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AGENCY OVERSIGHT SUBCOMMITTEE 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 in the offices of the Legislative Services Division.
Exhibits for this meeting are available upon request.

SUBCOMMITTEE MEMBERS PRESENT

REP. CHRISTOPHER HARRIS (Chairman)
REP. DEBBY BARRETT (Vice Chairman)
REP. PAUL CLARK
SEN. MICHAEL WHEAT
MS. ELLEN PORTER
MR. HOWARD STRAUSE

SUBCOMMITTEE MEMBERS ABSENT

REP. DONALD HEDGES
REP. JIM PETERSON

STAFF PRESENT

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

VISITOR LIST

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

SUBCOMMITTEE ACTION

- The Subcommittee recommended LC 9009, with the amendment proposed by Ms. Porter, be passed by the full EQC.
- DEQ will deliver by the September meeting the outline of what DEQ considers the preferred SEP policy and will take into account the Subcommittee's concerns about uniformity and flexibility and consider the legislation requested by DEQ for full authority to engage in SEP settlements.
- The Subcommittee requested that the EQC monitor and receive periodic updates on the fish hatchery issue and any possible litigation that may arise.
- The Subcommittee will recommend to the full EQC that it make a formal recommendation to the 2005-06 EQC that the nonattainment air quality designation issue should be followed over time.

CALL TO ORDER, ROLL CALL, ADOPTION OF MINUTES

The July 19, 2004, meeting of the EQC Agency Oversight Subcommittee (Subcommittee) was called to order by Rep. Christopher Harris, Chairman, at 8:10 a.m., in Room 102, Montana State Capitol Building. The secretary noted the roll ([ATTACHMENT 3](#)). The Minutes of the previous meeting were adopted subject to the approval of the full Environmental Quality Council (EQC).

PUBLIC COMMENT

No public comment was offered.

AGENCY OVERSIGHT ISSUES FOLLOW UP

• Septic Tank Pumper Rules

Mr. Ed Thamke, Waste and Underground Tank Management Bureau Chief, testified that subsequent to the March 9, 2004, EQC meeting, the agency met with the stakeholders regarding their concerns and formed a Septic Pump Advisory Council (SPAC). In addition, the public comment period for the septic pumper rule was extended until June 30, 2004, to allow SPAC and other stakeholders sufficient time to submit their comments. Mr. Thamke outlined the dominant areas of concern as: (1) screening; (2) advance notice of inspection; (3) reporting requirement; and (4) termination of land application sites. Mr. Thamke reported the agency is in the process for formulating its response to the written comments. Mr. Thamke also reported the stakeholders have agreed in principle to support legislation increasing the annual license fee.

Chairman Harris asked Mr. Thamke to address the advance notification of inspection, and suggested it may be inconsistent with the Department of Environmental Quality (DEQ) policy. Mr. Thamke disagreed and stated that it is consistent with DEQ policy and that currently they provide advance notice of inspection as a matter of courtesy. Chairman Harris inquired if it would be inappropriate for this area to have advance notice of inspections because infractions could be addressed with minimal notice. Mr. Thamke agreed.

In response to a request by Chairman Harris, Mr. Thamke anticipated being able to respond to public comment in August and that the rule should be promulgated by September. Mr. Thamke added the original time frame was shorter, but noted they had to extend the public comment period which bumped the deadline back six months.

Mr. Thamke submitted a letter from Don Heimlugries, a member of the Advisory Committee (**EXHIBIT 1**) and a map depicting Septic Tank Pumper Advisory Board Member Regions (**EXHIBIT 2**).

- **Methamphetamine Cleanup Bill**

Chairman Harris noted the Subcommittee has spent a great deal of time on methamphetamine cleanup and solicited comments on the draft legislation (**EXHIBIT 3**).

Chairman Harris informed the audience that the proposed legislation was drafted in compliance with the Subcommittee's request that the legislation be straightforward, as simple as possible, and address the issue at hand. In addition, Chairman Harris explained the reason the standard is set by law is because it was decided the Washington state standard was appropriate. Chairman Harris explained placing the standard in Department of Public Health and Human Services' (DPHHS) rules would be the best use of resources.

Ms. Maggie Bullock, Administrator, Health and Safety Division, Montana Department of Public Health and Human Services, stated the Health and Safety Division would be the agency responsible for enforcing the law. Ms. Bullock's major concern with the legislation is that they should be working with DEQ on the methamphetamine issue, and Ms. Bullock did not feel DPHHS should be the sole responsible party. Ms. Bullock noted the proposal is for training and testing, and is not for sample taking. Ms. Bullock thought the responsible state entity should be able to charge a fee for sample taking. Ms. Bullock strongly suggested taking a multi-agency approach.

Dr. Michael Spence, State Medical Officer, Department of Health and Human Services, added a joint effort between agencies would be in the best interest of the legislation.

Ms. Jan Sensibaugh, Director of the Department of Environmental Quality, testified DEQ does not currently have responsibility for indoor air contaminants. Ms. Sensibaugh agreed DEQ does have responsibility for asbestos and radon, but stated DEQ receives federal funding for those programs, and they are mostly educational programs. Ms. Sensibaugh submitted a paper on DEQ's roles and responsibilities regarding methamphetamine (**EXHIBIT 4**). Director . Sensibaugh stated DEQ would assist DPHHS with sampling and training.

Mr. Chris Christiaens, representing Montana Farmers Union and the Montana Landlord Association, has long believed Montana needs a standard. Mr. Christiaens did not believe property should be immediately condemned or considered contaminated until there is proof. Mr. Christiaens explained the difficulties experienced once the property has a record of contamination. Mr. Christiaens expressed concern with rumors about people falling ill while living in apartments that have been cleaned up. Mr. Christiaens explained there are no known cases of illness once a property has been cleaned up. Mr. Christiaens highlighted the importance of educating property owners on the proper way to clean property. Mr. Christiaens also suggested the property owner should be included as a victim. Mr. Christiaens suggested a surcharge on ephedrine could be used to help property owners.

Joan Miles, Director of the Lewis and Clark City/County Health Department, also testified on behalf of Butte Silver-Bow, Missoula, and Gallatin Counties. Ms. Miles also believed the problem should be handled by multiple agencies. Ms. Miles also suggested that counties do not have adequate resources or personnel to have an active role in sampling. Ms. Miles identified the counties' role as providing resources and information to property owners.

Ms. Peggy Trenk, representing the Montana Association of Realtors, appreciated efforts to keep the program voluntary and the attempt to get a clean bill of health for the property. Ms. Trenk noted current law requires realtors to disclose any adverse material fact. Ms. Trenk expressed concerns about the septic and water systems, and suggested a clean bill of health should address the whole property.

Mr. Dan Adams, representing Americlean, testified Americlean has been remediating meth labs for over one year. Mr. Adams stated it is impossible to determine the contamination level without testing. Mr. Adams testified some of the levels of contamination he has seen are higher than the immediate danger to life and health standards set forth by the EPA. Mr. Adams suggested standards can be so restrictive and can make remediation very expensive and unfeasible if those standards are applied to every situation. Mr. Adams spoke about tenants attempting to move in, and being unable to do so because of chemical residuals left in paint and carpet. Mr. Adams explained Washington state standards require remediation down to 5 micrograms per cubic foot, and Minnesota requires remediation down to .1 micrograms per cubic foot. Americlean adheres to the less than .1 micrograms per cubic foot standard, and suggested this standard can be achieved in every situation. Mr. Adams believed the more restrictive standard is necessary for public health. Mr. Adams expressed concerns about property owners receiving information about available resources if they suspect a meth lab has been operated on their property.

- **Questions from the Subcommittee**

Rep. Paul Clark asked Mr. Christiaens what his proposal is for the classification of property between the time of discovery and the time of determination. Mr. Christiaens replied they believe the property should be noticed, and he does not believe the property should be condemned until the level of contamination can be determined. Rep. Clark asked who would have the responsibility of overseeing the condemnation of the property. Mr. Christiaens responded that multiple agencies are involved in the condemnation process. Mr. Christiaens relayed the Cascade County Health Department does not feel it has the expertise or time to make those determinations. Mr. Christiaens suggested the proposed legislation needs to be revised before being placed in statute.

Rep. Clark asked if there was a classification which would consider the property uninhabitable but not condemned. Ms. Miles noted the proposed legislation does not provide for condemnation and provides for a voluntary process. Ms. Miles stated on a county level, they do not want to be responsible for certifying a property is safe for habitation without testing. Ms. Miles suggested there should be a consistent listing of properties where meth labs have been discovered and the status of those properties. Rep. Clark wondered about the State's responsibility to ensure, if nothing is done to clean up the property, that something is done to keep people off the property. Ms. Miles agreed it is necessary for Montana to adopt a policy regarding the properties and the possibility that these properties are hazardous to health.

Rep. Clark noticed DEQ is not receptive to becoming involved in habitations, and Rep. Clark asked whether DEQ would be receptive to becoming involved with septic systems. Director Sensibaugh replied DEQ believes septic systems are its responsibility, but noted DEQ addresses those issues without legislation. Rep. Clark inquired when a property's classification is questionable, whether DEQ inspects the septic system. Director Sensibaugh explained when DEQ gets a complaint about any suspected outdoor contamination, they perform an inspection and follow up on complaints. Rep. Clark asked if a meth lab had been operated on a property, whether there is an assumption of contamination of the septic. Director Sensibaugh responded they only investigate complaints, and there is no assumption. Mr. Thamke explained DEQ has a memorandum of understanding with the Board of Crime Control and if they receive notification from the Drug Task Force about the discovery of a meth lab, DEQ asks whether it appears they were discharging pollutants down the septic system. At that point, DEQ would work with the local health department since it has authority over individual wastewater systems. If the property was on a public system, DEQ takes responsibility.

Mr. Howard Strause noted DEQ's response about how they handle septic tank issues and asked Ms. Bullock if her concern is alleviated if there is a fee added on for inspections. Ms. Bullock responded it does not alleviate her concern, and that the bill needs to contain a provision for a fee to be charged for sampling. Ms. Bullock supports the idea of having environmental health and public health together because it is hard to separate the two. Ms. Bullock identified the Department of Labor and Industry as also having a role since they employ an industrial hygienist. Ms. Bullock identified public health as involving internal and external environments.

Mr. Strause was confused how DPHHS, who will be responsible for certifying the property has been cleaned up, and DEQ, who will be responsible for the septic cleanup, will mesh together. Director Sensibaugh commented that she interpreted the bill as only pertaining to the internal structure. Director Sensibaugh further responded that DEQ would let everyone involved know their findings.

Rep. Debby Barrett stated her understanding is the cleanup will depend on the level of contamination, and there should be a lead agency or entity to make that first contamination determination. Rep. Barrett stated there could be three levels of contamination. The first level would require participation from DEQ, DPHHS, and the County Health Department; the second would be just DPHHS and DEQ; and the third, would involve minor cleanups. Rep. Barrett identified the question as which agency will take the lead and make the initial determination.

Director Sensibaugh explained DEQ receives numerous calls about indoor air concerns from a variety of sources. Director Sensibaugh expressed her concern about where DEQ would get the resources to do the initial determination. Director Sensibaugh stated there is no reason DEQ cannot test air quality, but expressed hesitancy.

Rep. Clark asked Dr. Spence if he was part of committee working on public health tracking legislation. Dr. Spence replied he is and stated the Environmental Public Health Tracking Program is a federal grant to build infrastructure to address environmental problems as they might be related to health. Dr. Spence stated their primary purpose has been to define what databases in the environment can be linked to databases relating to health. Dr. Spence stated this issue is not before the committee at the present time.

Rep. Harris recalled Mr. Christiaens bringing this problem to the attention of the Legislature last session and that the problem was that property was being condemned, and that landlords were unable to rent or sell their properties because there was no cleanup standard. Rep. Harris asked why the bill would not satisfy Mr. Christiaens' concerns given the limited parameters of its ambition.

(Tape 1; Side B)

Mr. Christiaens stated one of the major concerns of the Landlord Association is raising the cost of housing due to huge cleanup costs. Mr. Christiaens also spoke about the mobility of clandestine labs their use in motels or hotels. Mr. Christiaens was under the impression that the DOL's hygienist was limited to government properties rather than private properties. Mr. Christiaens identified the biggest problem as certifying a property is clean and eliminating liability in the future.

Chairman Harris noted the bill is not a liability immunity bill and the legislation would not solve each and every problem. Rep. Harris also directed the Subcommittee and the panel to a the recent headline in *The Billings Gazette* "No laws require sellers to disclose meth status of houses." The proposed legislation would provide if the property is cleaned up to standard, no notification would be required by the seller, and Chairman Harris thought that would be the best incentive for the landlords to cleanup the property. Mr. Christiaens recalled that he carried a bill in the 1997 session that required a seller to disclose to the realtor, and the realtor is also required to disclose, any known hazard on a property. Chairman Harris disagreed and stated there is no requirement in state law to disclose the operation of a meth lab on property.

Dr. Spence suggested the legislation could allow for an assessment of the property to determine the level of contamination, and then make a determination of whether the property is clean after the proper cleanup measures have been taken. Chairman Harris appreciated Dr. Spence's suggestion, but noted Montana has extremely scarce resources. Chairman Harris depicted the legislation as a very modest step that is meant to solve a discrete problem, but not every problem, and the purpose of the bill is not to give a clean bill of health to the entire property.

Rep. Barrett thought there was no hazardous waste site or dump site in Montana, and wondered where razed buildings were deposited. Mr. Christiaens recalled a building in Havre was buried in the Havre dump. Mr. Christiaens also recalled soil was replaced around that building, and Mr. Christiaens was unsure, but he assumed the contaminated soil was buried.

Chairman Harris asked each panelist, given the modest purpose of the bill, what one or two changes fixes they would absolutely require. Mr. Adams thought the most important thing would be disclosure to the public that the property was used as a meth lab and whether the property has been tested and certified as clean. Mr. Adams agreed Sections 5 and 6 of the bill addressed his concern. Ms. Bullock would like to see the legislation recognize the whole property is involved, and would like to see the lead agency be instructed to work with all other agencies that can provide expertise. Ms. Bullock asked for clarification of Section 4 and suggested there needs to be an ability to charge a fee for sample taking. Dr. Spence noted that Section 1 only refers to DPHHS, and Dr. Spence would like to see the legislation refer to a multi-agency approach. Director Sensibaugh cautioned if the legislation is going to include multi agencies, it should specify the role of each agency. Ms. Miles stated her understanding is that

all of the testing would be done by independent contractors, and she would like to see the law remain that way. Ms. Trenk stated relators currently provide full disclosure, and would like to see the process done quickly and include a specific time frame. Mr. Christiaens suggested cleanup standards are important and would like it made clear where the public can go to get assistance.

DEQ SUPPLEMENTAL ENVIRONMENT PROJECTS

Ms. Jan Sensibaugh, Director of the Department of Environmental Quality, reported that once DEQ enters into settlement agreements with a violator, they discuss the option of performing Supplemental Environmental Projects (SEP). Normally, violators are not permitted to do a one-for-one offset for the total penalty. Director Sensibaugh reported they follow the Environmental Protection Agency (EPA) SEP policy to determine what SEPs are acceptable, how much money is offset, and how the SEP is negotiated. In the case of the Yellowstone Mountain Club, DEQ calculated the amount of penalty and then began negotiating on the SEP. DEQ proposed the Yellowstone Mountain Club fund the environmental impact statement for designating the Gallatin River as an Outstanding Resource Water (ORW); however, the Yellowstone Mountain Club declined that SEP. Director Sensibaugh stated sometimes the cash penalty is less than the cost of a SEP. Ultimately, the Yellowstone Mountain Club decided to purchase a glass pulverizer for a glass recycling program in the Gallatin Valley. Director Sensibaugh identified this as a very good project that would benefit Montana and granted approval of the SEP.

YELLOWSTONE MOUNTAIN CLUB

Mr. Steve Brown, representing the Yellowstone Mountain Club, and Bob Sumpter, Vice President of the Yellowstone Mountain Club, testified the glass pulverizer was chosen because it had direct and immediate environmental benefits.

Mr. Rob Ament, Executive Director of American Wildlands, stated that it has been over two years since his organization requested an environmental impact statement (EIS) to designate the Gallatin River as an outstanding resource water, and to date nothing has been started on that designation. Mr. Ament identified lack of funding as the reason for the delay in the EIS and identified several missed opportunities for funding. Mr. Ament identified the EIS as a commitment by the DEQ and suggested when dollars are available, DEQ should have met its obligations prior to working off of a wish list.

Mr. John Wilson, representing Trout Unlimited, recalled legislation that would have required the petitioner to pay for an EIS; however, the West Gallatin was taken out and the responsibility for that EIS was placed on the State of Montana. Mr. Wilson testified the Legislature had an opportunity to require the petitioner to pay for the EIS, it had the opportunity to leave the West Gallatin in the legislation. Mr. Wilson identified the issue as where the funding will come from. Mr. Wilson strongly suggested DEQ should find the funds to undertake the EIS. Mr. Wilson stated the decision about ORW designation is a legislative decision, and suggested an EIS may not be needed to move forward or, in the alternative, perhaps only an EA will be needed. Mr. Wilson urged the Subcommittee to find a quick solution to the funding problem.

In response to a question from Ms. Ellen Porter, Director Sensibaugh explained there are two separate obligations and the Gallatin ORW is a process to define the Gallatin River as an ORW

which brings with it some protections. While the Yellowstone Mountain Club is in the Gallatin drainage, the two are in no way connected.

Ms. Porter suggested SEPs can be a great tool to get good projects done when other funding is not available. Director Sensibaugh noted if a company chooses a SEP that actually makes them pay more than the cash penalty, then the State is getting an environmental benefit. Director Sensibaugh pointed out they do not have the authority to force the violator to pay for a SEP than is more than the actual value of the violation.

Mr. Brown stated the SEP cost the Yellowstone Mountain Club \$30,000 more than the DEQ penalty, but the Yellowstone Mountain Club voluntarily agreed to do the SEP because of the environmental benefits to the state.

Ms. Porter noted that usually when a SEP is undertaken, the project is funded to its completion, and the environmental benefit is realized, and an EIS can draw out the project and asked if the EIS would have to be completed in the SEP process. Director Sensibaugh stated the violator must do the project and DEQ makes sure the violator meets the obligations in the settlement agreement. Director Sensibaugh explained the agreement would have to clearly identify the activities and the amount of money that needed to be spent.

Sen. Wheat asked for an explanation of the settlement and what the penalty was. Mr. Brown explained there was an alleged violation of the storm water rules, and the Yellowstone Mountain Club reached a settlement with the State and agreed to a \$200,000 penalty. Ultimately, the Yellowstone Mountain Club agreed to pay \$76,000 in cash and to spend \$155,000 to purchase a glass pulverizer; therefore, the total amount paid by the Yellowstone Mountain Club was \$231,000. Mr. Brown reported the \$76,000 has already been paid to the State, and they are in the process of purchasing the glass pulverizer. Sen. Wheat noted the Yellowstone Mountain Club is paying more by entering into the SEP. Sen. Wheat wondered if the Yellowstone Mountain Club would receive a tax credit, and Mr. Brown replied it would not.

Sen. Wheat asked why the DEQ did not focus the SEP on the West Gallatin. Director Sensibaugh replied the West Gallatin was offered as a SEP and that DEQ urged the Yellowstone Mountain Club to accept the SEP, but that DEQ does not have the authority to require a particular SEP. Sen. Wheat asked Director Sensibaugh if DEQ could have accepted the \$200,000 penalty and put it toward doing the EIS on the West Gallatin. Director Sensibaugh replied all penalties for Water Quality Act violations go to the General Fund. Chairman Harris noted DEQ could have requested a budget amendment to get the \$200,000.

(Tape 2; Side A)

Director Sensibaugh explained that given the State of Montana's finances, she did not think a proposed budget amendment would be well received.

Mr. Strause noted the Subcommittee received a document entitled "EPA Supplemental Environmental Projects Policy" (**EXHIBIT 5**), and asked if those were the guidelines DEQ followed. Director Sensibaugh responded that those were EPA's policies and were also the policies followed by DEQ since EPA oversees DEQ's enforcement actions. Mr. Strause noted the guidelines contained in Exhibit 5 require a nexus between the violation and the SEP project. Mr. Strause could not determine the nexus between a water quality violation on the Gallatin

River and a glass crusher in Boulder. Director Sensibaugh responded DEQ deviates from EPA's guidance in this area and, if a good environmental project is proposed, DEQ will deviate from the nexus guideline. Mr. Strause emphasized that not only was there a deviation, there was no connection at all between the violation and the project. Director Sensibaugh admitted DEQ did not follow any of the nexus guidelines when it decided to deviate from the guidelines. Mr. Strause stated he found this disturbing since there was another SEP available that would mesh perfectly with the violation. Mr. Strause also noted DEQ started out with a potential violation of \$1.3 million, and settled for \$200,000. Mr. Strause cautioned that this may not be well received by the general public. Director Sensibaugh explained it is the nature of settlement negotiations for violations.

Rep. Barrett asked if the original cash penalty would go to the state General Fund or DEQ's General Fund. Director Sensibaugh replied the penalty would go to the state General Fund. Rep. Barrett explained how deviation from the EPA guidelines has been a problem in the past and suggested a bill should be drafted that would require DEQ to use the EPA guidelines and require that the penalty be kept in the local area.

Chairman Harris noted provision J(1)(b) of Exhibit 5 addresses the issue of deviation and requires DEQ to prepare a legal analysis and asked if DEQ did that in the case of the Gallatin River violation. Director Sensibaugh replied DEQ has a choice whether it wants to follow the guidelines, and DEQ implements the guidelines the way it thinks is best for the circumstances. Director Sensibaugh explained DEQ and EPA have an enforcement agreement and that agreement states DEQ will use EPA's SEP policy when appropriate.

Chairman Harris inquired what steps DEQ took to notify the public of the proposed SEP and wanted to know what kind of input was received. Director Sensibaugh replied they did not notify the public that DEQ was not going to follow EPA policy. Director Sensibaugh stated they take into account what the local public would think when determining what SEP will be approved. Director Sensibaugh believed the community would have supported this SEP.

Ms. Porter noticed the policy anticipates establishing a nexus between the violation and the SEP could be difficult and also could not see a clear nexus between the EIS and the violation. Director Sensibaugh replied that because the particular SEP in question was good for the whole state, there was a geographic nexus and benefit to the whole area. Ms. Porter suggested requiring DEQ to follow EPA guidelines more stringently could result in more litigation between violators and DEQ. Director Sensibaugh agreed and noted SEPs are voluntary and if they are made too onerous and restrictive, violators may choose to pay the violation rather than do a SEP.

Rep. Clark identified the issue as political and suggested that even if there is a nexus, the Yellowstone Mountain Club would not have funded the EIS since it was not in its best interest. Director Sensibaugh explained to Rep. Clark that DEQ did not propose to bypass the guidelines at the onset, but rather that determination was made after the proposals were evaluated.

Rep. Barrett inquired why DEQ did not pursue collecting the full penalty from the Yellowstone Mountain Club, and Director Sensibaugh explained there is more value to SEPs. Director Sensibaugh stated the EIS was proposed as a SEP, but it was not proposed as an ultimatum. Mr. Brown further explained that DEQ proposed projects, which the Yellowstone Mountain Club rejected, and the Yellowstone Mountain Club proposed projects, which the DEQ rejected. Mr.

Harris asked Mr. Brown if he could identify a nexus between the proposed project and the violation, and Mr. Brown replied they did not identify a nexus, but added the glass recycling project fit the parameters set by DEQ. Mr. Brown also informed the Subcommittee that this was an EPA policy and not an EPA rule and that there is no mandate for the nexus.

Chairman Harris requested Director Sensibaugh to provide the Subcommittee with a copy of the agreement between DEQ and EPA.

Rep. Clark asked if DEQ came forward with a list of possible SEPs after the Yellowstone Mountain Club rejected the EIS proposal. Mr. Brown recalled DEQ asked if the Yellowstone Mountain Club was interested in including a SEP in the settlement and both parties presented projects.

Mr. Sumpter explained how the Yellowstone Mountain Club considered and rejected financing the proposed ORW EIS. Mr. Sumpter explained it was at that time the Yellowstone Mountain Club proposed two other projects.

Sen. Wheat requested a copy of any internal policies that outline how DEQ is able to deviate from policies it agreed to follow in the agreement with EPA. Director Sensibaugh explained there are no internal policies and decisions are made on a case-by-case basis.

STATE AGENCY ENVIRONMENTAL VIOLATIONS

Mr. Keith Jones, Asbestos Program Attorney, Department of Environmental Quality, explained how the Montana Department of Administration (DOA) was performing renovations to the old Department of Commerce Building when it was discovered that the ceiling tiles contained asbestos. DOA was cited for failure to get an inspection prior to conducting the renovation and failure to use accredited personnel to do the work, and many work practice violations.

Mr. Marvin Eicholtz, Administrator, General Services Division, Department of Administration, agreed with Mr. Jones' summary and explained how DOA attempted to get a headstart before the contractors came in by removing the ceiling tiles and testified DOA had relied on a previous study which did not identify any ceiling tile containing asbestos. Mr. Eicholtz testified that once the asbestos was discovered, they hired an appropriate contractor to deal with the asbestos. Mr. Eicholtz identified safeguards DOA has undertaken to ensure a similar incident does not occur in the future. Mr. Eicholtz explained DOA will pay the fine out of its budget and the money will go into the General Fund.

Director Sensibaugh stated DEQ does not have authority for the Spill Prevention, Control, and Countermeasure Plan (SPCC) program and the violation is between the Montana Department of Transportation (MDT) and EPA. Mr. Robert Gentry, MDT Missoula office, provided the Subcommittee with background information on SPCC which is designed to prevent, rather than clean up, oils spills. EPA has instituted actions against three MDT maintenance facilities located in Browning, St. Mary, and Glasgow.

(Tape 2; Side B)

Mr. Gentry reported the fine has not been paid, and Mr. Gentry has requested an extension until August 10 to answer the complaints. The MDT is currently in negotiations with EPA regarding penalty reductions and penalty eliminations.

Upon question from Sen. Wheat, Mr. Eicholtz informed the Subcommittee the fine assessed to DOA was approximately \$67,400. Sen. Wheat wanted to know if DOA had an opportunity to participate in a SEP. Mr. Eicholtz replied DOA did have the opportunity, but decided not to participate in a SEP because it would ultimately cost more money. Mr. Eicholtz identified the difference between DOA's situation and the situation of the Yellowstone Mountain Club as the Yellowstone Mountain Club actually has to pay the fine, while DOA simply transferred the funds from DOA's budget to the General Fund.

Ms. Porter was curious how DOA was made aware of the asbestos in the ceiling tile. Mr. Gentry explained the asbestos was discovered when DEQ received an anonymous telephone call that "suspicious tile" was being loaded.

Mr. Jones testified DEQ did its best to treat DOA just as it would any other violator. Chairman Harris asked if there were any other parties who were potentially responsible. Mr. Jones explained DOA had hired SafeTech and Northern Industrial Hygiene, and SafeTech had received a warning letter, as did Northern Industrial Hygiene.

Upon question from Chairman Harris, Mr. Eicholtz was confident proper measures had been taken to ensure another incident would not happen in the future. Mr. Gentry explained MDT updated its SPCC plans and implemented those plans at the Glasgow and St. Mary facilities. Mr. Gentry also explained periodic inspections and training have also been implemented.

Chairman Harris noted SPCC requirements are complicated and that EPA will be implementing new requirements and asked what MDT is doing to ensure compliance. Mr. Gentry explained MDT is attempting to get out of the oil business and, if it is successful, no SPCC plans will be required. Mr. Gentry identified increasing environmental liability as a factor in MDT's decision to get out of the oil business.

Mr. Strause asked if there were any exceptions made for the State of Montana in the agreement with the federal government to enforce federal clean air or water violations. Director Sensibaugh replied all violators are treated the same.

Mr. Strause asked if there was a negotiation process in determining the amount of the fine. Mr. Eicholtz explained the initial fine was \$127,000 and through a process of providing more information, DOA was able to get the fine reduced.

Chairman Harris asked about the construction of new above-ground petroleum storage facilities. Mr. Jones stated MDT is moving to above-ground storage tanks and is motivated to make this move by the Underground Storage Tank Act.

Chairman Harris asked the presenters whether they felt the process and penalty was fair. Mr. Eicholtz commented switching money within the State from one fund to another does not make much sense.

BIG SPRINGS FISH HATCHERY PCB ISSUE

Mr. Chris Hunter, Fisheries Division Administrator, Montana Department of Fish, Wildlife, and Parks (FWP), provided the Subcommittee with a background on the Big Springs Fish Hatchery and the problem with polychlorinated biphenyls (PCBs) in that hatchery. Mr. Hunter explained how a DEQ employee located the source of the PCBs at the hatchery, and it was eventually determined that the blue paint which was used on the lower raceways was very high in PCBs. As a result, all the fish in the lower raceway had to be destroyed, which amounted to over 700,000 fish. Mr. Hunter explained the bulk of those fish had originally been destined to Hauser, Holter, and Canyon Ferry lakes. Mr. Hunter explained they are working with EPA to get approval of a plan to fix the lower hatchery. Mr. Hunter identified one problem as being that the PCBs have migrated from the paint into the concrete walls. Mr. Hunter is hoping the fishery will be back into production sometime this fall. Mr. Hunter explained the paint chips have also polluted the stream and stream clean up will also need to be done and will be much more difficult than fixing the problem at the hatchery.

Chairman Harris requested Dr. Spence, Montana's Environmental Health Officer, to assist in discussing the problem. Chairman Harris asked if anyone had identified the manufacturer of the blue paint and approached them with the problem. Mr. Hunter explained FWP legal staff is working with the Tort Claims Division of the Attorney General's office to explore options.

Dr. Spence stated the Department of Health and Human Services has taken notice of the situation and he traveled to Lewistown to address a community group, and then met with a group in Atlanta that is willing to do an epidemiological investigation to determine the health risks. This investigation would include getting volunteers from the community who eat fish to be tested for the presence of PCBs. Dr. Spence stated they will also look at other individuals who are at risk, including the people who did the painting and large fish consumers.

Sen. Wheat asked if they are continuing to test the water, and Mr. Hunter explained they will continue to test and will include the whole hatchery area. Dr. Spence added high levels of PCBs will be found in the sediment rather than the water.

Rep. Clark asked after the problem is corrected how long it is anticipated that the sediment in the streambed will remain contaminated. Mr. Hunter stated it is currently unknown, and he suggested the streambed may have to be removed.

Chairman Harris asked if any federal money was available to assist with remediation, and Mr. Hunter replied no federal money is available. Chairman Harris asked if they were considering abandoning the hatchery if the cost of cleanup is prohibitive, and Mr. Hunter stated they would consider that option, but cautioned it would be difficult to find an alternative site. Chairman Harris asked if they abandoned this hatchery, if they could increase production at the other hatcheries around Montana. Mr. Hunter replied the other hatcheries are all operating at full capacity.

Rep. Clark inquired what kind of paint was used at the other hatcheries, and Mr. Hunter replied they are currently testing the paint at the other hatcheries. Mr. Hunter reported the first hatchery they tested came back clean, as did the downstream waters.

Chairman Harris asked if information regarding Montana's purchase of the paint in the 1950s would still be available. Mr. Hunter explained they are in the process of trying to obtain those records, but stated five employees who were employed at the time the paint was purchased still work at the hatchery.

Rep. Barrett asked whether other states had experienced problems like this. Mr. Hunter replied they have not heard of any other states having this problem, but was confident if they tested, they would find a similar problem. Mr. Hunter told of a fishing derby being canceled at a federal hatchery in Bozeman because of a high level of PCBs, but that hatchery did not use the same paint.

Chairman Harris asked what the purpose was for putting PCBs in paint. Mr. Hunter responded it was his understanding PCBs were used in paint as an algicide for ocean vessels.

Sen. Wheat asked if the hatchery and contaminated streambeds could be designated as a Superfund site. Mr. Hunter replied they are exploring that option, but at this point they would prefer to have the cleanup regulated by the State. Chairman Harris pointed out there is reluctance to get a Superfund designation, but that given the severity of the problem and Montana's financial constraints, it may be necessary.

Dr. Spence reminded the Subcommittee they have no idea what the inherent danger and how real the risk of cancer is. Chairman Harris did not disagree, but stated there is still a risk and Superfund sites with PCB contaminants are always ranked higher because of the clearly documented health risks.

(Tape 3; Side A)

MEPA ISSUES

Mr. Larry Mitchell, Research Analyst, Legislative Services Division, submitted the cover sheet from a report by DNRC entitled "Alternatives for Funding Wildfire Costs in Montana" (**EXHIBIT 6**). Mr. Mitchell offered to obtain copies of the entire report for the Subcommittee members if requested.

Mr. Mitchell submitted a written report on Montana Environmental Policy Act (MEPA) Litigation (**EXHIBIT 7**). Mr. Mitchell reported resolution of Friends of the Wild Swan v. DNRC and stated the court had ruled DNRC did follow MEPA, reviewed cumulative impacts correctly, and did select an alternative. Mr. Mitchell explained that as a result of the court's decision, DNRC has submitted a bill draft request to change the definition of "cumulative impacts" in MEPA. Mr. Mitchell reviewed other litigation in Exhibit 7 with the Subcommittee.

Mr. Mitchell submitted a one-page report entitled "MEPA Database on the Internet" (**EXHIBIT 8**), which explains the process and information available on the MEPA website on the Internet. Mr. Mitchell reviewed the procedure for using the database with the Subcommittee.

PUBLIC COMMENT

Chairman Harris opened the hearing for public comment, and no public comment was offered.

SUBCOMMITTEE INTERIM SUMMARY

- **Proposed Methamphetamine Cleanup Legislation**

Chairman Harris asked the Subcommittee to focus on the meth cleanup bill and recalled the recommendation was to make the legislation simple, straightforward, and have the least cost possible.

Rep. Clark stated the legislation should be used as part of a process and the legislation should be moved forward to begin the process. Rep. Clark suggested the Subcommittee should start the ball rolling on the legislation, and that during the legislative hearings, others will offer information and advice.

Chairman Harris added the Task Force has been unable to offer a comprehensive solution, and commented the proposed legislation is simple, straight-forward, and would get the job done.

Ms. Porter suggested changing “may” to “shall” in terms removing the site from the database once the cleanup is completed.

Sen. Wheat agreed there should be a standard for cleanup that everyone agrees to so property can be productive. Sen. Wheat was hesitant to get the State and communities deeper into the process. Sen. Wheat would like to set the standards and let the cleanup professionals take care of the cleaning. Sen. Wheat added he does not like any proposed legislation that provides civil immunity and preferred the negligence standard.

Chairman Harris noted the grant of immunity is to State and local governmental officers, and Sen. Wheat commented State and local government officers have a duty and obligation to carry out their duties in a reasonable manner and should not be granted immunity. Sen. Wheat did not want to see anyone separated out and granted special immunity.

Chairman Harris noted the proposed legislation does not require rule making and that the absence of that requirement will allow the process to move forward. Chairman Harris added if DPHHS would like to engage in rule making, it can. Chairman Harris further noted the immunity provision could be struck by a less than two-thirds vote.

Chairman Harris moved the Subcommittee recommend the proposed legislation, with the Porter amendment, be passed by EQC.

Rep. Clark commented if the bill does not pass because of the immunity provision, the public would be put at risk.

Mr. Mitchell stated he has not heard any comments about the immunity provision.

Chairman Harris's motion that the Subcommittee recommend the proposed legislation, with the Porter amendment, be passed by EQC, carried with Sen. Wheat voting no on the basis of the immunity provision.

Chairman Harris commented he would like to see a unanimous vote from the Subcommittee on making this recommendation.

Rep. Clark stated if it becomes an issue to the state agencies, then further discussion could be held during committee hearings to add the provision back in. Rep. Clark clarified he would rather take the provision out and discuss placing it back in if it becomes an issue. Rep. Clark noted he does not want to see the bill put at risk because of the immunity provision.

Sen. Wheat agreed to raise the issue with the full EQC.

Mr. Strause agreed the better way would be to strike the immunity provision and let the agencies argue for the immunity provision if they feel it is necessary.

- **SEP Process**

Sen. Wheat suggested DEQ needs to follow EPA policy when implementing SEP agreements. Sen. Wheat did not like the fact that DEQ could ignore the policies on a case-by-case basis and suggested this will open the door for SEPs to be challenged on the basis the SEPs are arbitrary and capricious.

Chairman Harris agreed, and stated it is also a question of fairness between violators. Chairman Harris cautioned it could even just be a question of perceived unfairness between violators.

Sen. Wheat commented it appears there is no rationale basis underlying any single decision, and stated he is not necessarily disagreeing with decisions that have been made, but does not approve of the process that was used. Sen. Wheat added if there are policies, those policies should be followed, and it does not seem fair for DEQ to ignore these policies. Sen. Wheat suggested there should be a rule that says if DEQ is going to ignore the EPA's policies, they must provide a rationale reason for doing so. Sen. Wheat thought the Subcommittee should ask the EQC to consider requiring DEQ to adopt rules or look at legislation that requires DEQ to consider EPA policy or state a rational reason for not doing so.

Mr. Mitchell explained EQC has many options and stated DEQ has a bill proposal that addresses SEPs, and a provision could be added to that legislation to address the concern. In addition, EQC could ask that specific legislation be drafted. Mr. Mitchell also suggested letters could be written to DEQ and the Governor suggesting some of DEQ's discretion with SEPs should be removed or limited. Mr. Mitchell added that he is unsure where EPA gets its authority from Congress to have SEP policies and guidelines and noted these policies and guidelines do not have the force of law.

Chairman Harris commented the policy looks well-thought out and uses words like "require," and asked Mr. Mitchell if he was certain the policy did not have the force of law. Mr. Mitchell stated he was uncertain if the policy was ever published in the Federal Register, and noted the force and effect might be the funding provided to agencies. Mr. Mitchell thought annual or semi-annual review of the state's EPA agreements would reveal whether the federal government believes the state is spending its federal dollars wisely and in accordance with federal policy guidelines.

Rep. Clark suggested policy guidelines could change from one administration to the next and was cautious about passing legislation that says Montana will follow the policy guidelines. Rep. Clark wanted to hear how DEQ would like to see the problem solved and suggested that more information be obtained.

Sen. Wheat did not want to remove flexibility to negotiate SEPs from DEQ, but wanted to make sure that policy guidelines are followed or there is a good reason for not following the guidelines.

Ms. Porter commented that she does not feel DEQ violated the policy, and that limiting DEQ's discretion will result in fewer SEPs being undertaken. Ms. Porter pointed out that Montana benefits much more from SEPs than a penalty.

Rep. Barrett commented the federal guidelines provide for options and noted she would like to see the flexibility be more uniform. Rep. Barrett wanted to know how much time and money goes into lengthy negotiations. Director Sensibaugh stated the majority of time is spent negotiating what the actual penalty amount will be and not deciding which SEP will be implemented.

Chairman Harris asked whether DEQ would prefer being required to write rules regarding the EPA policies and providing an explanation when DEQ deviates from the policy, or have everything remain the same and DEQ has unlimited discretion in SEP agreements. Director Sensibaugh stated the policy is a framework EPA came up with for itself for approving SEPs, and she did not feel the policy should be adopted by reference. Director Sensibaugh suggested Montana should have its own legislation, rulemaking, and provide an opportunity for public comment. Director Sensibaugh cautioned against making the policy too inflexible, so companies will not choose to do SEPs.

Chairman Harris expressed his concern that sometimes there is a nexus between the violation and the SEP and sometimes there is not. Director Sensibaugh replied in some cases the violation is too narrow to find a nexus between the violation and a SEP. Director Sensibaugh suggested Montana should do its own SEP policy and could use some of the provisions of EPA's SEP policy. Director Sensibaugh testified that having sideboards on the policy is important if Montana wants to benefit from SEPs.

Chairman Harris stated regardless of flexibility, there must be a basic constraint of fairness and everyone should play by the same procedural rules. Director Sensibaugh agreed, but stated making a policy fair and flexible can be difficult.

(Tape 3; Side B)

Chairman Harris stated that if public comment had been required in approval of the Yellowstone Mountain Club SEP, there would have been overwhelming support for funding the Gallatin River EIS. Director Sensibaugh agreed there would have been public support, but also added the Yellowstone Mountain Club would not have chosen to do that particular SEP and would have simply paid the penalty instead. Director Sensibaugh cautioned against making the SEP too difficult for the company. Chairman Harris agreed, but thought if DEQ was interested in doing the Gallatin River EIS, it would have allowed the Yellowstone Mountain Club to pay the full penalty and then sought a budget amendment.

Rep. Clark disagreed and stated he could not see the Yellowstone Mountain Club ever agreeing to public meetings. Rep. Clark would like to see DEQ have some discretion in using the money that comes in and be able to designate a particular SEP.

Chairman Harris asked Director Sensibaugh if she saw any opportunities to fund the Gallatin River EIS. Director Sensibaugh replied it is in her Executive Planning Process (EPP) proposal, but she did not think it would get funded since other projects will take priority. Director Sensibaugh identified one reason the money goes to the General Fund is so DEQ cannot be accused of trying to fund particular SEPs by issuing violations. One of the benefits Director Sensibaugh identified for companies performing SEPs is the good will it creates with communities.

Mr. Strause asked about the SEP negotiation process and whether the fine could be assessed in such a way as to force companies to perform a particular SEP. Director Sensibaugh stated DEQ has to set the fine based on the violation and must set the fine first. Mr. Strause noted the Yellowstone Mountain Club started out at \$1.3 million and ended up at \$200,000. Mr. Strause also noted he saw no rationale for the \$200,000. Mr. Strause suggested discussion about SEP projects could be included in settlement negotiations. Director Sensibaugh replied that tying the penalty to a SEP could be viewed as blackmail.

Ms. Porter inquired whether Director Sensibaugh had ever seen a SEP of lesser value than the penalty. Director Sensibaugh replied the SEP is always more than the fine.

Sen. Wheat commented these are enforcement actions and suggested keeping the public out of these enforcement actions. Sen. Wheat was concerned, however, about DEQ looking like it is arbitrary in the way it treats violators. Sen. Wheat would like to see a concept developed by the DEQ on how it would like new guidelines to look.

Mr. Strause noted the federal rules provide "The net cost to be incurred by a violator in performing a SEP maybe considered as one factor in determining an appropriate settlement amount." Therefore, Mr. Strause did not see any reason why a particular SEP could not be considered when determining an appropriate settlement amount. Mr. Strause believed the state should be determining what SEPs are appropriate and have a priority list. Ms. Porter suggested it would be difficult if the state were to maintain a list of pet projects and this could create a whole new set of problems. Ms. Porter thought it made better sense to have a settlement amount prior to discussing a SEP.

Chairman Harris responded to Sen. Wheat's comment and noted EPA policy provides for public comment. Chairman Harris suggested the policy should be clear on whether it provides for community input.

Sen. Wheat requested Director Sensibaugh to provide the Subcommittee with guidance on how DEQ would like to see the policy written. Chairman Harris requested Director Sensibaugh to provide EQC with an outline on how they would like the SEP procedure to work. Director Sensibaugh agreed to provide EQC with the outline and stated they would use most of the EPA policy. Director Sensibaugh explained DEQ has already requested legislative authority to do SEPs, and DEQ would also like to do rule making on the SEP requirements. Director Sensibaugh did not feel this would be inconsistent with EPA policy. Director Sensibaugh stated she was concerned about how stakeholders that work with DEQ on SEPs would feel about this. Ms. Porter agreed the stakeholders should be involved in setting policy because if it is not a workable policy for the regulated community, they will not choose to do SEPs.

Chairman Harris suggested EQC request DEQ to deliver by the September meeting the outline of what DEQ considers the preferred SEP policy taking into account the Subcommittee's concerns about uniformity and flexibility and considering the legislation requested by DEQ for full authority to engage in SEP settlements.

SUBCOMMITTEE INTERIM SUMMARY

Mr. Mitchell submitted the Final Workplan for the Agency Oversight Subcommittee (EXHIBIT 9). The Subcommittee agreed they would not meet again in the 2003-04 interim.

Sen. Wheat asked that the EQC be keep informed of developments regarding the fish hatchery issue and any possible litigation that may arise.

Ms. Porter asked if the Subcommittee could recommend to the EQC that they follow the Missoula nonattainment air quality designation. Mr. Mitchell recalled the issue could be followed over time and that the EQC could make a formal recommendation to the next EQC.

Chairman Harris thanked the staff for their diligent work on issues that came before the Subcommittee.

ADJOURN

There being no further business to come before the Subcommittee, the meeting adjourned at 12:35 p.m.