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ENVIRONMENTAL QUALITY COUNCIL

May 9, 2002

State Capitol, Helena

FINAL MINUTES

Approved July 29, 2002

COUNCIL MEMBERS PRESENT

SEN. BEA McCARTHY, Chair
REP. DOUG MOOD, Vice Chair
SEN. MACK COLE
SEN. KEN TOOLE
REP. DON HEDGES
REP. DEBBY BARRETT
REP. CHRISTOPHER HARRIS
SEN. JON TESTER
SEN. PETE EKEGREN
REP. PAUL CLARK
SEN. WALTER McNUTT

MR. HOWARD STRAUSE
MR. TOM EBZERY
MS. JULIA PAGE
MS. ELLEN PORTER
MR. TODD O'HAIR

COUNCIL MEMBERS EXCUSED

REP. MONICA LINDEEN

STAFF MEMBERS PRESENT

MR. TODD EVERTS
MR. LARRY MITCHELL
MS. MARY VANDENBOSCH
MS. KRISTA LEE EVANS
Ms. Robyn Lund, secretary

AGENDA

[Attachment 1](#)

VISITORS' LIST

Attachment 2

COUNCIL ACTION

- Approved February minutes.
- Approved letter regarding MAPA exemption.
- Approved letter regarding meth lab cleanup.
- Approved letter regarding White Pine Sash superfund site segregation.

I CALL TO ORDER

Roll call was taken.

II ADOPTION OF MINUTES

MOTION/VOTE: REP. MOOD moved to adopt the February minutes. Motion passed unanimously.

III ADMINISTRATIVE MATTERS

There were no matters that needed to be addressed.

IV SUBCOMMITTEE REPORTS

- *Coal Bed Methane/Water Policy Subcommittee*

SEN. COLE said that there was a presentation from Chris Tweeten, chairman of the Reserved Water Rights Compact Commission. He gave some history as to where the Reserved Water Rights Compact Commission came from. Before this Commission was formed there was no central grouping of water rights. In 1979, federal legislation started looking at reserved water rights due to a couple of Supreme Court decisions. Water rights on reservations are different than state water rights. Federal reserved water rights, such as those on the reservations, require enough water to be set aside for the reservation for the purpose it was established for, primarily agricultural use. At this time there is an agreement with the Fort Peck tribe, although it has not been ratified by Congress yet. The Northern Cheyenne tribe and the state of Montana have an agreement that increased the elevation of the Tongue River Dam. The Crow Reservation has had their compact ratified by the state Legislature. At this time the tribe has said that they will not protest what was approved two years ago and want to move forward with federal ratification. The Rocky Boy and Fort Belknap compacts have been approved. There isn't an agreement with the Flathead Reservation. The Blackfeet Reservation and the Turtle Mountain Allotments are still in the negotiating process.

There was a presentation by Tom Reid, Department of Environmental Quality (DEQ), dealing with general permits for water produced by coal bed methane (CBM) wells. The permit requires a beneficial use and can be put in off-stream ponds. These are general permits and will not be final until the record of decision has been signed with the environmental impact statement (EIS).

The subcommittee will meet at 2:00 this afternoon to hear an update on the EIS. There have been EIS meetings all across the state. The same concerns have been heard at all the meetings.

SEN. TESTER said that Mr. Reid said that the beneficial use that the DEQ will be monitoring for is for livestock and wildlife. The goal of the general permit is to set a target for industry to hit, but this target doesn't include irrigation water quality. There was a discussion about the DEQ work on the watershed total maximum daily loads (TMDL). **SEN. COLE** and **SEN. TESTER** met with the watershed group in Sage Creek and then met with the DEQ about concerns expressed by the watershed group.

MR. EBZERY said that there is some confusion about the general permit and irrigation. In terms of not providing for irrigation, it needs to be clarified. Perhaps someone could clarify that.

SEN. COLE said that this water could be used for any purpose.

MS. VANDENBOSCH said that the DEQ has done a concept that is similar to that in Wyoming. The purpose is to give the industry one target to shoot for. It is not intended to cover all situations. It is to cover discharge to impoundments where there is no discharge to state water and the water is used beneficially for livestock or wildlife. A general permit is only used in certain circumstances. The DEQ determined that it would be appropriate to group these activities so that an operator could operate under this permit rather than having to get a new permit every time. There are other permits that cover the other uses.

SEN. TESTER said that the water can be put in the ponds, but it is important to note that 24% of that water will flow back to rivers and then become irrigation water. That water wasn't accounted for. The reason for that is that they have no control over the 24% that goes to the ground water. The U.S. Environmental Protection Agency (EPA) put stringent controls on in some similar cases. We have water that will be flowing back into the surface water. There needs to be some justification, monitoring and standards to prevent negative impacts to irrigators down stream.

SEN. COLE said that there is monitoring of all of the waters. There is self monitoring upstream of where the wells are. There is also monitoring by DEQ. There are agreements with Wyoming that there will not be water degradation at the border.

SEN. McCARTHY said that it is appropriate to keep track of this issue.

MS. PAGE said that the issue was also raised that the monitoring would pick up pollution after the fact. There would be a backlog of pollution in the water ready to come out when the monitoring picks it up. The problem is that the water is not intended for irrigation, but will be moving back to surface water. There is no requirement other than it be drinkable, which is not protective of irrigation.

MS. PORTER asked how often the monitoring was to be done. **SEN. COLE** said that he didn't have that information. The monitoring is tied to the amount of activity in the area. The ponds are being closely monitored.

SEN. McCARTHY agreed that more in depth information is needed.

MS. PORTER said that she would assume that as the water infiltrates the soil it will receive some treatment as well and the total dissolved solids won't be as high as when it is discharged into the impoundments. **SEN. COLE** said that was correct.

• ***Energy Policy Subcommittee***

SEN. McNUTT said that **SEN. TOOLE** presented his initiative to buy back the dams, I-145. This was an informational meeting. Jeff Martin, Legislative Services Division, had done work on the implications of I-145. There were a lot of good questions on the effect on local tax bases and possible cost shifting. He said he can provide copies of Mr. Martin's work. There was a legal opinion that was prepared by **MR. EVERTS** on the effect of the voters rejecting HB 474. He referred to **EXHIBIT 1**. Many issues can be handled at the next legislative session. The Universal Systems Benefits Programs (USBP) was extended to 2005; if the initiative prevails, that program will end in June 2003. There was a presentation by Paul Cartwright, DEQ, on the state of the state EQC energy publication. There were some recommendations from the committee about items to include in the publication. **SEN. TOOLE** wanted more definitive remarks about conservation included. There will be a public comment period for that report and the Electric Law Handbook. There will be some delay in getting all of the work done because of the initiative to repeal HB 474.

MR. EVERTS said that both publications will go out for public comment in June and will be finalized in July. There are issues with HB 474 and other portfolio issues that will occur after these publications are finalized. There will be a supplement to the state of the state publication to ensure that it is up-to-date at the beginning of the session.

SEN. McNUTT said that these handbooks would have been handy in 1997. He is anxious to see them completed and we can be proud of the work that has gone into them.

SEN. McCARTHY asked for copies of Mr. Martin's report to go to all of the committee members. **EXHIBIT 2**.

SEN. MOOD said that Mr. Martin pointed out that the bonding authority of the counties would be impacted if the initiative to buy the dams passed. It would appear that the objection with HB 474 has to do with full cost recovery and the language that was in there. Full cost recovery differs from the current system by which the Public Service Commission (PSC) determines rates for the utility because that full cost recovery doesn't allow for a profit. The PSC allows for a 6% profit. This is a subtle difference, but it is important.

SEN. TOOLE said that the taxation work by Mr. Martin was interesting. The report has a lot of information on the effect on the tax base, but I-145 allows for payment in lieu of taxes. There was a lot of discussion on the effect that I-145 could have on local government taxing entities that were capped at their millage. Having a revenue stream coming back with those payments in lieu of taxes will also have an effect. It is important to remember that payments in lieu of taxes will go back to local communities.

SEN. TOOLE said that regarding HB 474, in the old regulated world, utilities were only allowed profits on capital investments and not simply on contracts. In the new deregulated world with a default supplier, it is contemplated that the default supplier will simply move electricity and not

make any capital investments. There is a difference, but he is not sure that it applies in the pre-regulation/post-regulation scheme of things.

- ***Agency Oversight/MEPA Subcommittee***

- ***EQC letter to FWP Commission regarding the MAPA exemption***

REP. HARRIS said that there is a letter that the subcommittee requested that the full Council send to the Fish, Wildlife and Parks Commission, see **EXHIBIT 3**. It asks for the department's future intent for rule making. This letter doesn't refer to the Big Hole seasonal rule, but asks when the department will rely on the Montana Administration Procedure Act (MAPA) exemption. This is a clarification. The subcommittee feels that the exception should be used rarely and MAPA used primarily.

MR. EBZERY asked if there was any objection in the subcommittee on this letter.

REP. HARRIS said that the subcommittee was unanimous in their support of this letter.

MOTION/VOTE: **REP. HARRIS** moved to approve the letter. The motion passed unanimously.

- ***Proposed legislation***

REP. HARRIS said that the Big Hole issue resulted in another action. The EQC is not equal in the code to sister interim committees. The subcommittee felt it was necessary to add 3 lines that places the EQC on the same level in terms of agency review. **EXHIBIT 4**.

SEN. McCARTHY said that the committee will defer action on this until July.

- ***Request to the Governor regarding methamphetamine lab issues***

REP. HARRIS said that the meeting concerning this issue was intense. This is a serious issue that needs some attention. One issue that was very apparent is that the DEQ and Montana Department of Public Health and Human Services (DPHHS) are not meeting to address the issue of developing cleanup standards. The DEQ looks outside the structure and DPHHS addresses contamination inside a structure. There is a lot of work to do. There are no environmental cleanup standards at the federal level. The answer to "how clean is clean" is often an expensive one. The property owners are extremely concerned about this. The immediate problem is that the 2 departments are not getting together to work on an appropriate cleanup standard. The subcommittee recommends a letter to the Governor requesting that she direct the departments to meet as often as necessary to develop those standards.

MR. O'HAIR said that there is a task force related indirectly to this issue. The DEQ has raised some of these concerns about cleanup standards. This is a new issue in Montana and is a growing concern. The cleanup of meth labs is an issue that the governor's office would be interested in helping to address.

SEN. McCARTHY asked if a letter from the EQC would provide some impetus to get things going.

MR. O’HAIR said that if the committee wants to ask for an aggressive stand on environmental cleanup, the governor’s office would be receptive.

REP. HARRIS said that the letter is necessary. The DEQ has been unable to set up a meeting with the DPHHS. Developing standards is crucial. The state is simply trying to deal with the immediate problem of cleanup and making sure that the property can be put back into service. If the property is kept out of service it is a hardship and adversely affects the economy. The proposed letter can be seen as [EXHIBIT 5](#).

REP. CLARK asked if there are a number of sites in limbo because there isn’t a clear cleanup plan. **REP. HARRIS** said that the broader picture is that there is a major epidemic of meth labs going on. There are several examples of where meth labs have been found in a residence. There is no way to deal with the indoor air pollution and any outdoor pollution. Without a consensus of how clean is clean the state will be left in limbo. **REP. CLARK** asked if there is an emergency interim management plan. **REP. HARRIS** said that there are no guidelines as to how to proceed.

SEN. McCARTHY asked if a time line needs to be included in the letter. **REP. HARRIS** said that the subcommittee would look at it at the next meeting if the Governor’s office requests their assistance. **SEN. McCARTHY** said that she would suggest an additional paragraph that states when the next meeting is and that the EQC would like a report at that time.

MOTION/ VOTE: **REP. HARRIS** moved that the draft letter with amendments be adopted and signed by the Chair and Vice chair. Motion passed unanimously.

REP. HARRIS said that the subcommittee heard about split estates where the surface owner and the mineral owner are different entities. It is fair to say that to research mineral rights is not something that is easily done. There was a hearing on MEPA fees and EIS costs. The complaints by the industry were well taken. The industry could live with the fee structure, but would like to see the process go more quickly and with more consultation between the DEQ, environmental consultants, and the applicant. The EIS process works well but is too time consuming. Time is money. The subcommittee approved 2 versions of a draft MEPA public participation brochure. There was a MEPA litigation update. In July they will hear from DEQ on the petro fund and whether an increase in fees is needed. They will also discuss the DEQ turnover rate. There is a pay plan that may help. The subcommittee will review whether that will help the turnover rate. The subcommittee decided to send a guidance letter on compliance and enforcement reports emphasizing trends.

REP. BARRETT said that the industry MEPA panelists came to the meeting by invitation. Previously the subcommittee heard from the department, the industry came without complaints to offer a balanced look at the cost of MEPA.

REP. HARRIS said that the industry didn’t like the delays or the fees.

SEN. TESTER asked if there were any presentations about meth lab discovery notices being attached to the property forever. **REP. HARRIS** said that it was not clear of the impact of having a lab. He had pictured an issuance of a clean bill of health after appropriate cleanup. This is the concern of the property owner. **SEN. TESTER** asked if that lab is clean that the title would be

clean. He has been told that it is attached to the title forever. **REP. HARRIS** said that without the cleanup standards they can't get a clean bill of health.

V DEFAULT ELECTRICITY SUPPLY PORTFOLIO UPDATE

MR. EVERTS said that at the last meeting there was a request to have energy items before the full Council.

Dave Hoffman, Public Service Commission (PSC) staff, said that the default supply docket was initiated on October 29, 2001, by a filing made by the Montana Power Company (MPC). The filing included 7 contracts that were intended to comprise the electric supply starting July 1, 2002. MPC also filed prefile testimony to support the contracts and urge adoption of those contracts. The Commissioners are bound by rules similar to those that bind judges in a contested case proceeding. The testimony is filed in writing. Other parties have an opportunity to intervene and file their own prefile testimony. The 7 contracts that were filed include a 5 year contract with PPL Montana, 1 year contract with Duke Energy, 10 year contract with Rocky Mountain Power, a wind power contract with Montana Wind Harness, a Tiber Dam contract, Thompson River Co-Gen, and the Montana First Megawatt contract. The interveners are the Montana Consumer Counsel, Northern Alternative Energy, Northwest Power Planning Council, Commercial Energy and Energy West, Human Resources Development Council (HRDC) 11, Comanche Park, and the Montana League of Cities and Towns.

Since October there has been a process of discovery which means that the parties had the opportunity to ask each other questions and the Commissioners had the opportunity to ask questions of the parties to clarify the testimony or expand in certain areas. The PSC set the hearing for the middle of March. They were waylaid by a lawsuit that was filed by an association of media groups dealing with testimony filed under a protective order issued by the Commission. Any parties to the case can have access to the information, but can't disclose it to the public. Judge Honzel raised some concerns about the process used by the PSC. In light of that, the PSC felt it had to postpone the hearing until there was some clarification about how to proceed from the court. Through an agreement they decided to go ahead, but any time it moved into the protected information, the transcript would be bookmarked, the discussion would stop and the process would move to the next item. There were 4 days of technical hearings.

There is one more component of the hearings to complete dealing with some of the items that were bookmarked. It should last no more than a day. After that there will be a series of public hearings. There will be a total of 16 hearings. After that the PSC will be able to begin discussion. The target date is May 31.

Will Rosquist, PSC staff, said that the issues that were raised during the proceeding are generally those of the interveners in the case. The biggest issue is that of "prudence" and if NorthWestern Energy acted prudently in assembling the portfolio of contracts. Under HB 474, the procurement is to be done according to industry accepted procurement standards. One of the issues in the case is how to define industry accepted practices. There are 2 tiers of issues. The first having to do with the process and the outcome of that process. Under the process there are a number of issues: whether NorthWestern Energy used competitive bidding processes appropriately, whether NorthWestern Energy used competitive bidding process along with unsolicited proposals. This issue is whether NorthWestern Energy should have relied more on the bidding process. The other process issue has to do with whether NorthWestern Energy's

analysis of alternative resources was appropriate. The third process issue has to do with the decision criteria that NorthWestern used. They said that cost was a primary criteria, as well as having a diverse portfolio. The issue is whether they defined and applied the decision criteria. And finally, did NorthWestern Energy meet its burden of proof in demonstrating that the process used was prudent? Were they acting prudently? Under the outcome tier the issues deal with those that have to do with the individual resources themselves.

There are 3 other specific resources that have been contested in the case: the Montana Wind Harness project, Rocky Mountain, and Montana First Megawatts. Other resources haven't caused a lot of dispute among the parties. A Request For Proposal (RFP) was used to select the wind resource. The question has more to do with the decision making process that came from that RFP process. With respect to Montana First Megawatts, it has to do with the potential affiliation that existed at the time that the contract was being negotiated. It did not go through a bid process; it was an unsolicited bid. How did the affiliated relationship affect the contract? With respect to the Rocky Mountain Power Project, it has to do with the development of the process and the length of time that the negotiations took place in. As the resource was presented to the PSC, was it prudent at the time? The ownership and experience has changed over time. At the time the MPC selected this resource, it was a different resource. There are other issues and many involve detailed arguments with the interveners.

REP. CLARK asked if there had been discussion about separating the controversial contracts and dealing with them separately rather than dealing with the entire portfolio. **Mr. Rosquist** said that the PSC hasn't discussed how they will treat the contracts. They are waiting until all the public hearings are done before they start deliberating. There have been interveners that indicated that the PSC could go forward with the uncontested contracts and require a redo of the controversial contracts. **REP. CLARK** asked specifically about the privileged information. **Mr. Rosquist** said that the privileged information has to do with dispatch costs of some of the resources and the fact that these costs go to NorthWestern costs in the short term when they may be buying and selling in the wholesale market to supplement needs and sell surplus power. If the information was publically known it would compromise their ability to take advantage of this process.

SEN. McNUTT said that there is a price freeze until June 30, 2002, on the electric component from PPL. What happens if the PSC order doesn't come until after that date? **Mr. Rosquist** said that the contract with PPL runs through the end of June 2002. As of July 1, NorthWestern will need approved tariffs from the PSC in order to start charging rates that cover their costs. If the PSC hasn't issued an order by July 1, NorthWestern does have signed contracts with some resources and the ability to buy on the market. At that time, NorthWestern could ask for an interim tariff or continue to charge the current approved rates.

REP. HARRIS asked how NorthWestern decided the criteria for competitive bidding rather than the request for proposals. **Mr. Rosquist** said that in March 2001, NorthWestern went with their first RFP. At that time the wholesale market was very high. The bids that came back at that time were very high. NorthWestern began negotiating with PPL. They didn't sign the first agreement and PPL didn't want to further negotiate. At that point they had received some proposals and began negotiating. The idea was that by signing the contracts it would put pressure on PPL to negotiate again. The Consumer Counsel's testimony says that there is no reason that when the PPL negotiation broke apart that a competitive solicitation wouldn't have had the same effect.

MR. STRAUSE asked what happens if an order is issued rejecting some of the supply. **Mr. Rosquist** said that it depends on the nature of the PSC's order. There are 2 categories of contracts, those with existing resources and those with new resources. Those existing contracts are uncontested. If the PSC order took the form of expressing concern with the new generation projects, NorthWestern has resources available in existing resources that would get them through at least the first year. If the PSC rejects the entire portfolio it would cause more of a problem for NorthWestern. **MR. STRAUSE** asked if the PSC rejects some of the supply based on the secret information, do all of the interveners then know the secret information and will they be able to use it in the next round of bidding, giving them a market advantage. **Mr. Rosquist** said that it is a fair statement of an issue that has been raised in the case. There may be a competitive advantage in a redo process. He doesn't know the PSC's position. **MR. STRAUSE** asked how often the state will have to go through this process. **Mr. Rosquist** said that there may be additional hearings depending on the nature of the order and depending on how the transition to choice plays out. There will be a cost tracking mechanism.

Dennis Lopach, NorthWestern Corporation, said that there is another part of the process which has evolved out of the necessity of time, Phase 2 of the default supply docket. The parties are discussing rate design and how customers will come and go over time, etc. NorthWestern is trying to come up with approaches that will work to address some of the statutory requirements. Through these discussions they will develop a report to be brought before the PSC in time for the July 1 deadline. There has been some discussions about whether the same model can be used for legislative changes that may be needed. They hope to then get into a discussion of whether there are changes that make sense for the state. There are two areas that he would recommend be looked at. The large customers who have gone to choice, does it make sense to allow them to come back to the default supply? Maybe it would make sense to leave those customers in the market. Another issue is the question of whether it makes sense for small residential customers to have the choice option. Various parties have different answers. There are questions that surface in the default supply docket. Does it make sense to have long term contracts when the load in the future is uncertain? Clearly, when MPC set out to secure the default supply, they tried to get the cheapest sources of power available. To do that they had to get some long term contracts. The argument is that some certainty would make sense. His sense is that if we are going to debate those issues, we should start sooner rather than later.

REP. HARRIS asked about the option of having the residential customers be handled in a regulated market. **Mr. Lopach** said it would look like how utility service use to look. It is his understanding that Oregon has gone that direction. If we can move through the default supply docket, then the attention can move toward getting some resources.

MR. EBZERY asked, under SB 390 large customers had a right to get in or get out, under HB 474 do they have the right to come back in? **Mr. Lopach** said that they have the option to come back as of July 1, 2002. What is being negotiated is that they would come back for a 1 year minimum. **MR. EBZERY** said that with the uncertainty of the industrials coming in and out, would that affect the small customer? **Mr. Lopach** said that it would depend on how it is priced. It is a lot of volume. If they were not under contract and the default prices were less and the large customers could come back, it could affect the small customers. The large industrial customers are a steady load, which is attractive. The more variable the load, the higher the cost.

MR. EBZERY asked if, after this is over, a full requirements approach will make sense again. **Mr. Lopach** said that the “dump the deal” issue came about because at the end of the legislative session MPC and PPL negotiated a 4 cent contract, but before the contract was formalized the market began to move down and negotiations continued. It became clear that there were more attractive deals in the market at the time. MPC wanted to reopen the negotiations with PPL at that point. PPL declined, wanting to hold to the 4 cent contract. In the end, the contracts that resulted were 26 million per year less than the original deal with PPL. NorthWestern will respond to whatever the PSC issues. A full competitive market is beneficial for Montana non-choice customers, Montana choice customers and key to not being captive to incumbent generators in the future.

MR. STRAUSE asked if the PSC has the authority to allow NorthWestern to set rates for the large customers different than everybody else. **Mr. Lopach** said that is an issue that they have discussed. He would argue that the PSC can make that distinction among customer classes. **MR. STRAUSE** asked why the large users would come back in. **Mr. Lopach** said that it is theoretical. It is contemplating a possibility that is very unlikely. The large industrials enjoy having the opportunity to negotiate with other suppliers.

REP. CLARK asked how the general public would be able to receive competitive prices in a non-competitive market. **Mr. Lopach** said that with the idea of retail choice, the real problem is, do the residential customers offer a sufficiently attractive market for the suppliers to serve them. Residential customers are expensive to serve. Do residential customers really want a choice of competitive supplies? He is not aware of a truly competitive market for residential customers in America. It is not an easy issue, but there is enough concern that it is likely one that could be advanced through further legislation.

VI KENDALL MINE UPDATE – STATUS AND FUTURE

SEN. McCARTHY said that in years past the EQC has been able to visit the areas that will be discussed. This has been going on for many years. Montana is both a mining state and an agricultural state. We need to keep both of those entities working.

MR. MITCHELL said that the member folders contain a chronology of events that occurred at the mine prepared by DEQ and a copy of an agreement between Canyon Resources and DEQ dealing with the release of the bond, included in **EXHIBIT 6**.

Jim Volberding, Canyon Resources, said that the Kendall site is 20 miles northeast of Lewistown. It is a historic mining district. He showed a picture of what the site looked like before Canyon’s involvement. There was some waste rock and tailings that could be seen.

Canyon became involved through its subsidiary CR Kendall in 1988 and has been on the site since then. He showed another picture of the site from 1999, following the end of mining. There was a series of 5 pits that were developed. There are 4 drainages that emanate from the deposit area and flow off to the east. Canyon mine produced about 35,000 to 40,000 ounces of gold per year through 1995.

Canyon began full scale reclamation in 1995 on the waste rock piles and the pits on the northern end. He showed a map depicting what has been reclaimed; about 70% of the disturbance has been reclaimed. In 1996 and 1997, some seepage from in the dumps was

found in the drainages. Pump back systems were installed at the base of those dumps to help with the treatment of that seepage. They were placed in 4 valleys including Little Dog Creek. In 2000, augmentation systems were installed to take water from wells in the aquifer that had not been impacted and replace it at a gallon for gallon rate into the drainages. On average there were flows from 5 to 15 gallons of water per minute. The reason they are collecting the water is that the water doesn't meet background standards. The Mason Canyon and Last Chance Creek are at or below the background levels that have been determined for that area.

There has been a long and convoluted history of reclamation at the CR Kendall site. See **EXHIBIT 7**. CR Kendall approached the DEQ in fall of 2000 with a proposal to get work done on the site. Canyon didn't have the financial resources, but there was bond money available. There was a bond forfeiture process. There were reclamation and increased bond discussions that were terminated by the bond forfeiture action. They felt that was uncalled for. They met with the DEQ to avoid the litigation that would be coming over the bond forfeiture. The existing bond amount was transferred to an account that is managed by the DEQ.

Canyon was to produce a closure plan within 30 days. They did that. The plan included regrading and capping the leach pad, and leaving the pump back systems in place for water management throughout the closure period. Part of that discussion was to allow the 2 drainages to go. The water would be captured and then retained in the pond systems. It could then be irrigated on site or it could run by gravity to a 60 acre plot below the mine site. They went through one round of completeness on that plan.

The agency modified the plan and put that plan before a public hearing. It was essentially what Canyon had proposed except that they were proposing a 17 inch sub-layer instead of 19 inches for the leach pad cover. The agency decided to proceed with an EIS. Canyon feels that the plan they submitted can be accomplished within the funds in the account. They are eager to see the site reclaimed.

Pat Plantenberg, DEQ, referred to **EXHIBIT 8**. The operating permit still remains in effect. Kendall is still responsible for management of the site. Parameters of concern in the water include sodium, cyanide, nitrates, etc. There are water quality problems. There is a summary in the exhibit. Water quality interpretations for the drainages of the mine area have been complicated by the presence of the historic mining. Background levels of contamination in this mineralized area may already exceed state water quality standards. CR Kendall installed the 4 pump back systems to collect contaminated seepage and pump it to the mill for treatment. Total seepage collected from 1997 to 2001 varied from 17.5 to 24 million gallons per year. During 2001 pump back rates from a single drainage range from an average monthly flow of less than 1 gpm to 43 gpm. Seepage is pumped to the existing treatment plant. 3.1 million gallons were treated and discharged to ground water in the Kendall pit. Prior to 2000, captured seepage water was evaporated, used in irrigation on reclaimed areas, or treated and discharged into the pits. In using land application, vegetation removes the nitrates. They have used land application for disposal of all the seepage water. During the months when irrigation is not possible, the seepage water is stored in lined containment ponds. In 2001, Kendall collected 17.5 million gallons from the seepage capture system. Water quality standards were not met for some parameters. The DEQ is currently researching the data and evaluating the enforcement options under the Water Quality Act.

He referred to Exhibit 6, which shows the reclamation plan for waste rock dumps. In August 1997, the DEQ authorized the use of reverse osmosis for water treatment, which typically meets all the standards. The use of evaporation in the leach pads was making the water quality worse. This process was terminated in July 1999. The DEQ has noted that the land application areas are not being managed as well as they should be.

The need for Montana Pollutant Discharge Elimination System (MPDES) permits has been a controversial issue at the mine. The DEQ and the EPA directed CR Kendall to apply for a surface water discharge permit in 1997. The permit was never issued because CR Kendall could not meet surface water discharge standards. An administrative order was issued to address the violations in 1998. Interim water quality limits were set to allow time to complete reclamation. CR Kendall is still obligated to obtain permits for the discharge of water.

CR Kendall submitted an amended closure plan in 2001 which identified CR Kendall's proposed plans for long term water management on the site. The DEQ asked CR Kendall to apply for an MPDES permit. CR Kendall said that they would do so when approval of the amended closure plan was received. The plan was not approved because the DEQ decided to do an EIS.

Final reclamation of the process valley has been delayed until the cyanide in the heap leach pad was neutralized to low levels and the water balance issues at the mine site were resolved. As part of a bond settlement, Kendall proposed an amended closure plan on March 8, 2001 and agreed to use a 36 inch cover system. After further DEQ study, they put forth a plan that required only replacing the 17 inches of top soil.

After preparing an EA on the closure plan, public comment convinced the DEQ that a full EIS is needed. The EIS that the DEQ is preparing will address all the issues raised in the August 2001 draft EA public comments. The major issues include an entire reevaluation of the reclamation plan, including existing reclaimed acres on the site; a range of alternatives including back filling, impervious covers on leach piles and waste rock dumps, soil sources, effects of the land application of water on reclaimed areas, etc. It will review all potential impacts to water quantity and quality in the drainages, the need for an MPDES permit, and background water quality concentrations. The DEQ is considering using a consensus building process such as a multiple accounts analysis process. This process forms a technical working group comprised of DEQ, the Department of Natural Resources and Conservation (DNRC), third party consultants, and members of the public working to develop alternatives, address public concerns, and meet reclamation and water quality requirements. The EIS schedule has a request for proposals this spring. They hope that reclamation can occur in 2003.

The DEQ ordered forfeiture of the bond. Canyon's \$1.9 million reclamation bond was released to the DEQ by agreement and the process was dropped. This summer Kendall is doing some logging on the site. Vegetation and soil studies will be done this summer. They are also hiring a hydrologist to assist with water quality studies.

Stephanie Shammel, rancher, referred to **EXHIBIT 9**. She was a housewife with 3 children when she learned that she was going to have a cyanide heap leach mine in her backyard. She worked really hard to understand what they were going to do at the mine. The metals that were in the overburden are flushing out with the rain water. The cyanide used in the process is not as much of a problem as the metals are. The mine was blasting with ammonium, nitrate, and fuel oil. The nitrogen that doesn't go off in the blast goes into the soil.

She feels that she is a business person. She contributes to the economy. It is difficult to be a rancher, but when someone takes all of the water away it becomes harder. The DNRC did some estimates showing a loss of 8 million gallons per year of runoff. In 1994, they began having mine contamination leaching through the waste rock dumps. The mine tested her water and learned that the spring was contaminated, but didn't tell them until the following year. They had a meeting with the Bureau of Land Management (BLM) and the company and asked for the problem to be fixed. At this point, all of the waste rock dumps are putting out contamination in excess of human health standards.

In 1996, Kendall started pumping back water, even though the DEQ had rejected the pump back plan. At this point anyone below the mine started having water problems. They have no water at the buildings on the ranch. The creeks are going dry. The dams below the mine have no water, but those to the north are full. DNRC issued a notice of violation. The Little Dog Creek pump back is on her drainage. They have had nitrates in excess of 107 part per million, the human health standards are 10 parts per million. We need to look at water rights. A person should have to prove, prior to developing the water right, that they will not affect other water rights holders. The water rights court said that the company didn't want the water so they didn't need a water right. This leaves her family with no recourse. We need to get this company to put some money up before they go bankrupt like Zortman did. The DEQ is projecting a need for 100 years of water treatment.

Another thing is that mineral rights owners don't pay any taxes in this state. It would be a great source of revenue. They asked the BLM and the Forest Service to show one reclaimed cyanide heap leach mine in the US. There is not one.

MR. MITCHELL said that Jack Stults is here from the DNRC for questions.

MR. STRAUSE asked if Judge Honzel's ruling in the recent Golden Sunlight Mine case will impact what needs to be done as far as reclamation. **John North, DEQ**, said that pit back fill is one of the tools that needs to be looked at. There are advantages and disadvantages. There needs to be a multiple accounts analysis. The decision requires that type of process.

MR. STRAUSE asked when they started monitoring the water downstream from the mine.

Mr. Plantenberg said they started in 1989 and began finding problems in the early 1990's. They have added new sampling sites as needed. **MR. STRAUSE** asked for the first violation.

Mr. Plantenberg said that there was a soil salvage violation that was issued in 1994. There have been several violations over the life of the mine. There was a water quality violation issued in 1998 with a large penalty. In September 2001 there was a proposed settlement where Kendall will pay approximately \$132,000 of which 10% will be cash, the rest will be mineral rights.

MR. STRAUSE asked about the provision in the DEQ- Canyon agreement that Kendall will open an account in addition to the \$1.86 million. **Mr. Volberding** said that there is an account that has been set up with a nominal amount of money. **MR. STRAUSE** asked if there is any reason in the last year that there hasn't been more than a nominal amount put into the account.

Mr. Volberding said that they disagree that the reclamation will exceed the bonds.

MR. STRAUSE asked if CR Kendall is prepared to pay the amount if the reclamation does exceed the bonds. **Mr. Volberding** said that they would be responsible for additional reclamation on the site. **MR. STRAUSE** asked if CR Kendall is financially able to do that. **Mr.**

Volberding can only say what is in the agreement. **MR. STRAUSE** asked about the landowner's water rights and that they have become useless, is that a result of mining activities? **Mr. Volberding** said that over the past 2 years the site has returned almost double the amount of water to the drainage that has been pumped out of the drainage. There was a drought last year in Lewistown.

MR. STRAUSE asked, once the DEQ determined the reclamation costs, why didn't they require Kendall to put up that amount? **Mr. Plantenberg** said that Kendall can appeal that decision.

MR. STRAUSE said that the appeal shouldn't stop the process. **Mr. Plantenberg** said that they can go through a contested case hearing. The DEQ will be doing the EIS and will then ask for a revised bond amount. **MR. STRAUSE** asked if there is any indication that there won't need to be water treatment after reclamation. **Mr. Plantenberg** said that the bond calculations include water treatment for 100 years.

SEN. EKEGREN asked if there is loss of water. **Ms. Shammel** said that the well that they are using to return the water across the mine comes from her drainage. **SEN. EKEGREN** asked if the water was put back after reclamation. **Ms. Shammel** said that they take the pump back water, mix it with the leach pad water, and then spray it on the land. The company has actually contaminated their own vegetation.

SEN. EKEGREN asked if the mine puts twice the amount of water back as was taken out. **Mr. Volberding** said that was correct. **SEN. EKEGREN** asked where the water is put back to. **Mr. Volberding** said that the water is put into the section 29 spraying.

SEN. McCARTHY asked if Mr. Volberding could explain the spraying process. **Mr. Volberding** said that they collect the water and it is pumped back, taken to a central location, then applied to the land on site. Some water is put back into the section 29 spring.

SEN. EKEGREN asked for explanation of the loss of water. **Ms. Shammel** said that the well was still clean, but they had to have clean water in the section 29 spring because the metals were bad enough that they couldn't use that spring. The well is in the same drainages as the spring and pump back system.

SEN. McCARTHY asked, on a day to day basis, do they have water in their own home. **Ms. Shammel** said that her water comes from the Eagle Sands to the east. Traditionally they have run 500 animals. The feedlot is empty, they are only able to hold 100 cows

Mr. Volberding referred to photo, **EXHIBIT 10**. It shows beaver ponds and lots of water.

SEN. EKEGREN asked if that is water that can be consumed. **Mr. Volberding** said that it can be consumed. **Ms. Shammel** said that when the mine started they were able to put a well on her father-in-law's property. The decision was that if the section 29 spring went dry, the mine would have to replace water to the spring. As soon as they turned the water on for the mine the spring went dry. The mine supplemented the spring, but when they turned on the pump back system the spring dried up again. The company was then supplementing the spring again. DNRC then said that water needed to be returned to other drainages.

SEN. COLE asked about the photo. **Mr. Plantenberg** said that there is a shortage of water in that area. The ranchers are having to haul water. They are trying to sort out how much is related

to the drought and how much is related to the mine. The DEQ is hiring a hydrologist to look at this issue. Another problem with the drainage is that the mountains have been lifted up. The water doesn't always make it all the way down the mountain. **SEN. COLE** asked if they were in agreement about doing the reclamation and now we are down the road 3 or 4 years and in the mean time there isn't reclamation being done at all. Why did the DEQ wait to do the EIS?

Mr. Plantenberg said that they have tried to do several iterations of the reclamation plan. They have been bogged down by appeals and comments on the EA's. The company has the right to appeal. It is time to do this EIS and hopefully get the reclamation done next summer.

SEN. COLE asked about where the appeals were coming from. **Mr. Plantenberg** said that there were a lot of public comments from community members and the Montana Environmental Information Center (MEIC). They have legitimate concerns that need to be addressed. The DEQ listened to the local ranchers and decided to do an EIS. **Ms. Shammel** said that contaminated water will be piped 4,000 feet to a land application site right next to her hay fields.

SEN. McCARTHY asked if she is satisfied with a 4 year delay. **Ms. Shammel** said that she doesn't have any choice. She is in litigation with the company. She has been working on this for 14 years.

SEN. TOOLE asked if the appeals came from the company. **Mr. Plantenberg** said that was correct. **SEN. TOOLE** asked if that is slowing down the process. **Mr. Plantenberg** said yes.

REP. CLARK asked if the current plan can be done with the bond amount that they have available. **Mr. Plantenberg** said that if they had gone with the company proposed plan, the bonds would not be enough. **REP. CLARK** asked about the 14 million dollars. **Mr. Plantenberg** said that is the calculated bond with 36 inches of soil, plus water treatment. That includes 100 years of water treatment. **REP. CLARK** said that he sees a trend of bonds that aren't even close to covering the actual cost of reclamation. Are we doing things differently now? **Mr. Plantenberg** said that they have increased bonds on sites significantly. The DEQ is trying to work with the companies to come up with alternative bonding ideas.

REP. HEDGES asked about a DEQ water quality penalty fine being used to buy minerals for the Department of Fish Wildlife and Parks (FWP). **Mr. Plantenberg** said that it is a settlement for violation. The cash would go into the general fund. **REP. HEDGES** asked if FWP had the corporate decision capability about where we spend our general fund money. **Mr. Plantenberg** said that the money would probably come out of FWP's budget. **John Arrigo, DEQ**, said that the company and state are not buying mineral rights. The DEQ is penalizing the company. The company will be giving to the state the mineral rights. The state is not buying them. The FWP Commission is making a final decision today. Then it will go to the State Land Board. It is a question of whether or not the state wants to accept these mineral rights as an asset.

REP. HEDGES said that some group decided that rather than cash they would accept mineral rights. **Mr. Arrigo** said that penalties are deposited to the state general fund. Since the company had no cash, they settled on this approach. There have been instances where a company has been allowed to do an environmental project for a penalty in lieu of a cash payment.

REP. HARRIS asked if the DEQ has authority when the water supplies are interrupted by a diversion of water. **Mr. North** said that under the Metal Mine Reclamation Act there is a provision for a person that feels that their water has been diminished, the department does an

investigation and can require replacement of the water. **REP. HARRIS** asked if there had been an application by the adjacent ranches. **Mr. Plantenberg** said that there was something in the permit that required the mine to provide make-up water. **REP. HARRIS** asked if that is the case, why are there concerns about the lack of water. **Mr. Plantenberg** said that they have a plan to replace the water. Some of the ranchers obviously feel it is not adequate. It will be looked at through the EIS.

REP. MOOD asked if Mr. Plantenberg felt another EIS would resolve the problems with appeals. **Mr. Plantenberg** said that an EIS is a more defensible document. **REP. MOOD** asked if that is the most efficient way of proceeding with reclamation. **Mr. Plantenberg** said it was.

SEN. McCARTHY asked if the reclamation could have continued at the same time as the EIS. **Mr. Plantenberg** said that the comments on the last EA said that the DEQ needs to look at other issues. The DEQ feels that a comprehensive EIS will look at all the alternatives and will then be able to come to a decision that can be defended.

REP. MOOD asked about the bonding. Is the shortage in the bond a result of increased environmental standards? **Mr. Plantenberg** said that may be true. The standards are more stringent. A big reason is the increased water treatment costs.

SEN. COLE asked if Canyon Resources had helped some of the landowners with supplemental water, was this offer made to all the people in the area? **Mr. Volberding** said that it was.

SEN. COLE asked if some accepted. **Mr. Volberding** said that there were some that accepted the offer.

SEN. EKEGREN asked if the new EIS is done and five years from now they find that more reclamation is needed, can they do another EIS? Is there an end to how this works?

Mr. Plantenberg said that this is a closure EIS. **SEN. EKEGREN** asked if the company complies with the EIS, is it done? **Mr. Plantenberg** said that it would be for this plan. If something new happened, it would require an amendment to reclamation plan and it would go to the public for a comment.

MS. PORTER asked if the EA was appealed. **Mr. Plantenberg** said that in the last 2 EA's the public has asked for an EIS. **MS. PORTER** asked if the background water quality would exceed the water quality standards. **Mr. Plantenberg** said that could be possible in several of the drainages that had the historic tailings in them. **MS. PORTER** asked if the money for water cleanup will impose requirements on the mine to clean the water beyond background standards. **Mr. Plantenberg** said that the reclamation bond didn't address that. The standards will have to be addressed in the EIS. **MS. PORTER** asked if they are anticipating meeting WQP 7.

Mr. Plantenberg said that it could be met in certain instances on the site and not in others.

MS. PORTER asked if the mine would be represented on the technical working group.

Mr. Plantenberg didn't think that they would be in the group, but they would be involved.

SEN. TESTER asked if any of the reclamation was upped because of Ms. Shammel's problems. **Mr. Plantenberg** said the seepage capture has been in place since 1996 in their drainage, so the answer is yes. **SEN. TESTER** asked if they went from projected impacts to real impacts.

Mr. Plantenberg said that impacts were found, but not projected. **SEN. TESTER** asked if the patch of ground where the mine is going to irrigate is part of the plan. **Mr. Plantenberg** said it was not. It is the proposed amended closure plan and is one of the alternatives that will be looked at in the EIS. **SEN. TESTER** asked if that is a higher elevation than the land around it, is there a chance that the water will enter the surface, go in as ground water and come up as surface water again. **Mr. Plantenberg** said that is the concern of the neighbors.

SEN. TESTER asked how many ranches are impacted by the mine. **Ms. Shammel** said there are 6 families in the lawsuit. One has settled. **SEN. TESTER** asked if the Shammels have community support. **Ms. Shammel** said that they do. **SEN. TESTER** asked if the Montana Environmental Information Center (MEIC) had sought her out. **Ms. Shammel** said that she sought them out looking for help. **SEN. TESTER** asked if she belonged to any agricultural organizations. **Ms. Shammel** said that she belonged to the Farm Bureau. **SEN. TESTER** asked if they had supported her. **Ms. Shammel** said that the agricultural organizations didn't offer support because they say that mining, farming and ranching are analogous. **SEN. TESTER** asked how long the family had been on the ranch. **Ms. Shammel** said that her husband's family had been there since the 1940's. **SEN. TESTER** said that the carrying capacity went down because of the drought. **Ms. Shammel** said that they have pasture in the snowies. They took extra cows to the snowies to mitigate the loss, but had to decrease the herd because of loss of hay production. **SEN. TESTER** asked if the water had to be hauled. **Ms. Shammel** said that it had to be hauled from at least 10 miles away. **SEN. TESTER** asked how many ranchers were offered the water. **Ms. Shammel** knew of 2 ranchers that took the offer, but were close to the water. **SEN. TESTER** asked how much the litigation is costing the Shammels personally. **Ms. Shammel** said that it is a contingency law firm, which is the only way they can afford it.

SEN. McCARTHY asked why she objected to closure. **Ms. Shammel** said that she doesn't object. Currently they are not doing anything. The plan is going down while the bond is going up.

SEN. TESTER asked for the harm in thallium. **Ms. Shammel** said it is one of the most toxic metals to humans.

MS. PAGE said that one of the issues with an EIS is the timeliness. How long has it been that the residents in the area have been asking for an EIS? **Mr. Plantenberg** said that they did a reclamation review in 1999, the public asked for an EIS at that time. There was another EA last year and the public asked for an EIS again.

VII FIRE FUNDING UPDATE

MS. EVANS said that the committee asked to make a formal request to the Legislative Finance Committee (LFC) and ask them to address the study. There was a letter presented to LFC. The Committee voted to have staff work with the DNRC and examine changes to current funding methods, but didn't express a particular concern with the current methodology. They have determined that LFC staff will not formally pursue this issue further. Therefore the fire funding study will not go any further.

VIII FUTURE EQC MEETING AGENDA ITEMS

MR. EVERTS said that the agenda items that the EQC has for the next two meetings include the review of department legislation, DEQ, DNRC, and FWP have all requested legislation; and the renewable resource grant and loan. If there are other requests, please submit them in writing.

IX OTHER BUSINESS

• *Missoula White Pine Sash remediation*

REP. MOOD said that the site has been contaminated by pentachlorophenol (PCP). The contamination is on the southern end of the site and the flow is to the south. The current owners of the site want the parcels separated in order to proceed with plans for development for the future.

MOTION: REP. HEDGES moved that the EQC send a letter to the Governor recommending that the Missoula White Pine Sash superfund property be segregated and those properties that meet environmental standards be released for development.

Discussion:

REP. HARRIS said that it is an excellent motion. The property is being prevented from being used commercially because it has been under review for quite some time. There has been a lot of turnover of DEQ staff preventing timeliness of the review. He would second the motion.

REP. MOOD said that there are some hot spots on the property that will be dealt with prior to development.

REP. BARRETT asked if there are other superfund sites that can be segregated and deemed safe, is the council stepping into a trap where everyone will come to the EQC for segregation of a site. **REP. MOOD** would anticipate other requests for segregation of superfund sites.

SEN. TOOLE asked if the EQC had done this before. **MR. EVERTS** said that the EQC has sent letters to the Governor and the departments on this type of issue, but it is only advising, not binding on either entity.

SEN. McCARTHY said **REP. BARRETT's** comment is well taken. There are a lot of superfund sites in Montana. The comment is something that needs to be considered as we look at this motion. This is a far reaching issue.

REP. HARRIS said that we know a fair amount about this site. A certain portion of this site is clean and is prevented from going back into commercial use because of its status of a superfund site. His experience with DEQ and EPA is that occasionally they need an injection of common sense. That is the basis of the motion.

REP. MOOD said that this site is unique in that it is under the control of the state.

SEN. McCARTHY asked if it is appropriate to send a letter to John Wordell, EPA, and the agency. **REP. HARRIS** said that this is a DEQ site. His point is that both EPA and DEQ occasionally need some prodding in this direction of common sense.

REP. HEDGES said that it is beneficial for the citizens of Montana to do this so that we clean up our mess one little pile at a time.

VOTE: Motion passed 15 to 1, with Sen. Toole voting no.

• *Sage grouse conservation plan*

REP. BARRETT said that she finally received the information that was requested. There are 6 sets of minutes for the public meetings, but they don't have a lot of information about what was discussed at the meeting. She referred to **EXHIBITS 11** and **12**. She received a letter from Sen. Butcher. She has heard the department say that they have signed a memorandum of understanding (MOU). The letter says that they are in the informational gathering stage. For whatever reasons the technical advisory group is going to go ahead and keep working. FWP is now attempting to gain commitments from other agencies. Perhaps EQC can have a visit from the director at the next meeting.

REP. HEDGES said that if there are concerns, now is the time to have them addressed, before they go very far on their plan.

MR. EVERTS said that he can put it on the agenda for the next time.

MS. EVANS said that if there are specific questions, those could be sent before the meeting to ensure that the council's questions are answered.

SEN. McCARTHY said that **REP. BARRETT** would work with **MS. EVANS** on that. We will try to put it on the July agenda.

MS. EVANS asked who the committee would like to hear from at the meeting.

SEN. McCARTHY said that we need the director.

• *HJR 29 - DEQ report to EQC - Asbestos sampling study*

MR. MITCHELL referred to **EXHIBIT 13**. There are no ambient air quality standards for asbestos. He was asked to write a specific state standard for an ambient standard for asbestos in the air. He learned that if the federal government can't come up with a standard, he can't either. The bill draft turned into a resolution. The problem is that the measurements are not well defined. Depending on the size of the microscope that you use, more or fewer particles can be seen. The U.S. Occupational Safety and Health Administration (OSHA) has some occupational health standards, but there is nothing for ambient air. The resolution asked for a task force to develop some method for measuring asbestos that might result in some sort of ambient air standard and to have the agency report to the EQC. The department has solicited a request for proposals from Montana State University. They received a proposal from the university system. The resolution requires the agency to work with the task force to find funding.

X CONFIRM LOCATION OF THE NEXT MEETING AND INSTRUCTIONS TO STAFF

SEN. McCARTHY said that the next meeting will be a Monday and Tuesday meeting the last week in July. The last meeting is in September. The meetings will be in Helena.

SEN. COLE said that there will be people from all 3 lead agencies to speak about the EIS in the subcommittee meeting.

REP. MOOD referred to **EXHIBIT 14**, an email from Tony Tweedale.

MS. PORTER said that she would like to request that Louisiana Pacific has an appeal before of the Board of Environmental Review the first week in June. A major point of the appeal involves statutory structure. Is there a chance that there could be a representative from the EQC could attend? **SEN. McCARTHY** said that could be done.

XI ADJOURN

There being no further business, the meeting was adjourned.