut down all water rights by priority, including those that have asserted they are nonconsumptive. The burden of

proof is on the person with the water right to prove they are nonconsumptive to be exempted from the judge's ruling. Mr. Clark asked if any judge had made a decision about whether a pond is consumptive or nonconsumptive, and Mr. Stults thought Judge Guenther had come close at one time, but Mr. Stults admitted he did not know the outcome.

Sen. Wheat suggested a pond is a man-made body of water that gets filled from a diversion from a tributary and asked if the problem is that diversion could infringe upon a senior water right. Mr. Stults agreed that was a problem, so Sen. Wheat suggested defining pond as a diversionary source of water. Sen. Wheat agreed with Sen. Story that the definition of "pond" and "pit" are basically the same. Sen. Wheat suggested the difference is a pit is man-made but not filled by a diversion of water. Mr. Stults replied a pond could be on or off the source, and a pit is never on the source. Mr. Stults expanded by saying a pit is still considered a diversion because it collects water and holds it for use.

Rep. Harris asked if a swimming pool would be considered a pond under the proposed rule since it is a body of water created by man-made means that stores water for beneficial use. Mr. Stults stated he would look at this issue, as well as the ambiguity between "pit" and "pond."

Sen. McGee commented that in his mind a pond would have no flowing water through it or out of it. Sen. McGee identified two other factors as (1) somebody is diverting water; and (2) somebody is seeking a water right. Sen. McGee identified the issue as whether there is consumption based on diversion, as well as the seeking of a water right. Mr. Stults agreed, and Sen. McGee thought those points should be included.

Chairman McNutt suggested it would not be necessary for the Subcommittee on ponds to meet and that members of the Subcommittee could comment on the proposed rules.

Rep. Harris suggested consideration should be given to the situation where someone wants to create a man-made body of water by diversion and store it for beneficial use, but is not seeking a water right. Rep. Harris also noted the overlap between the definition of "pit" and "pond."

The Subcommittee will review the proposed rules relating to ponds and give their comments to Mr. Stults. The EQC will not request legislation regarding ponds.

- Public Comment

There was no public comment offered.

**METAL MINE BONDING STATUS PAPER - FINAL DRAFT PAPER - Larry Mitchell,**  
**Research Analyst, Legislative Services**

Chairman McNutt noted there is no final draft of the metal mine bonding status paper because he and Rep. Clark and Mr. Mitchell had had an in-depth conversation on the report and recommended language changes. Chairman McNutt requested action on Metal Mine Bonding be postponed until September.

Mr. Strause stated he would like the final language to reflect the specific number of cases rather than just reference "all cases."

**(Tape 2; Side A)**

Mr. Mitchell explained that the language was revised because every time a surety company has had to do the reclamation, they declined and the agency has had to step up for the surety. Sen. Story stated he was concerned the language could be taken out of context. Rep. Clark asked in all the cases where the company had to either forfeit their bond or do the work, what the percentage was of those who forfeited back to the state. Mr. Mitchell referred Rep. Clark to Table 5. Mr. Mitchell stated in every instance where the surety had the opportunity to step forward and do the reclamation, they declined.

Rep. Clark wanted to know if the cost of the reclamation was projected to be more than the bond amount. Mr. Mitchell responded if the surety felt it could do the job for the money it had available and pocket the savings, it would likely have done so. Mr. Mitchell replied the sureties apparently assumed the job was going to cost more than what they had bonded for. Rep. Clark asked if it was safe to say each of the six cases were under-bonded, and Mr. Mitchell agreed that would be a safe assumption.

Chairman McNutt stated in looking at what has happened with metal mine bonding over the past few years, bonding amounts have gone up, and Montana has the highest rate per acre of the surrounding states. Chairman McNutt suggested one of the reasons the bonds are so high is because Montana has had to assume the role in many cases to do the reclamation. Chairman McNutt stated the mine company does not decide to forfeit the bond, but rather that is the decision of the surety. Chairman McNutt cautioned that EQC needs to make sure that if it is premised that public money should not be spent on reclamation, that there is enough bonding to do reclamation, and if the state has to do the reclamation, it will cost more money.

**HJR 43 - ZORTMAN LANDUSKY WATER ISSUES - PRELIMINARY PAPER - Larry Mitchell, Research Analyst, Legislative Services Division**

Mr. Mitchell presented a preliminary paper on Zortman and Landusky Mines, HJR 43, Water Quality Impacts ([Exhibit 5](#)) and invited questions and comments from the EQC.

- **Questions from the EQC**

There were no comments or questions from the EQC.

- **Public Comment**

Mr. Andrew Huff, representing the Indian Law Resource Center and an attorney for the Fort Belknap Reservation, suggested the report should take a stream-by-stream approach and give the current status of each stream in terms of state water quality standards. Mr. Huff pointed out that current water capture and treatment systems at the sites are not enough to capture the volume of water produced. Mr. Huff would like to see the report address the potential impacts if water treatment stops.

Mr. Tom Ebzery inquired what would happen if treatment stopped. Mr. Huff explained the main worry is that there is not a plan in place to ensure treatment will not stop, and funding will run out in 2028, but treatment will have to take place forever. Mr. Huff suggested investing an

amount of money now and letting that money earn enough interest so money will be available to run the water treatment plants when current funding is no longer available.

Mr. Strause asked about water being cast out onto fields, and Mr. Huff explained the land application disposal process, and that water that is not treatable gets piped down to fields that are considered dead zones. Mr. Huff further explained the water is contaminated since the water has either not been treated or only been partially treated.

Mr. Strause inquired how the water is treated. Mr. Wayne Jepson, Montana Department of Environmental Quality's project manager for the Zortman and Landusky Mine, explained there are several water treatment systems at Zortman Landusky, and explained those systems to the EQC. Mr. Jepson stated the vegetation is healthy in the area because it gets more water. Mr. Jepson stated the area has also been seeded with alfalfa. Mr. Jepson further explained most of the cyanide has decomposed through natural processes.

Sen. Wheat asked if it is anticipated cyanide concentrations in the water coming off the old leach pads will reduce over time. Mr. Jepson stated the concentrations have been continually decreasing since the mine shut down and is close to zero, but was unable to predict when that would happen. Mr. Jepson added, however, that there are other contaminants in the water that are more significant than cyanide and those contaminants will determine how long treatment will need to occur. Mr. Jepson explained the pond systems are sized with excess storage capacity to handle unexpected heavy rainfall. Mr. Jepson reported the working life of the water treatment system is approximately 15 years. Mr. Jepson identified the role of vegetation in the process as critical.

Chairman McNutt asked if they were considering expanding the area and whether people in the grazing district were requesting the water. Mr. Jepson replied that discussions have taken place, but stated there is a high cost associated with relocating additional pipelines and irrigation systems. Mr. Jepson stated they are hesitant to invest money in a new area when there is a chance that it will not be needed in a few years.

Mr. Dean Stiffarm, Fort Belknap Environmental Department, noted his office is supposed to be involved in the HJR 43 study, but he stated the Tribes are denied access to the mine site. Mr. Stiffarm reported the last time he received information was in September 2003. Mr. Stiffarm explained they walk the drainages and rent airplanes to fly over the area in an attempt to keep informed and track impacts. Mr. Stiffarm believes streams in the area of the mine are being impacted.

Rep. Bixby asked about Mr. Stiffarm's perception of state cooperation and the state's reason for denying access. Mr. Stiffarm replied the private landowner that bought the mine claims has denied access to the Tribes, and BLM and DEQ are the only ones allowed on the site.

**(Tape 2; Side B)**

Mr. Stiffarm added that a representative of the Tribe could be granted access by invitation from DEQ. Mr. Stiffarm identified the private landowners as the major barrier to the Tribe's access.

Mr. Stiffarm clarified his reference to Montana Pollution Discharge Elimination System (MPDES) permit is the permit referenced in the Record of Decision (ROD) the agency issued in May 2002.



Mr. Clark asked if Mr. Stiffarm was suggesting DEQ was discharging to groundwater without a permit. Mr. Stiffarm replied that to date no MPDES permit has been issued.

Chairman McNutt asked the EQC to take a serious look at the report. Mr. Mitchell stated he is waiting to receive public comments on the report. Mr. Mitchell stated he would attempt to organize a tour to the Zortman and Landusky Mine.

### **UPDATE ON THE RENEWABLE RESOURCE GRANT AND LOAN PROGRAM**

Mr. Mitchell explained EQC has a statutory requirement to review the applications for the Renewable Resource Grant and Loan Program submitted to DNRC. EQC is then charged with ranking the programs and placing the applications into HB 7 for the Legislature to approve.

Mr. John Tubbs, representing DNRC Conservation and Resource Development Division, also submitted a copy of the Reclamation and Development Grant Program (RDG) Application List for the 2004 Legislative Cycle ([Exhibit 6](#)), as well as a list of projects funded by the 2002 Legislature ([Exhibit 7](#)). Mr. Tubbs reported they received 63 applications for a combined total requested of approximately \$6.5 million, and there are more requests than grant funds available. Mr. Tubbs explained the Renewable Resource Grant and Loan Program is focused on conserving, managing, developing, and protecting Montana's renewable resources and the number one resource is water. Mr. Tubbs stated he was surprised not to see a wind generation project proposed. Mr. Tubbs explained they are in the process of reviewing the applications for both programs and will be ranking the applications in August and presenting the projects to the Legislature next session. Mr. Tubbs spoke about the funding crisis experienced by the Renewable Resource Grant and Loan Program and hoped the funding crisis would be solved next year and noted there is a statutory obligation of \$2 million per year from the Resource Indemnity Trust (RIT).

Rep. Harris asked about the funding crisis, and Mr. Tubbs noted this is flat tax revenue stream and that it is paid by coal, oil and gas, and other mineral taxes. Mr. Tubbs explained problems for the program come from inflationary agency appropriations for FTEs, office rent, and electricity, but the RIGWA tax revenue source is fixed and does not allow for inflation. Mr. Tubbs stated the result would be fewer projects would be funded. Mr. Tubbs testified it is difficult every session to protect their funding.

Rep. Barrett asked if there was another place the funding went before it came to the renewable resource grant program. Mr. Tubbs stated the revenue that used to go to the account now goes to the General Fund. Mr. Tubbs stated at one time the Water Resources Division was funded out of this account, but has been moved to the General Fund. Rep. Barrett asked about choices that will need to be made to get the water adjudication completed in Montana. Mr. Tubbs suggested the choice is made every session whether to fund projects or programs.

Rep. Barrett was curious how many grants had gone to the same group or same county and wanted to know if the grants were being evenly distributed throughout the state. Mr. Tubbs reported more grants are given where there is more water and a higher population.

Sen. Story inquired whether there was language in the Constitution stating how the money is to be used. Mr. Tubbs stated the Supreme Court has said the money can be used for natural resource projects, including state agencies.

## **TMDL PANEL DISCUSSION**

Ms. Krista Lee Evans, Research Analyst, Legislative Services Division, explained that she had asked panel members to address eight specific questions:

1. Is it necessary that public input be gathered in the same manner it has in the past—regardless of the amount (of time) that it takes to do so?
2. At what point in the process should public comment be taken?
3. From your group's point of view, is it necessary to expedite the TMDL process in Montana?
4. How will TMDLs be done from this point forward with regard to public comment and other areas?
5. Who will be doing the TMDLs--DEQ or EPA? Why?
6. Will the agencies be doing the work or will the work be contracted out?
7. What is the deadline for having all of the TMDLs on the 1996 303(d) list completed?
8. How are TMDLS that are not party to the lawsuit going to be completed and are the time frames realistic?

Mr. Art Compton, Montana Department of Environmental Quality, responded to Ms. Evans' questions, stated that taking public comment like DEQ has in the past is not necessary, and DEQ is working to implement a more streamlined method of public involvement. Mr. Compton thought a MEPA-type process could be utilized and there should be an initial meeting in the subject watershed and, at a minimum, there should be a public meeting in the watershed on the draft Total Maximum Daily Load (TMDL). Mr. Compton absolutely agreed it is necessary to expedite the TMDL process. Mr. Compton explained they have divided up TMDL workload between EPA and DEQ, and they delegate to EPA those watersheds that have jurisdictional issues. Mr. Compton reported the agencies will be doing the work and some work will be contracted out. Mr. Compton stated the deadline for having the TMDLs on the 1996 303(d) list completed is 2007. Mr. Compton stated they have been given ten years to complete TMDLs that are not party to the lawsuit, and he believed that time frame was realistic.

### ***(Tape 3; Side A)***

Ms. Ellen Engstedt, Executive Vice President of Montana Wood Products Association (MWPA), testified that MWPA has been involved in the TMDL process since the passage of the original bill in 1997. Ms. Engstedt testified she is extremely anxious about the manner in which uncompleted TMDLs are being used against the Montana wood products industry. Ms. Engstedt testified how the 2001 fire season hit the Lolo National Forest hard and the resulting lawsuit which was filed regarding salvage timber sales and how it affected the Clean Water Act. Judge Meloy ruled the Forest Service could not claim water quality would be improved by the post-fire work because the Forest Service did not know enough about the streams involved and their ability to cope with sediments due to a lack of completion of TMDLs by the State of Montana.

Ms. Engstedt testified how the ruling sent a chill through the timber industry. Ms. Engstedt further explained the Ninth Circuit Court of Appeals reversed Judge Meloy's ruling on the TMDL portion of the decision, but the ruling was not published, so the decision applies only to the Lolo post-burn project. Ms. Engstedt suggested there should be a final, technical, scientific product and noted implementation and public participation need to go hand-in-hand. Ms. Engstedt thought modeling and contracts should be used to expedite the process and projects should be completed as quickly as possible.

Mr. Mike Wendland, Montana Association of Conservation Districts, submitted written testimony ([Exhibit 8](#)).

Mr. John Youngberg, Chairman of the Montana State TMDL Advisory Group and representing Montana Farm Bureau, stated initially there were misconceptions about the program. Mr. Youngberg testified the TMDL is part of a process. The first part is to determine the beneficial use of the water and the second part of the process consists of monitoring the water to determine whether it is meeting the beneficial uses. The third part is scientific and consists of determining what needs to be done to meet the beneficial uses. The last part is the stream restoration part of the process. Mr. Youngberg believed there needed to be some public participation, but suggested the TMDL process is scientific, and that public comment may be more appropriate when the draft TMDL comes out. Mr. Youngberg added public comment will be critical when the TMDL is implemented. Mr. Youngberg agreed it is absolutely necessary to expedite the process, and also agreed TMDLs should be split between EPA and DEQ and reported some of the work will be contracted out. Mr. Youngberg stated that he feels the program is now on-line where it should have been in 1997.

Mr. Strause asked Mr. Youngberg to describe the public-involvement process. Mr. Youngberg would like the TMDL to go out for public comment when it is in draft form. Mr. Youngberg emphasized that once DEQ receives the comments, it needs to move ahead quickly. Mr. Youngberg believed public comment would be critical during implementation.

Mr. Ron Steg, Environmental Protection Agency, oversees the Montana TMDL program. Mr. Steg testified he believes Montana has lost sight of what TMDLs are and has turned TMDLs into something they are not. Mr. Steg depicted the intent of TMDLs as developing a plan to ensure better fishing, more wildlife, higher quality recreation, better water for agriculture and industry, and good drinking water. Mr. Steg was perplexed because there is no requirement for implementation of non-point source TMDLs. Mr. Steg spoke about the Lolo National Forest case and stated that although the opinion was unpublished, it can be cited within the district, and although the project was stopped temporarily, Mr. Steg stated he did not see this happening again. Mr. Steg stated a problem could not be fixed until it is understood and noted water quality problems are very complex. Mr. Steg suggested Montana should identify water- quality problems and develop plans to fix the problems. Mr. Steg would like to see the public better informed. Mr. Steg agreed the TMDL process should be expedited, and he did not believe a 2007 deadline was realistic. Mr. Steg would like to see no distinction between DEQ and EPA and stated the agencies work closely together, have a cooperative agreement, and follow the exact same process and procedure. Mr. Steg stated EPA works with many contractors and could never hire enough FTEs to perform these functions. Mr. Steg again stated the 2007 deadline was not realistic, and added a joint motion with the plaintiffs would be filed to extend the deadline to 2012.

- **Questions from the EQC**

Sen. Roush recalled the issue was before the EQC in the past and asked Mr. Steg if he wants to omit the public concept from the process and rely on only the scientific process. Sen. Roush stated property owners sometimes know more about their particular areas. Sen. Roush inquired why conservation districts are being omitted from the process.

***(Tape 3; Side B)***

Mr. Steg did not believe any affected stakeholder should be omitted from the process, and thought EPA should be more efficient in the ways it interacts with the public. Mr. Steg stated EPA is looking for effective, efficient public involvement.

Mr. Youngberg stated originally they had intended to have a watershed group on every stream, and that group would develop a TMDL; however, there are numerous watersheds where people are not interested.

Mr. Ebzery asked if public involvement means people get a chance to come in and speak about their concerns or whether it means the conservation districts were shut out of doing TMDLs. Mr. Ebzery sees these as two distinct differences and asked Mr. Steg to comment. Mr. Steg agreed there has been a misunderstanding and stated it has never been the responsibility of conservation districts to develop TMDLs. Mr. Steg suggested projects should be looked at on a case-by-case basis, and stated that sometimes the public does not have enough interest or technical expertise to participate. Mr. Steg believed that once people understand the process, they can understand where they can fit into the process.

Ms. Sara Carlson, Executive Director of the Montana Association of Conservation Districts, agreed it is a complicated process, but stated the point is the conservation districts have the ability to get the experts out onto the stream and to enable experts to talk to people in the community. Ms. Carlson stated not too many people are excited about inviting DEQ or EPA onto their land. Ms. Carlson suggested conservation districts could help the process proceed in a more timely fashion. In addition, Ms. Carlson explained conservation districts are good at partnering and providing access to other scientists, and noted there can be disagreement between experts. Ms. Carlson thought the notion that if the conservation districts and local public were not insisting on input more TMDLs would be done is not a clear reflection of what is happening.

Mr. Ebzery offered his thanks to the panelists and commented he believes they are on the right path.

**UPDATE ON TONGUE RIVER TMDL AND MONTANA/WYOMING ISSUES**

Mr. Art Compton, Montana Department of Environmental Quality, testified the centerpiece of the Tongue River TMDL is a water quality model, and they are a little over one year and have invested close to \$500,000 of federal funds in the model. Mr. Compton explained the model is completed and there is an internal review of initial model results. Mr. Compton reported the final meeting will be on August 10 in Billings. Mr. Compton thought it was important to be able to differentiate between natural water quality changes and man-induced water quality changes. Mr. Compton reported the water quality for the Tongue River is within state standards, except for

the area within Miles City, and suggested Miles City would not be a good place to measure water quality because of the TY irrigation ditch diversion. Mr. Compton spoke about the implications of drought on water quality in the Tongue River and stated they also consider historic flows, and stated the model will help answer questions.

Mr. Compton testified Montana and Wyoming had an agreement for the Powder River to freeze water quality at the border until Montana had completed its standard-setting process. Mr. Compton explained the agreement expired about a year ago, and Montana has adopted water quality standards. Mr. Compton identified water quality from Wyoming as a critical concern to the agencies, and that it is important to make sure compliance efforts for Montana producers are not out of line with those experienced by Wyoming producers. Mr. Compton explained water-quality targets have been proposed to Wyoming and dialogue is open between Montana and Wyoming.

Ms. Page asked whether the model was schematic of the water quality in the stream and where it is being tested. Mr. Compton explained the water quality model is a sophisticated computer program that uses existing water quality up and down the Tongue, Powder, and Rosebud Rivers. The program uses existing water qualities and has the capability of predicting water quality. Mr. Compton stated anytime flow is below a certain level, it affects water quality and the model will be able to predict affects of a drought, discharge, or diversion.

Ms. Page asked if there was a diminishing amount of water coming from Wyoming and whether Montana had addressed the issue with Wyoming. Mr. Compton replied DEQ has not spent much time on the water quantity issue. Mr. Compton stated on-channel storage ponds could definitely reduce the amount of water delivered downstream.

Ms. Page asked Mr. Compton to comment on Mr. Steg's suggestion that TMDLs are water-quality restoration plans. Mr. Compton explained generally a water-quality restoration plan looks to return water quality to a standard. Mr. Compton spoke about the water quality issue at Miles City and thought the question for regulators is whether the problem is a natural or man-caused issue. Mr. Compton stated all border water-quality issues come down to balancing the operational flexibility of Wyoming producers versus Montana producers.

Rep. Clark asked if the water being diverted at Miles City was being used for irrigation at 1200. Mr. Compton replied that there are few CFS left after the TY diversion flows into the Yellowstone River. Mr. Compton stated that he was uncertain that measuring the little water left after the diversion was a good place to test compliance. Rep. Clark asked if the water that is being diverted is also at 1200, and Mr. Compton believed it was substantially higher. Mr. Compton did not believe evaporation was the cause and stated water that goes into the Tongue and Yellowstone ditch is good for irrigation and the water that is left during low flows is not. Rep. Clark suggested this should be a major point of focus for a TMDL.

Mr. Compton recalled there is 200-300 CFS flowing from Wyoming into Montana, and the EC was currently at 600. Sen. McGee stated the solution is in dilution and reducing the volume of water increases the sediments and salts. Sen. McGee thought it was a quantity related issue. Rep. Clark disagreed. Sen. Story commented the EC level is generally lower on the surface of a stream than on the bottom.

**PUBLIC COMMENT**

There was no public comment brought before the EQC.

**RECESS**

The EQC recessed at 5:50 p.m until 8:00 a.m. on July 20, 2004.