



# ENVIRONMENTAL QUALITY COUNCIL

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ENVIRONMENTAL QUALITY COUNCIL  
with the Department of Environmental Quality  
March 25, 2002  
Helena, Montana  
**FINAL MINUTES**

### EQC Members Present

SEN. BEA McCARTHY  
SEN. MACK COLE  
SEN. JON TESTER

### DEQ Representatives Present

Art Compton, Administrator, Planning, Prevention and Assistance Division  
Bob Raisch, Chief, Resource Protection and Planning Bureau  
Bob Bukantis, Monitoring and Data Management Bureau

### Staff Present

KRISTA LEE EVANS, EQC  
Robyn Lund, Secretary

This meeting was held in response to **EXHIBIT 1**.

**SEN. COLE** said that there were some questions that came out of the meeting that was held in Chester. **SEN. COLE** and **SEN. TESTER** thought that these questions should be addressed before TMDL moves east.

**SEN. TESTER** said that the Chester meeting lasted about 1 ½ hours and was a good discussion. The TMDL process is something that they want to talk about in more general terms. There are conditions in eastern Montana that are fairly consistent. If the problems that were brought forth by the Sage Creek Water Alliance can be addressed now, it will make the process better down the road.

**SEN. McCARTHY** said that she would like to hear the difficulties that the Department of Environmental Quality (DEQ) has, so that changes, legislative or otherwise, can be made.

**Art Compton, DEQ**, said that generally the TMDL program is the program without friends. The first 130 TMDL's were associated with point sources and these were the easy ones. The rest of the TMDL's are non-point sources and these are not a simple or easy thing. They have completed 8 or 9 of the more than 600 non-point source TMDL's. The watershed groups are working with the 319 program and the non-point source grant program, and then the TMDL program comes along and overlays additional requirements, parameters, and approval constraints, and takes people off in a different direction. Non-point source solution is not regulated by anyone and no one is comfortable putting numbers down on paper. This has been seen in every watershed they have dealt with.

They need to look at eastern versus western Montana, intermittent streams versus perennial streams. The Sage Creek group had gone a substantial direction down the 319 path and then the TMDL program came in with all the additional things that would have to be done to get approval. The watershed group had already invested a lot of work on the 319 program.

**SEN. TESTER** said that most likely that would be found in every watershed in eastern Montana. **Mr. Compton** said that they would like to avoid that at other watersheds. If the stream is on the 303 D list, DEQ can't take it off. They are experimenting with the 2001 TMDL's, the 4 watersheds that were sent to Environmental Protection Agency (EPA) on December 31, 2001, on saying that the reassessment work has indicated that the stream is not impaired for that constituent. They have heard from the plaintiffs' attorneys that that was not acceptable; it was not up to the agency's discretion to do TMDL's for those water bodies.

**SEN. COLE** asked if the 1996 list is still holding in that tight. **Mr. Compton** said that the 1996 list was put together before the formal staffing and creation of Montana's TMDL program and before the sufficient and credible data requirements. Some streams on the lists don't have sufficient and credible data to show that they are impaired. The plaintiffs convinced the district court that DEQ is arbitrarily removing streams to decrease workload. Overall, with the TMDL program, DEQ walks a tight rope and is pulled between the watershed groups and Region 8, EPA. This is a daily debate. Part of the issue at Sage Creek was DEQ trying to mold the watershed's efforts into something that Region 8, EPA would approve.

**SEN. TESTER** asked if Region 8, EPA demands a numerical standard for a TMDL. **Mr. Compton** said that it either has to be a numerical standard or a numerical reduction in the present load. **Bob Raisch, DEQ**, said that EPA has shown some flexibility in some cases where there isn't the amount of data that is needed to put a TMDL together. EPA does accept phased approaches where an initial TMDL can be submitted and then revised in a couple years when more data is available. They are working toward the numerical expression of a TMDL. Sage Creek was one of the first that was done under the new court ordered schedule. This was a data-short area that they worked on and they could have used more information to do a good job, but it was one of the first ones on the schedule. They had a difficult time getting it done on time working with what was available. It would have been much better had there been more data.

**SEN. COLE** said that there is always more that could be done, but there needs to be a point where they can say that they have enough.

**Mr. Compton** said that the phased approach is an option with the Sage Creek TMDL and is something that DEQ had planned to do.

**SEN. TESTER** said that he is not here for the Sage Creek watershed. They don't plan on challenging this. The concerns that the Sage Creek group brought forth are applicable to all eastern Montana. Does the EPA feel that one flow in 5 years is enough for credible data?

**Mr. Raisch** said that it was not enough for good credible data. **SEN. TESTER** said that the next reading done on that watershed will have very high contaminants because it will be flushing salt that has been accumulated during the drought. **Mr. Raisch** said that there were provisions for that in the TMDL. They looked at all the pollutants and nutrients and did a detailed evaluation with the limited data that DEQ had. DEQ decided that the water was not impaired for nutrients.

**MS. EVANS** asked if the EPA could send the Sage Creek TMDL back saying that is was listed for nutrients too and that a TMDL for nutrients needs to be done. **Mr. Raisch** didn't think that there would be a problem with the EPA, but the plaintiffs may cause problems.

**Mr. Raisch** said that some of the data during that one flow period was at the point where there could be some impact to fish. The DEQ was required to protect fish, so they did set the level at the point 1250 total dissolved solids (tds). There are people in the watershed that felt that was not necessary. Even if DEQ had said that the stream was not impaired by salinity, they would have had to prepare an explanation for the plaintiffs similar to the explanation they prepared for nutrients.

**SEN. TESTER** said that the watershed's concerns were that with the drought, it is a difficult time to set baselines. **Mr. Raisch** said that a lot of the time DEQ can't get any monitoring data because there isn't any water to monitor. **Mr. Bukantis** said that in the TMDL there is a provision to come back and adjust it as DEQ learns more.

**SEN. COLE** said that there is a court order that DEQ has to follow. This may be something that the Sage Creek watershed participants didn't fully realize.

**SEN. TESTER** asked if DEQ has the staff necessary to come back to these streams to conduct the required monitoring. **Mr. Compton** said that DEQ has talked about staff and general TMDL approach issues with the Water Pollution Control Advisory Committee (WPCAC) and the TMDL Advisory Work Group. DEQ is only at 60% staff, with 11 open positions. They are having a hard time getting people to apply for TMDL staff and retaining people. They are relying heavily on contract support to get this year's schedule done. There will be an alternative pay plan at DEQ that they are hoping will help to recruit new staff and retain the people that they have. DEQ is also using outside agency assistance. They have had some recent success with hiring due to the anticipation of the new pay plan. One year from now they hope to be fully staffed. Maybe in 2005 they will be able to argue that they are fully staffed and need some more FTE, but they can't make that argument now.

**SEN. COLE** asked about contracts. **Mr. Compton** said that Tetra Tech is working on the Tongue and Powder Rivers. There will be some permit pressure on these rivers coming soon due to coal bed methane (CBM). The DEQ is trying to get contractors and outside agency assistance to get the 2002 schedule done. By the end of 2002 they hope to have positions filled and will be able to get staff out to talk to the watersheds.

**SEN. McCARTHY** asked how many contractors are former employees. **Mr. Raisch** said that one contract is with a firm that has a former employee working for them. **Mr. Compton** said that the TMDL coordinator left and that was a huge set back. He is now working for the EPA. DEQ

asked to keep his focus on the Tongue and Powder Rivers, which looks like it is working well. The former employee is still working hard on the TMDL efforts. DEQ is able to use some EPA funding to get the contractors working on the TMDL's.

**SEN. TESTER** asked, from a testing standpoint, what happens if the positions don't get filled. There is a tremendous turnover of staff. **Mr. Bukantis** said that if DEQ is short staffed, they can't personally do as much work. DEQ went through an RFP process to qualify a bunch of contractors. The idea with that is that if DEQ is short staffed, that gives them some more management flexibility to contract some of the work out. He said that if DEQ is able to contract with firms who have former DEQ employees, that is a positive thing because those are people who are very familiar with DEQ efforts and the program. Being fully staffed would be the ultimate.

**SEN. COLE** asked if the contracting can fill in instead of FTE. **Mr. Compton** said that they are hopeful that they will be able to fill the positions with the alternative pay plan. This year they are relying on contractors.

**SEN. COLE** asked if the Tongue and Powder Rivers would be the primary streams for 2002. **Mr. Compton** said that there are 6 others as well. The Tongue and the Powder Rivers are where the contractor resources are being applied first to ensure that those TMDL's are done in time.

**SEN. McCARTHY** asked if the 130 finished TMDL's are mostly in western Montana. **Mr. Compton** said that most of the point sources are in western Montana, but there are a few spread out over the state. The point source TMDL's are the easy ones. **Mr. Raisch** said that DEQ works with the watersheds and some of those watersheds can do some of the ongoing monitoring. DEQ can help them through 319 or other grants. If there is a pollutant the monitoring may take some expertise and the watershed groups can't do that. **Mr. Bukantis** said that DEQ would like to have one of their technical staff involved with the watershed groups. There should be good monitoring plans built into the TMDL's and taken into consideration as to what resources may be available on the local level. DEQ needs to look at the situation, water problem, local capability and design a monitoring plan appropriately.

**Mr. Compton** asked that when looking at the next eastern Montana stream, would DEQ do anything differently. They have to use their best professional judgement. **Mr. Raisch** said that eastern Montana is a problem because there is less information on a lot of the streams. They don't know the potentials of the streams. The main thing they would like is more data and a better feel for the stream's potential. **Mr. Bukantis** said that TMDL has been a focus of monitoring and data management of the Bureau of Water Quality's efforts, but there is more going on with statewide monitoring. We don't understand eastern Montana streams as well as western Montana streams. Those systems have not been studied as well.

**SEN. McCARTHY** asked if we need to fix the law or can this be dealt with administratively. **Mr. Bukantis** said that they are working on new standards. **Mr. Raisch** said that they are looking at new classifications. They are also looking at this with regards to discharges to streams that changes an ephemeral stream or an intermittent streams to a permanent stream. In some cases they change the standards that are applicable to those streams. **Mr. Compton** said that the classification of the drainage drivers the classifications of those streams.

**SEN. McCARTHY** asked if they have authority for rule making changes. **Mr. Compton** said that they look at that every 2 years. The adjustments that are needed on the TMDL program are staffing, outside assistance, and rule making. DEQ feels that they have the flexibility under HB 546 to make these adjustments. He offered the example of the Geraldine waste water system, which discharges into a dry ditch. That is something that needs to be fixed through rule making and lower the bar on the uses that ephemeral drainages need to support. Very often those drainages are in no way representative of the entire watershed. He thinks that the Board of Environmental Review will be receptive to those changes.

**Mr. Raisch** said that the most of the reclassifications have a provision that they can't affect the ability of the stream that they discharge to, to meet its standards. You can't use an ephemeral stream as a discharge transport stream. **Mr. Bukantis** said that the other situation is that they are imposing unrealistic expectations on what a water can produce because of inappropriate classification. There is a formal process called the Use Attainability Analysis, which is a process that can formally relax the standards. You can do the ground work to reclassify the stream. That is something that DEQ can do. **Mr. Raisch** said that has been done, usually at the request of a watershed group. The reclassification scheme that they are putting in would require those as well. This should be fairly easy for ephemeral and intermittent streams. When there is a stream that runs continuously, it become more technically oriented.

**SEN. McCARTHY** asked for a copy of the changes that the board will make. **Mr. Compton** said that when they request initiation of rule making, the draft is done. They have the proposal done and the technical work has already been done.

**SEN. McCARTHY** said that the EQC members would like notifications when they do the hearings. **Mr. Compton** said that the hearings would be within the next month.

**SEN. McCARTHY** asked if the hearings are in Helena. **Mr. Raisch** said yes.

**MS. EVANS** asked if a stream was reclassified, because of the 1996 list, it still has to have a TMDL done. **Mr. Raisch** said that if DEQ can show through data that the stream is not impaired, DEQ is taking the position that a TMDL doesn't need to be done. They don't anticipate any argument from EPA. **Mr. Compton** said that they got a scathing letter for the plaintiffs' attorney after the December 31 submission of the 4 watersheds, because one of the things that DEQ said in that submission is that the lower Musselshell wouldn't get a TMDL because it was only for flow alterations. "All necessary TMDL's" is in the court order. Work with the plaintiffs needs to be staff to staff, assuming that staff is in control of the attorneys.

**SEN. COLE** asked if the lower Musselshell had a lot of work done on it. **Mr. Raisch** said that there are some other areas upstream of that which will be dealt with later. The lower stretch was listed for flow alteration. EPA doesn't accept TMDL's for flow alteration.

**Mr. Compton** said that the drought has made monitoring difficult to get up and running.

**SEN. TESTER** asked, stepping back to the 1250 tds limit on Sage Creek, since there was only one year of testing, what else was used. **Mr. Raisch** said that they used a laboratory study that was done based on Fat Head Minnow that showed that at 1250 tds there was some mortality. This is typical sensitivity of the type of fish in that drainage. **SEN. TESTER** asked if the Fat Head Minnow was in eastern Montana. **Mr. Raisch** said that it is primarily southeastern

Montana. It was about the same sensitivity as the fish in the Sage Creek. There are some assumptions there.

**SEN. McCARTHY** asked how the fish survive in a creek that is dry most of the time. **Mr. Bukantis** said that they survive in pools. **Mr. Raisch** said that the pools are supported by ground water. **SEN. TESTER** said that the influence of ground water on these drainages is significant.

**SEN. TESTER** said that most folks are western Montana trained. When it comes to eastern Montana, does DEQ need help to train field people as to issues particular to eastern Montana. **Mr. Bukantis** said that they have some good people with training across the state. The monitoring coordinator of the Missouri has a background in geohydrology with an interest in water quality, that plays into eastern Montana. It takes some effort to understand the systems in eastern Montana.

**SEN. COLE** said that some contractors have done a lot of work in eastern Montana that may be able to help.

**SEN. TESTER** asked regarding entities such as Montana Salinity Control Association (MSCA) or the Montana Bureau of Mines and Geology (MBMG), is there a necessity to use these entities as a resource. Those are the people that the farmers in the area work with. **Mr. Bukantis** said that DEQ needs to work with those folks. **Mr. Compton** said that DEQ is looking for all the help they can get.

**SEN. McCARTHY** said that we need to encourage more interest and education in eastern Montana.

**SEN. TESTER** asked if there is any potential for education. **Mr. Compton** said that the key to that is collaboration with other groups. **Mr. Raisch** said that both MBMG and the MSCA are a perfect example of that. DEQ needs to use those folks.

**SEN. COLE** asked about NRCS. **Mr. Compton** asked if there was an alternative to establishing a flow standard of 1250 tds. **Mr. Raisch** said that reference streams could be another path taken. You find a similar stream(s) and use that information. If there are several reference streams, that may give a better idea of where the requirements should be set.

**SEN. McCARTHY** asked if there is overlap with the Reserved Water Rights Compact Commission (RWRCC). **Mr. Compton** said that the RWRCC tends to be more water quantity than water quality. There is some overlap. The TMDL program can't have any impact on water rights. There is a direct connection with quality and quantity. Watching Wyoming has shown that water quality issues have really come to the forefront with coal bed methane (CBM) development. **SEN. McCARTHY** said that she is thinking about the Milk River. It might help to get some of this together.

**SEN. TESTER** asked if there are any unimpaired drainages in eastern Montana. **Mr. Bukantis** said yes. **Mr. Raisch** said that is the advantage of looking at reference streams. "God can't violate water quality standards." **SEN. TESTER** said that is what they are talking about here. **Mr. Bukantis** said that they just delisted a bunch of tributaries.

**Mr. Compton** asked if water quality on reference streams is something that can be substituted as standards or TMDL targets. **Mr. Raisch** said yes. **Mr. Compton** suggested that the next TMDL done may take a different approach.

**SEN. TESTER** asked if there will be criteria in the work plans about when and where as far as sampling data in terms of effectiveness monitoring. **Mr. Bukantis** said that they need to evaluate it on a case-by-case basis. They need to look at the pollutant, impairment, and resources and evaluate that.

**MS. EVANS** asked if a more structured monitoring plan would be use than what is in Sage Creek. **Mr. Bukantis** said yes. **Mr. Raisch** said that Sage Creek has an outline to develop a monitoring plan.

**SEN. TESTER** asked when developing a monitoring plan, does DEQ consider upstream irrigation and back flows. **Mr. Bukantis** said that if the return flows are going back to state waters they have to meet standards. **SEN. TESTER** said that some water would back flow into the river. **Mr. Compton** said that it is a non-point source. **Mr. Raisch** said that those are difficult situations. Any controls would have to be voluntary because DEQ doesn't have authority for non-point source.

**Mr. Compton** said that the CBM environmental impact statement (EIS) says that 24% of production water will eventually manifest itself as surface flow again. A good deal of that will be subsurface return flow. **SEN. COLE** said that it will be a difficult thing to say. It is a natural percolation. **MS. EVANS** said that the base line of the discussion is that non-point source is voluntary. **Mr. Raisch** said that their approach would be management. **MS. EVANS** asked if an example of management is that recharge areas could be used to reduce discharge. **Mr. Raisch** said that the type of irrigation system would affect the amount and rate of percolation. For example, there could be a lot of leakage from ditches, DEQ can work with those type of things through management.

**Mr. Compton** said that there were TMDL's completed for 4 drainages in the first year. There are 8 on the schedule in 2002. There will be 22 in 2007. The court imposed schedule required the TMDL's to be done by 2007. The Tongue and Powder were moved to this year. **Mr. Raisch** said that they are hoping that moving these will not cause a problem for the plaintiffs.

**Mr. Compton** said that the plaintiffs are the Friends of the Wild Swan and the defendant is EPA. DEQ has a productive dialogue with some local representatives, but have had problems with some of their attorneys.

**MS. EVANS** asked if there is still an appeal. **Mr. Compton** said yes.

**SEN. McCARTHY** asked for DEQ's attorney. **Mr. Compton** said Claudia Massman.

**SEN. TESTER** asked if dealing with contractors is cost effective. **Mr. Compton** said that immediate efforts are more cost effective in the short term. Young staff take some time for them to get comfortable in front of a watershed group, but it is a long term issue. Long term staff has to provide technical leadership.

**SEN. McCARTHY** said that the local groups often are not receptive to a younger person.

**SEN. TESTER** asked for the turnover rate before the pay plan. **Mr. Compton** said that it is 45% over a biennium. **SEN. TESTER** asked if that was mainly the pay plan. **Mr. Compton** said that is part. Another problem is that it is a hard job and in reference to the court time line, many feel that they won't get there. DEQ needs recruiting and retention to better position themselves. **SEN. TESTER** asked if they will be asking for more money to fund the pay plan. **Mr. Compton** said that the pay plan will move operating funds to personal services. It is relying on the vacancy savings. They won't be asking for additional money.

**SEN. COLE** asked if more funding would come federally. **Mr. Compton** said that they do receive some federal funding. **SEN. COLE** said that DEQ is on top of what they are doing. **Mr. Compton** said that he feels like they are on the bottom.

**MS. EVANS** asked if Tetra Tech is using EPA money. **Mr. Compton** said that was true, it is using EPA contractor dollars. It is very cost effective for DEQ. **MS. EVANS** asked if staff ever goes out with contractors. **Mr. Raisch** said that they have to oversee contractors. It would be an advantage to send new employees out that way too.

**SEN. TESTER** said that anything that the EQC can do to help with this project they will be happy to do. There are some problems in eastern Montana that need to be addressed. **Mr. Compton** said that reference stream quality data is a big step to doing it differently.

**SEN. McCARTHY** said that it helps if people work with the same DEQ person over and over.

**Mr. Raisch** and **Mr. Bukantis** agreed.

There being no further business the meeting was adjourned.

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