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ENVIRONMENTAL QUALITY COUNCIL
Agency Oversight/MEPA Subcommittee
July 29, 2002
Final Minutes

COUNCIL MEMBERS PRESENT

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

STAFF MEMBERS PRESENT

Mr. Larry Mitchell

AGENDA

Attachment 1

VISITORS' LIST

Attachment 2

SUBCOMMITTEE ACTION

- Decided to have Mr. Mitchell continue with final drafting of the MEPA public participation documents.

I CALL TO ORDER

REP. HARRIS called the meeting to order.

The minutes of the May meeting were approved by consensus.

II OLD BUSINESS

MR. MITCHELL said that there were 5 letters that were written by the subcommittee or by the EQC at the behest of the subcommittee.

• ***EQC letter to Governor regarding methamphetamine labs***

MR. MITCHELL said that **EXHIBIT 1** includes a letter that went to the Governor in May asking the Governor to get the agencies dealing with methamphetamine cleanup and guidance together to work on a standard for cleanup, the Governor's earlier response, and a response from the Montana Department of Environmental Quality (DEQ). That response said that the DEQ met recently with the Montana Department of Justice (DOJ), Montana Department of Labor and Industry (DLI), Montana Department of Public Health and Human Services (DPHHS), the federal Agency for Toxic Substances and Disease Registry (ATSDR), and the federal Environmental Protection Agency (EPA). The meeting produced 3 options to deal with this problem: (1) develop a complete regulatory program that dealt with the cleanup of methamphetamine labs and standards and guidance, (2) development of numerical cleanup standards, and (3) development of guidance alone that could be used without numerical cleanup standards or government oversight. The third option is the direction that was chosen because of limited financial resources. This group is working towards developing a pamphlet on guidance for property owners as to how to best respond to cleanup problems. There will also be a web site to provide other information to the public and property owners. Several other states have gone this direction. If the Legislature feels the need to develop a regulatory program that would provide cleanup oversight from the government, then they feel that it would be necessary to also provide resources to do that.

REP. HARRIS asked if the DEQ made a recommendation of its 3 options. **MR. MITCHELL** said that they selected the third option of developing a guidance package: the pamphlet and web site.

MR. STRAUSE said that one of the proposed pieces of legislation by the DEQ addressed this issue.

MR. MITCHELL said that proposal was in the DEQ package that was mailed to all EQC members. It will be up for discussion in the full Council meeting as the agency presents its legislative package to the full EQC.

REP. HARRIS said that he felt that the subcommittee didn't have enough information to endorse any of the 3 options at this point. The purpose of the subcommittees's original recommendation was to get the affected agencies talking, and that has been accomplished.

• ***EQC letter to the Governor regarding Missoula White Pine Sash remediation.***

MR. MITCHELL said that **EXHIBIT 2** is a letter from the Chair and Vice Chair of the EQC to the Governor following the May EQC meeting where a vote was taken to send a letter urging the Governor to ask the DEQ to consider separating the clean properties out of a Superfund site, focusing attention on the areas that needed cleanup. There has been a response to that letter which is attached. The Governor responded that the DEQ is in the process of developing preliminary remediation goals, which will be the standards that the agency uses for the cleanup of that particular site. They hope to have that completed by the end of July 2002. Once those standards are developed, the DEQ will be better able to determine which properties are "clean" and which are going to need some additional work. There has been some experience with that already. The subcommittee heard a presentation referencing Zip Beverage of Missoula, which purchased a portion of the former Missoula White Pine Sash property and which has been operating some warehouses on a portion of the property for several years.

REP. HARRIS asked if the Zip Beverage property was entirely responsive to the EQC's request for splitting out the property. **MR. MITCHELL** said that the Zip purchase has been in place for quite some time before the request from the EQC.

REP. BARRETT asked how that was done without the numerical standards. **MR. MITCHELL** said that at some point the DEQ must have determined that there wasn't additional cleanup necessary at that particular site or that the use of the property wasn't going to impair any future need for cleanup.

- ***EQC letter to the Fish, Wildlife, and Parks Commission (Commission) regarding the seasonal rule exception use.***

MR. MITCHELL said that **EXHIBIT 3** is a letter to the Commission from the Chair and Vice Chair of the EQC. This is a result of the efforts of the subcommittee and EQC regarding oversight of the agency's rule making processes this interim. The letter asks the Commission to provide its policy as to when it decides to use the seasonal rule exception to the Montana Administrative Procedures Act (MAPA). That response has been drafted, but the director has not yet approved it. The response will be submitted at a later date.

- ***Subcommittee letter to the compliance and enforcement reporting agencies.***

MR. MITCHELL said that **EXHIBIT 4** was prepared as a result of the May meeting and the subcommittee's work during the interim in regards to the report that 3 state agencies are required to provide to the EQC dealing with compliance and enforcement efforts. This is a result of an EQC study that was done in the 1995/1996 interim. The letter states that it was the decision of the subcommittee that there will be no compliance and enforcement report this interim, but there will be a report submitted next year for 3 fiscal years, 2001, 2002, and 2003. The report will be submitted every 2 years thereafter in the fall of the odd numbered years; post legislative session. The letter didn't ask for any response from the agencies, but the DEQ did provide a response. This response is attached to EXHIBIT 4. The response was generally favorable. The DEQ felt that the timing switch was a better situation. There were some questions about trends. The DEQ also responded that the subcommittee didn't provide the agencies with any feedback on the format of the report. There were also questions about who else should receive the report. Typically that report has been made available to other legislators through a list of available publications. Copies of the full report have been distributed only to the EQC in the past. The letter noted that the legislation that requires the report was not changed, so the same type of information will be provided. The DEQ committed to trying to include some numerical trends in the next report.

REP. HARRIS said that this discussion would be postponed until the afternoon session.

- ***Subcommittee letter to the Petroleum Tank Release Compensation Board.***

MR. MITCHELL said that **EXHIBIT 5** is a letter to the Chair of the Petroleum Tank Release Compensation Board (PTRCB) asking specifically whether or not they felt it necessary to ask for a fee increase of the gas tax, for how long a period, and what other efforts was the PTRCB taking in order to limit costs. The response said that they were considering a placeholder for that legislation. They felt that it was only necessary through fiscal years 2005 or 2006 at this point in time. They have established a new line of credit with the Montana Board of Investments (BOI) to try to keep the fund solvent.

III PETROLEUM TANK RELEASE COMPENSATION FUND

MR. MITCHELL said that additional background information can be found in **EXHIBIT 6**.

Sandi Olsen, DEQ Remediation Division Administrator, said that last week the PTRCB took formal action on all of the proposed underground tank program legislation. With regard to the fee proposal, the PTRCB has decided to continue forward at this time. The PTRCB continues to be very concerned about the final wording of the proposal.

REP. HARRIS asked for the nature of the concerns regarding the wording of the legislation. **Ms. Olsen** said that the concern is how long the fee increase will last. They haven't had a full debate and the DEQ is still building data.

Joe Murphy, Petroleum Tank Release Compensation Board, said that he feels that the PTRCB is in support of the fee increase. At this point there is room for modifying the language as needed. The intent was to propose the increase with a sunset clause.

Ms. Olsen said that there are several ways to approach sunset language. A specific method has not been adopted.

REP. HARRIS asked if the PTRCB would come up with a preference on how the legislation should be drafted. **Ms. Olsen** said that language should be developed by September. **REP. HARRIS** asked if the BOI will always be there to provide loans in the future if necessary. **Ms. Olsen** said that the statute provides the authority to take a loan up to \$15 million or a value equal to 80% of 3 years' proceeds, whichever is greater. There is always the opportunity for that language to be struck from the statute. The PTRCB would prefer to keep the fund solvent rather than taking loans. Money paid to interest can't be used for cleanup. **REP. HARRIS** asked if it would make sense to let this small increase remain permanent. **Ms. Olsen** said that as a result of the 1998 upgrade requirements for tank systems, there has been a dramatic drop in the number of releases. At some point, cleanup needs and costs should catch up with revenue. At that point there would be no need for additional revenue.

Tom Livers, DEQ, said that he had been asked to look at issues of fund management and to help identify and implement some process improvements. The analysis is that borrowing is not a preferred alternative in getting to the point where claims drop and revenues will exceed costs. If that point were coming quicker, the PTRCB could probably borrow in order to get to that point. From what he has seen, however, they would incur too much debt for too long a period of time. If they were not able to see an increase in fees, they would be forced to curtail expenses. The PTRCB will be looking at that anyway, but without the fee increase there will have to be a limit put on claims. The sites wouldn't be cleaned up as quickly or as extensively. The DEQ would have to recommend that the PTRCB limit claims to a "first in, first out" basis, or possibly rank the claims based on environmental or health risks. The problem is just bigger than the resources.

REP. HARRIS asked if there was an estimate as to how long the fee increase should remain in effect. **Mr. Livers** said that he would advocate that it be based on solvency rather than some time period. Claims are hard to predict. The year 2005 or year 2006 estimate is as good as they have. They are looking at that estimate to see if it holds up under closer scrutiny. In terms of inflation, in the period of time that the fee has been in effect, the consumer price index rose to the point where the buying power is 2/3 of what it was when the fee was established. However,

because the number of claims is dropping, the DEQ doesn't feel that a permanent fee increase is needed.

REP. HARRIS asked if Mr. Livers would use the definition of solvency as it is in the existing statute. **Mr. Livers** said that he thought it would be based on the existing statute.

Ms. Olsen said that the existing statute stops collection of the fee at \$8 million and restarts at \$4 million. An example of a proposal that the PTRCB might put forward would be to stop collection of the extra fee at \$6 million. At that point the fund balance is still climbing, but it is more than half way to the cap. In the reverse direction, the state could start collecting the extra 1/4 cent if the fund balance dropped below \$2 million. **REP. HARRIS** asked how difficult it is to put the fee on and take it off. **Ms. Olsen** said that from the DEQ's perspective, it would be fairly easy. The fee is assessed and collected by the Montana Department of Transportation. The statute is written such that the fee change occurs at a fiscal year end or beginning.

Mr. Livers said that there is an existing loan balance of just over \$700,000. They anticipate that even if the fee increase is successful, the revenues from that wouldn't be seen for another year. They anticipate needing to borrow to keep the fund solvent for this fiscal year. The PTRCB has approved a line of credit from the BOI for the fund of up to \$2.5 million. At the meeting last week they received approval to draw \$1 million for the first quarter of this fiscal year. Depending on revenues and claims, they could end up drawing the entire \$2.5 million for the course of this fiscal year.

Ronna Christman, Petroleum Marketers Association, said that since the Legislature passed the bill that created the petroleum fund in 1989, for a period of time the fund grew to almost \$9 million in the early 1990's. Since then the fund has been reduced the deficit that stands today. It is not a surprise that administrative costs grew. It is a surprise that they find themselves in this emergency situation that caused the PTRCB to have to ask for this additional fee much sooner than expected. Improper accounting is partly to blame for this emergency situation. They are reluctant to support asking for a fee increase without taking a look at several other things.

Montana's fund is a straight reimbursement fund. There are several states that have what is more of an insurance type of program. Those states have typically been more successful in controlling their costs and keeping their funds viable by applying that kind of management. About 4 years ago the PTRCB appointed a committee to look at whether or not it would make sense to try to refine and transition the program into more of an insurance type of program. This type of program would be managed by the State Auditor rather than the DEQ.

Looking at the big picture, it may not be entirely appropriate for the fund to be managed under the same department that is responsible for the collection of the funds. The Petroleum Marketers Association still believes it is worth looking at trying to transition that fund. The number of claims being reported is dropping. However, the cost of the claims is increasing. It is important to get a good grasp on why that is happening.

There are several things that need to happen with the management of this program before the Petroleum Marketers Association will say to the Legislature that the fund needs to have this increase. They believe that the criteria for the review and implementation of work plans has to be looked at. It seems to take up to several years to get a work plan approved on a project. They feel that the staff is trying to be a consultant, when the companies are paying their own

consultants. There needs to be a complete revision in how claims are reviewed. There is a redundancy right now with remediation staff reviewing claims and petro fund staff reviewing claims. That needs to stop. She is hearing from the staff that there are some rules that need to be changed in order to make this process more simple. The DEQ needs to develop a policy on how to evaluate the sites that are in the monitoring stage. This is a constant drain on resources. These sites need to be moved onto the next level so that they can be taken off the list and closed. There also needs to be a procedural policy put in place that actually delists and closes sites. They would recommend that the director appoint a committee that consists of key staff, consultants, and owners that actually determines how the sites get closed and actually get the sites closed.

Mr. Murphy said that the law as it now stands requires tank owners and operators, if they do have a release, to promptly comply with water quality standards and address the problems that were caused by the release. Any soil contamination or threat to ground water is required to be promptly addressed and mitigated. The current status of the fund is limiting DEQ's ability to allow the consultants to do their job and promptly address these problems. It is a concern of the consultants that because of the limited funds right now, they are not able to help owners comply with the law and meet the standards that are required. That is one of his personal concerns. He shares the concerns that the DEQ is trying to micro manage these projects rather than overseeing the project. There is more technical involvement by the DEQ than was ever intended. Sometimes having the DEQ get into the technical issues can make it harder for the PTRCB and the consultants to get the project done. He would like to see a more streamlined process.

Mark Johnson, Resource Technologies, said that raising money is better than borrowing money. He wanted to express the importance of the fund. It has had many successes over the years. The fund pays to remediate sources of contamination that are in populated areas and that affect the shallow ground water. There is no more immediate source of contamination to the public, other than indoor air quality problems. These tank releases are all over the state in both large and small communities. These people are not intentional polluters. The technology that was installed at the time has just simply worn out. Some of the people from the staff of the petroleum fund compared costs across the country and Montana is one of the lowest in costs for cleanup of these sites. In a well intended effort to try to conserve money in the fund, the DEQ staff is micro managing these projects. Most of these sites are fairly simple and straight forward. What has happened is that as a result of trying to save money at the beginning, more money is actually spent at the remediation stage because of misguided efforts to save money. There is a conflict of interest. There needs to be a more streamlined and more well defined process. There also needs to be a designation for sites in the monitoring stage allowing the owner or operator to get out from under the sites if they so desire.

Dennis Franks, Ram Environmental, submitted written testimony, **EXHIBIT 7**. Mr. Franks stated that he has been involved with the cleanup of petroleum releases for over 15 years, and has often worked with the Petro Fund to accomplish cleanup of a site and achieve closure status. Active cleanup sites can require many different types of cleanup. Once the contaminants are removed, the remedial efforts can be decreased for final site polish. However, over the past couple years, a fundamental shift has occurred in the DEQ that has required a consultant to comply with new policies as they come out that advance the idea that site characterization and long term sampling will promote cleanup via natural attenuation. Although this is a viable cleanup technology, it takes cleanup of a site from several years to likely over 100 years and

does nothing to prevent contamination from moving to new properties. The cost to complete a natural attenuation study can be very large. The DEQ has requested that sites go from quarterly monitoring to semi annual or annual sampling in addition to having active and effective remedial systems turned off until the DEQ can evaluate the system. In the short term, he feels that this has been an effort by the DEQ to save fund money by reducing field activity that produces real time cleanup. At the same time it appears that oversight by the DEQ staff has either stopped or increased depending on an in-house priority system. He is in favor of the 1/4 cent increase as long as the money goes for site characterization and on-site cleanup actions. The DEQ needs to allow the consulting industry to do the job that they were hired to do. The DEQ needs to not bias the cleanup process by internal priorities.

REP. BARRETT asked if the director of the DEQ was aware of these problems. **Jan Sensibaugh, DEQ Director**, said that she was aware of this. The whole program has been under review and consideration by the DEQ. They are working on prioritizing what they can and can't do. The financial situation of the fund is now the top priority.

MR. STRAUSE asked if Ms. Christman was proposing a total overhaul of the system. **Ms. Christman** said that could happen. She wanted the subcommittee to be aware that it was something that had been looked at. Her association has looked at this seriously from the industry standpoint. Since the inception of the program, the fund has always been attached to the DEQ for administrative purposes. The change that was made in 1999 was that previous to that the PTRCB could hire its own staff, after that they could not. This may have been a mistake, but was done to reduce some of the administrative drain on the fund and because the PTRCB only meets every 6 to 8 weeks and it is hard to get a grasp on what 2 staffs are doing.

MR. STRAUSE asked whether changing the system would help get more cleanup from the fund. Is it correct that Montana has one of the lowest cleanup costs as compared to other states?

Mr. Johnson said that is his understanding. The state has some of the most efficient cleanup costs. **Ms. Olsen** said that the costs she had seen were among the highest costs as compared to other states. **Mr. Johnson** said that there is a lower profit margin associated with tank projects than with other types of environmental consulting work. The billing rates of the consultants are also among the lowest in the country. **MR. STRAUSE** said that would be a factor in deciding if we want to switch to another system.

MR. STRAUSE asked Ms. Christman about the improper accounting implications that have caused the deficit. **Ms. Christman** said that it didn't cause the deficit, it caused the surprise depletion of the fund balance earlier than expected. What was happening is that the approval process wasn't being done properly for claims that were coming in. **Mr. Livers** said that the DEQ didn't fully accrue existing costs at the end of the last fiscal year. There are probably a couple other factors that caused his people to see this fund deficit occur quicker than expected. The DEQ did put a big push on processing claims. There was a concern that there was a backlog on the claims. The Remediation Division staff cleared an abnormally high amount of claims through. This also helped trigger the deficit. Also, there were some communication problems that made the deficit more of a surprise. **MR. STRAUSE** asked whether the information that the PTRCB was getting adequately reflected the financial stability of the fund. **Mr. Livers** said that there was some confusion. The DEQ didn't clarify well enough the

difference between cash and fund balance. The accrual that took place last fiscal year and this fiscal year doesn't impact cash, but does represent a liability on the books.

MR. STRAUSE asked about the issue of a shift in DEQ policy changing a more hands-on cleanup policy to a more natural attenuation policy. **Ms. Sensibaugh** said that she didn't agree that there was a shift in DEQ policy. To some extent, PTRCB policies have pushed them in the opposite direction. There was a potential staff misunderstanding of the significance of the fund balance and because of these concerns, some staff were trying to pro-actively control costs by making the kind of shifts that Mr. Franks saw. The DEQ believes that effort has stopped, but the department has not gone back over all sites to make sure that that is not happening at any site. What Mr. Franks saw was real, but it was not representative of a shift in DEQ policy.

MR. STRAUSE asked about the problem with reviewing and approving the work plans.

Ms. Sensibaugh submitted **EXHIBITS 8 and 9**, which are some sample statistics of the number of sites that they are working on. Under the statute, the PTRCB and the DEQ are required to ensure that the expenditures they make from the fund are actual, reasonable, and necessary. The work plan review process is basically the process where they decide what is necessary. Anything that is approved in a work plan then becomes eligible for claims payment. Because the number of disagreements over what was necessary was growing, the DEQ instituted a negotiation process up front rather than having a vague work plan that may allow for work that was not necessarily within the scope of the work plan. The DEQ put more emphasis on having staff work with consultants up front to make sure that there was a clear and mutual understanding of what was in the work plan and what would be paid for. That emphasis has slowed down the work plan reviews. **MR. STRAUSE** said that the question has been raised regarding whether or not it is a good idea for the regulator to also be the one that hands money out from the fund. **Ms. Sensibaugh** said that one of the purposes of the transition to where they are now was to increase efficiency. They have reduced staff by 2 FTE's since that transition occurred. Administrative costs for the program have been flat for 7 or 8 years. Last session the DEQ got approval to hire additional FTE's, which were not hired because of concerns about expenditures. She would advocate that the DEQ retain its current role. They expect to increase efficiencies over time. **MR. STRAUSE** asked what "confirmed release date" means. **Ms. Sensibaugh** referred to **EXHIBIT 10**. This provides some background information about what happens when a release is found. **MR. STRAUSE** asked about creating an interim status between active and closed. **Ms. Sensibaugh** said that the DEQ is moving in that direction.

MR. STRAUSE asked if 15% for administrative costs would be attainable. **Ms. Sensibaugh** said that the numbers indicate that administrative costs are now running about 20% to 22%. She is certain that they can achieve more efficiency, but is not sure how low that would take them.

MR. STRAUSE asked how much the web site is being used. **Ms. Sensibaugh** said that when people call in they are provided as much information directly as the DEQ is able to provide. She doesn't know how much people are using the web site.

REP. HARRIS asked if Mr. Liver's feels that staff felt the obligation to guard the fund and as a result they engaged in micro management. **Mr. Livers** said that there is some of that. On occasion it has lead to a point of spending dollars to save pennies. That is the most obvious change that needs to happen. There is a need to streamline and focus on what is important.

REP. HARRIS asked if there are too many staff people looking at too few problems.

Mr. Livers said that is possible. One of the controls that has been implemented in the last several months is reduced dollars for travel. There is a need for some field presence. Sometimes decisions can be made quicker with a DEQ staff member on site. He is hoping that there will be further efficiency measures implemented in this area. **REP. HARRIS** asked if there will be a day in the near future where the department and the consultants are on the same wave length.

Mr. Livers said that the DEQ needs to get there. He is optimistic that it is possible to get there.

REP. HARRIS asked if, from what was heard today, the improvements that need to be made by the DEQ in order to get the Petroleum Marketers Association's approval of the fee increase sufficiently on line so that they can make the endorsement of the fee increase.

Ms. Christman said that she had heard some positive things. She is not saying that the Association won't support the increase, but their fear is that if they don't bring these issues to the table now, it won't happen. Even with their support, this proposal is not certain. All the options need to be looked at. She does feel that the effort on the part of the DEQ is there.

REP. HARRIS asked if the consultants are encouraged by what they heard today from the DEQ. **Mr. Franks** said that one of the problems that he finds as a business owner is that every time a policy or procedure changes in the DEQ it forces him to change his internal process. This causes his profit margin to drop. He believes that the DEQ is trying to make the changes, but he doesn't know if the focus is strong enough. **Mr. Johnson** said that there has been some recent attitude adjustment by the DEQ. Some things are reassuring, but when dealing with a bureaucracy some things are frightening. He does feel that they have been listened to.

REP. HARRIS asked if Mr. Murphy saw the gap between petro board staff and the consulting community narrowing. **Mr. Murphy** said that they are concerned about what the changes might bring. If the DEQ is truly going to streamline the process and make it easier, he is in favor of it. The ball is in DEQ's court. He is waiting to see what the DEQ will bring back. He is cautiously optimistic.

MR. STRAUSE asked if there are any federal ramifications if the fee increase is not passed.

Ms. Olsen said that the tank program is delegated to the DEQ through the U.S. Environmental Protection Agency (EPA). It depends on what changes were made as to whether there was a risk that the department may lose its authority. The federal program is very broadly defined. **MR. STRAUSE** asked if the federal program included specific goals. **Ms. Olsen** said that there are federal statutes that define certain requirements.

REP. BARRETT asked if Mr. Livers thinks that he can come up with some recommendations before the 2003 session. **Mr. Livers** said that he could. He thinks that things can change. Some pieces are very straightforward and can be implemented within a few months.

REP. HARRIS said that he gets the impression that there is a consensus, but it is a work in progress. It will be aided by the fee increase.

IV DEQ REMEDIATION DIVISION – STAFFING AND FUNDING

REP. HARRIS said that high staff turnover undermines the mission of any agency, federal or state. It is particularly corrosive for an environmental agency. He asked about DEQ's thinking on the issues that were raised over the interim and the current state budget shortfall issues.

Ms. Sensibaugh, DEQ Director, said that the DEQ has had a tremendous amount of turnover. There was a recruitment problem as well as a retention problem. They felt that the major problem was the salaries. They decided to go to Pay Plan 20. This affected almost every job in the agency and Pay Plan 20 was implemented for the entire agency. It was implemented by doing market surveys of in-state and surrounding states' salaries of comparable positions. They found that the entry salaries, plus the market salaries of those comparable positions were higher than what the agency was offering. The agency then analyzed the resources that they had to give to Pay Plan 20 and found that they could bring everybody up to the entry salary. Then because she felt it was important to reward the employees that had stayed with the agency for a period of time, those employees were given a 5% raise, moving them towards market. If the employee was over market, they did not get a raise. Nobody was moved beyond market.

Because most people were moved just to entry, they need to continue to promote people along a pay scale or they will leave. The agency was hoping that the next Legislature would award pay to the departments differently, where the department would get a lump sum payment to give out as competency based pay, so that everybody didn't get exactly the same pay raise, but the department could build in incentives for the employees. Given the budget problems, she doesn't know how the raises, if there are any, will be dealt with. If there is no mechanism to continue giving raises, they will be right back to where they were before.

So far they have been having more luck in recruiting people. To evaluate the effectiveness of this, every employee that leaves does an exit interview with the personnel officer so that she can find out why they are leaving. This is new, so there isn't a lot of data, but they are finding that people are still leaving because of money. The Remediation Division has no general fund moneys and therefore is not directly affected by the current general fund problems.

REP. HARRIS asked if the DEQ is facing a staffing crisis agency wide. **Ms. Sensibaugh** said that the crisis isn't agency-wide. It seems to be cyclical. It doesn't seem to persist over time in the same field.

Ms. Sensibaugh said that while getting staff on and retaining them does help the Superfund process as far as continuing with the institutional knowledge, she still feels that those projects will take a long time just because of the function of how those projects are done. A lot of the delays in these projects are not DEQ's fault, it is just the way the process works.

REP. HARRIS said that there are some improvements in managing the DEQ which would help. Is there any tangible progress with those? **Ms. Sensibaugh** said that there is. But it is incremental to the point that dramatic changes will not be seen. **REP. HARRIS** asked about the need for tracking the workload and if there is a system in place to move employees to where they are most needed. **Ms. Sensibaugh** said that the flexibility is not there currently. It is something that she has begun to seriously think about, but there isn't a process in place for that now.

REP. HARRIS asked for the current status from the Governor's perspective about money to fund Pay Plan 20. **Ms. Sensibaugh** said that currently there is still commitment on the part of the Governor's office to negotiate that out so that it would be adequately funded. It will depend on what the numbers look like and prioritization of where the dollars will go. **REP. HARRIS** asked about the plan to borrow from the Orphan Share Fund and what effect that will have for orphan sites. **Ms. Sensibaugh** said that it won't have any practical impact on site cleanup at all because of how the Orphan Share statute is written. All of the remediation work has to be done before the applicant will be reimbursed. The DEQ pays out as it receives the money. Money will still be coming into the Orphan Share. **REP. HARRIS** asked if there are any new sites qualifying for Orphan Share that are on the horizon right now. **Ms. Sensibaugh** said that there are not.

REP. BARRETT asked if the cost of advertising for state jobs is still high. **Ms. Sensibaugh** said that it is. It was felt that if the DEQ didn't have to advertise, it would help pay for the pay plan. It is incredibly expensive to do the advertising that they have to do. **REP. BARRETT** asked if there was a proposed bill to help with this problem. **Ms. Sensibaugh** said that she had not heard of anything.

REP. HARRIS asked if this advertising is required by state law. **Ms. Sensibaugh** said that it is more a matter of having to do the advertising in order to recruit people. **REP. HARRIS** asked if it would make sense for agencies to cooperate and have one big internet bulletin board with all the jobs. **Ms. Sensibaugh** said that out-of-state people already go to the web site. It is the in-state people that look in the newspapers. It is habit. The other question is whether everyone who is looking for a job has access to a computer.

V **MEPA LITIGATION UPDATE**

MR. MITCHELL referred to **EXHIBIT 11**. There is one new case with a MEPA cause of action. It is an administrative appeal of an air quality permit for the Sterling Mining Company Rock Creek Mine. It was appealed to the Board of Environmental Review (BER).

The Continental Energy Services appeal is also an air quality permit appeal to the BER. A dismissal of that appeal has been granted.

In the Pompey's Pillar case, the state District Court ruled against the Pompey's Pillar Historical Society and the Society has appealed the ruling to the Supreme Court. This is the first time this interim that there is a case in the Supreme Court that includes a MEPA cause of action.

Many of the rest of the cases have had no activity. He referred to **EXHIBIT 12**, which is a memo summarizing what has gone on with MEPA this interim. There is a table that shows 12 decisions that were appealed or taken to court on the basis of a MEPA claim. Many of them have other claims as well. All 12 cases involve state decisions to issue permits or approvals. None of them involve an agency initiated action. Nine of the 12 decisions involve the DEQ. Three involve the Montana Department of Natural Resources and Conservation (DNRC). No other agencies had MEPA decisions challenged during the timeframe. Of the 12 decisions that were challenged, 4 of them were air quality act administrative appeals to the BER. The remaining 8 complaints were filed in state District Court. Four of those have been resolved with respect to the state. The memo includes some descriptions of what the courts have said in regards to MEPA this interim.

VI MEPA HANDBOOK REVISION AND UPDATE

MR. MITCHELL said that he didn't rewrite a lot of the text, rather he simply updated it to include changes based on the legislation. There are a few additions to the rules cross reference section. The model rule is unchanged. The statute is the new statute passed by the 2001 legislature (**EXHIBIT 12a**).

REP. HARRIS asked about the comment on page 35 which states "NEPA also requires that federal agencies initiate and utilize ecological information in the planning and development of resource oriented projects. Although this language is absent in MEPA, impact analysis and the interdisciplinary analysis hugely necessitate some type of ecological evaluation." Since NEPA hasn't changed, what was the reason for striking that language from the handbook? **MR. MITCHELL** said that the original language is incorrect. MEPA does in fact require the state to initiate and utilize ecological information in planning and development of resource oriented projects. This was found in 75-1-201 (b)(8), MCA.

MR. STRAUSE said that, on page 6, under "How do agencies inform and involve the public," he is not sure if this is as clear as it could be. He thinks that it is trying to say that the level of public participation depends on the significance of the project. He feels that different language could be used here. **MR. MITCHELL** agreed.

MR. STRAUSE said that, on page 36, in the second paragraph, he agrees that with the revisions of MEPA it is an accurate statement, but he is not sure if it is as accurate for NEPA. It seems that there are some NEPA cases that have upheld the implementation of mitigation measures even when the project sponsor doesn't approve of those. **MR. MITCHELL** said that is the case. Early in NEPA's history there were some rulings by the courts that held that NEPA could be used to condition, to alter, or to amend. Later court rulings said that NEPA could not be used to condition, to alter, or to amend a project. The most recent rulings and analysis goes with the thinking that, generally, NEPA should be interpreted this way. It is arguable and it might be best to modify that section or leave it out.

VII MEPA PUBLIC PARTICIPATION DOCUMENTS

MR. MITCHELL referred to **EXHIBIT 13**, a brief summary of the comments that were received on the MEPA public participation documents. There were 9 entities that offered comments. **EXHIBITS 14 and 15** are the two documents with the public comments included. Many of the comments are just clarifications of the language. There also are some significant differences.

There is considerable concern among the agencies that the language of HB 473 be incorporated into this document and that there be an emphasis that the agencies' ability to condition permits is not there under MEPA. DNRC suggested using the words "MEPA is procedural, not substantive," in a couple places.

There was an error on his part where he tried to tie together the constitutional environmental provisions and MEPA as a result of some comments at the last meeting. That portion of the document cause a major rebellion among the environmental groups as well as the agencies. The Clark Fork Coalition provided some alternate language for that section. Another place that there was some difficulty was on page 6 of the MEPA website guidance document.

Two of the major agencies rebelled against the discussion of the constitutional right-to-know that points out that an opportunity to participate is not necessarily the same as a right-to-know. This was brought up at the previous meeting by REP. BARRETT and Janet Ellis, Montana Audubon. Many EAs do not require public notice, public comment, or circulation. Most MEPA documents are EA checklists and rarely do they see the light of day.

REP. BARRETT said that she was unaware of that. Instead, her concern was that if an agency is not in compliance with MEPA then there is no way to comment. That is the opportunity that she was referring to.

MR. MITCHELL said that both the Montana Department of Fish, Wildlife, and Parks (FWP) and the DEQ wondered if this discussion was necessary to include. The other place where there are some differences is, "Can I use MEPA to stop a project?" He has found that when it comes to public participation, there is a significant difference between what the agencies do and how they implement MEPA. Because of these differences, it was suggested that the agencies obtain the EQC public participation documents electronically so they can then manipulate them to fit how each agency does things. The Department of Natural Resources and Conservation (DNRC) said that they might use the documents. The Montana Department of Transportation (MDT) said that they will not use these documents. The FWP said that they probably would use the documents. The DEQ said that they probably would not use them. They would prefer an electronic copy to modify to their particular MEPA implementation process.

REP. BARRETT said that this wasn't produced for each agency to manipulate. This is a brochure for how the public can participate. She is not interested in each agency having a different interpretation. She feels that would confuse the public.

REP. HARRIS agreed that it creates more confusion if there are different interpretations on what MEPA means.

MR. STRAUSE said that this isn't the end all and be all for somebody who wants to get involved in the MEPA process. This is just a simple explanation of public participation in MEPA. Some of the agencies wanted to get too much into the technicalities of MEPA. This is not what the brochure is for.

MR. MITCHELL agreed. Each time you try to simplify, some things are left out. He was trying to avoid getting into the technical, mechanical details of MEPA implementation. That is why there are no cites from the statute in either document. He took this right out of the model rules in statute. Almost every agency with MEPA rules has adopted the MEPA model rules word for word. Still, it is interesting to see the implementation differences that the agencies have from using the same rule.

MR. MITCHELL said that the comments on the first page of the web guidance document are inconsequential. The second page is where the revolt began about having an executive agency do a judicial balancing of constitutional rights. He agrees that this needs to be corrected.

MR. STRAUSE said that he likes the alternate language that was suggested by the Clark Fork Coalition.

REP. HARRIS agreed that the suggested language makes sense. The language is helpful.

Don Allen, Western Environmental Trade Association (WETA), said that he would agree that it is a bad idea to link the constitutional rights with MEPA. When you talk about what the full human environment means, there are other ideas that are included such as economic issues. He has a problem with linking MEPA and the constitutional right to a clean and healthful environment in any way.

Mr. Allen asked if there is anything in the pamphlets about that concept. **MR. MITCHELL** said that the pamphlet didn't include that discussion. **Mr. Allen** asked if it is in the handbook. **MR. MITCHELL** said that there is a more lengthy discussion of it in the handbook. The constitutional provisions are written up in the handbook. The comment here is that these constitutional amendments reflect the spirit of MEPA. MEPA requires the state agencies to make better decisions. **Mr. Allen** said that the current language recognizes each person's entitlement to a healthful environment. But when you get into what one of the rights are, there are others in that same section. He doesn't know why we would single out just one of those rights.

MR. STRAUSE asked what other constitutional right would be impacted by a MEPA decision. **Mr. Allen** said that the definition of "human environment" includes environmental, biological, physical, social, economical, cultural, and aesthetic components. The one he is concerned about is the economic one. The wording in the constitution talks about property rights and pursuit of happiness.

REP. HARRIS read from Article 2, section 3 of the Montana constitution; "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment, the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring and possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." **Mr. Allen** said that the property right is another right that is affected by MEPA. The right to pursue life's basic necessities is also a right that is impacted by MEPA. There are a lot of communities that are suffering right now because of MEPA. He doesn't feel that it is correct to limit this to one of those inalienable rights. A MEPA document deals with all of those things.

REP. HARRIS suggested the wording of "a right to a clean and healthful environment, as well as the right to acquire, possess, and protect property are among the inalienable rights guaranteed to Montanans." In the Clark Fork Coalition's language, "to accommodate these statutory rights in a way that does not conflict with the public's constitutional rights."

Mr. Allen said that one of the problems is that no one really knows what a healthful environment is. That is one of the big issues out there. This needs to be accurate. He would agree with **REP. HARRIS'** suggested language.

Mr. Allen said that page 3 should say, "possible impacts on the human environment."

REP. HARRIS asked if it should quote from 75-1-201 (1)(b)(4), MCA. "Include in each recommendation a report on proposals for projects, programs and other major actions of the state government significantly affecting the quality of the human environmental." His suggestion is "Analysis of the impacts of a proposed decision on the human environment helps determine

whether the state can accommodate the statutory rights,” etc. He would amend that further to use the phrase, “Under MEPA, an analysis...”

Mr. Allen said that the only thing he was trying to do is make sure that it didn’t refer just to the environment unless it was appropriate.

MR. MITCHELL said that the comments submitted regarding “What Does MEPA Do?,” are primarily just language. The agencies want to make a distinction between an EA that was a checklist, an EA that was more comprehensive, and the detailed EIS. On the fourth page, the DNRC wants to include a statement that says, “MEPA is a procedural law, not a substantive law.”

REP. HARRIS said that he would add, “As a result of the 2001 legislation.”

MR. MITCHELL said that these documents both say that without using those specific words. For example, the next sentence says, “MEPA itself does not force the agency to select a particular course of action depending on the anticipated impacts of the proposal.” This action-forcing portion of these environmental policy laws is what makes them substantive.

REP. HARRIS said that his suggestion is to either say, “As a result of the 2001 legislation, MEPA is procedural, not substantive.” Or to strike the phrase all together.

REP. BARRETT said that she likes the wording with REP. HARRIS’ amendment.

MR. STRAUSE said that we are trying to follow the language in the statute and now are inserting two words that are not included in the statute. He is not sure what the Supreme Court will do in terms of an agency action.

REP. HARRIS suggested that the phrase be stricken. The rest of the paragraph makes the point that there is no action-forcing mechanism in MEPA.

REP. BARRETT said that the courts don’t make the laws, the Legislature does. That is what was done. She likes the wording suggested by REP HARRIS. She would like to keep it.

MR. STRAUSE said that there was an opportunity in the last Legislature to put this exact language in the bill and it wasn’t done. Now we are putting it in a public document.

REP. HARRIS said that the legislative history will say that it was the will of the 2001 Legislature to make MEPA procedural and not substantive.

MR. MITCHELL said that the suggestion on page 4 by Bob Lane, FWP, makes the same point that MR. STRAUSE is making.

Mr. Allen asked when that statement would be true. **MR. MITCHELL** said that it would be true when the agency itself decided to withdraw its proposal.

Mr. Allen feels that it is misleading to the public to tell them that sometimes a MEPA document can be used as a decision making tool. He doesn’t agree with that statement at all.

REP. HARRIS said that MEPA is a decision making tool. As a result of the 2001 legislation, you can't deny a project unless there is a conflict with a statute or regulation. MEPA is a gathering of information and a way of making decisions.

Mr. Allen said that the first paragraph explains it real well.

REP. HARRIS said that he is inclined to go with MR. STRAUSE's view that it is unnecessary to include the suggested language by FWP given the explanation in the document. He would suggest not adopting the proposed language.

REP. BARRETT said that if we are not going to have the proposed language because it doesn't have legislative backing for the MEPA document, then why are we delving into the constitution's inalienable rights because that wasn't put in by the legislature either. **REP. HARRIS** said that this is potentially misleading. With the other changes, everyone agrees with the FWP's initial language that we have now neutrally and accurately described what MEPA accomplishes.

MR. STRAUSE agreed to strike the language.

Mr. Allen said that on page 5, it talks about "unavoidable environmental impacts may occur as a result of decision." There we need to talk about impacts on the human environment. If a project gets stopped, there are economic impacts as well as environmental impacts.

REP. HARRIS said that on the bottom of page 4, he would like to see the word "selected" used instead of "made." **MR. MITCHELL** said that it is either "made a decision" or "selected an alternative." He would change the phrase.

MR. MITCHELL said that the portion from FWP is simply a comment.

REP. HARRIS said that he didn't feel that it made a great difference if the wording was "made a decision" or "selected an alternative."

MR. MITCHELL said that on page 5 he would agree with the "describe reasonable impact mitigation measures" comment.

REP. HARRIS said that he would go with the DEQ language.

Mr. Allen asked, where it says, "The applicant may decide that if the impacts are too great or the compliance requirements/economic impacts are too costly," why was that taken out. He liked the original language. **MR. MITCHELL** agreed that he liked the language. He thinks that DEQ got gun shy when Judge Honzel's decision came down and said that economic impacts are irrelevant in the Golden Sunlight mine reclamation case. This is an entirely different issue.

REP. HARRIS said that he would put it back in.

MR. MITCHELL said that he would agree with the suggested language on the bottom of page 5 and top of page 6.

REP. HARRIS also agreed.

MR. MITCHELL said that page 6, second paragraph, is an error on his part.

REP. HARRIS asked **MR. MITCHELL** to rework that so that it was accurate.

MR. MITCHELL said that regarding the right to know issue, the FWP and the DEQ question whether or not this discussion of the right to know versus the right to participate was necessary.

REP. HARRIS said that it is useful for the average reader to know that they may not have a specific right to participate. He believes it to be an accurate statement and one that the public should know.

MR. MITCHELL said that the following paragraph details the reasons for this.

REP. HARRIS said that there is a need for the paragraph.

MR. MITCHELL asked **Mr. Lane** why he did not like this paragraph. **Mr. Lane** said that he had a couple of concerns. He didn't understand the sentence that says, "The right to know is stronger than the right to participate." He is not sure that is true. Also, talking about, "unless the law specifically requires a public hearing or meeting on an action, the EA decision may occur without public notice." He doesn't feel that is true. Other public participation statutes require that decisions of significant interest to the public must involve public review and comment.

REP. HARRIS asked if **Mr. Lane** would feel more comfortable if the paragraph was rewritten to make the point that if the decision is of significant interest, then there is the right to participate.

Mr. Lane said that would be a better way of doing this.

REP. HARRIS said that the document would say that there is a right to participate as long as the decision is of significant interest to the public.

Mr. Allen said that on the top line on page 7, regarding the word "seriousness," he doesn't know that this is needed. The limited environmental impact is not defined anywhere.

MR. MITCHELL said that MEPA model rule VI, part 3 has that definition. He is quoting from the rule itself.

MR. MITCHELL said there is a comment from FWP again about EA checklists. They seem to take public notice more seriously in terms of MEPA and the agency attempts to get public input on more of its proposals. This may reflect the relative MEPA workload of the agencies.

Mr. Lane said that FWP notices EAs on a regular basis.

MR. MITCHELL said that the last paragraph on page 7 is written in two different ways. The DEQ added the sentence, "Agencies may use the scoping process for complex EAs also." The original sentence said, "Before a complex EA or EIS is prepared, agencies conduct scoping."

REP. HARRIS said that he would leave that up to the drafter.

MR. MITCHELL said that the next paragraph on page 8 includes only DEQ comments. He doesn't know that it is necessary. The rules do require the applicant to comment, but that right can be waived. It is the agency that has to address comments, not the applicant, so "or the applicant" should be stricken.

REP. HARRIS said that if it is accurate, he would go along with the suggestion.

MR. MITCHELL said that page 9 is fine. Page 10 is an explanation of the impact of HB 473, using the example of a landfill permitting action and stretching the potential impacts on the human environment to something that isn't included in the landfill permitting statute.

MR. STRAUSE said that this is a good example of how an action could affect the human environment.

Mr. Lane said that he was afraid that this was a situation where the comment related to the impact on the human environment, but was one that the permitting agency couldn't use in formulating any conditions.

MR. MITCHELL said that he included this type of example because even if it isn't relevant to the permitting statutes of an agency, this is important information that could be provided to the agency and to the public. There may be other things that could be done that could minimize the possible impacts.

MR. MITCHELL said that the next change suggested using the pamphlet language in place of what was written on page 10.

There were no objections to using that language.

MR. MITCHELL said that the HB 473 comments are the next changes. He is not sure what the DEQ comment does.

Mr. Allen said that page 11 should also refer to the impact on the human environment.

MOTION/VOTE: REP. HARRIS moved to have MR. MITCHELL proceed with the final preparation of this document with discretion as he consults with agencies and does final drafting. The motion passed unanimously.

VIII EQC SUBCOMMITTEE ON AGENCY OVERSIGHT AND MEPA – 2001-2003

• Interim Findings and Recommendations

REP. HARRIS said that he had no problem going to the EQC and saying that the 1/4 cent increase in the fee for the petroleum tank fund is necessary. It would be helpful if the administration is equally on board with that increase and he feels that they are. **Ms. Olsen** said that the administration is on board to the extent that they submitted all the PTRCB's proposed changes to the administration and got approval to go forward with them. They have not begun the search for a sponsor for this bill. It would be wonderful if EQC sponsored the bill.

REP. HARRIS said that it has been his experience that having everyone on board a piece of legislation helps the bill to go forward.

Ms. Olsen said that they would provide any support that they can in moving this effort forward. It is the fiscally responsible approach to take in dealing with this situation.

Mr. Livers said that this is a tough road and if the department is not willing to look at their own expenses, it probably will be a harder road.

MR. MITCHELL said that he was not aware of any other findings or recommendations that were necessary in response to an inquiry from REP. HARRIS.

REP. BARRETT said that on another MEPA related matter, she had asked Mr. Everts for a legal opinion on three FWP issues. As a result of that opinion, it appears that FWP is not always in compliance with MEPA. They are struggling with what agency actions are subject to MEPA and MEPA compliance. Planning is new to the department and they are trying to figure out how to fit MEPA into the agency's planning efforts. If an agency isn't following the MEPA process, then the public can't participate.

REP. HARRIS said that he heard Mr. Lane say that FWP went beyond the call of duty in sending out notices.

REP. BARRETT said that she wants a recommendation from EQC that staff work with FWP and that the EQC receive a systematic report from them about plans and projects to help them work through this.

Mr. Lane said that FWP agrees with the legal opinion. He thought that it was a confirmation of what they were doing. Earlier he was talking from a historic perspective. Over the last decade they have not always done MEPA when they probably should have. It is theoretically possible to do plans and not trigger MEPA because no action is taken. It is hard to see how you don't trigger MEPA with most plans. There have been some errors in the past, but he feels that those types of errors are no longer occurring. They would be more than happy to work with EQC if that is what is desired.

REP. BARRETT said that the reason for this recommendation comes from her being on the EQC this interim and seeing first the Big Hole/Beaverhead river rules issue, then the sage grouse issue, then the upland game bird issue and other issues that have come before the Council this interim. It appears that some assistance may be needed.

Mr. Lane said that he is not sure that it is necessary, but they would likely be willing to do this. They already rely on EQC staff to help with their MEPA decisions.

REP. BARRETT said that the recommendation would be upon receiving a quarterly list of FWP plans, projects, and programs, they would work with EQC staff and if they need assistance the help would be there.

MR. MITCHELL said that he is unsure how we define a plan, project, or program. As long as everyone is on the same page it would be fine.

REP. HARRIS said that what they are requesting is a heads up on projects that might trigger MEPA and that there be consultation.

REP. BARRETT said that it would be to ensure that if MEPA is needed, it is done.

Mr. Lane said that he is not sure of an instance where they didn't do a timely review and it has caused a problem. Some examples would be good. He doesn't have any problem with avoiding those things and going through a process. How much detail do they want the department to get into in this?

REP. HARRIS said that if there was a doubt of whether a project, plan, or proposal requires a MEPA review or not, then a discussion could be held with EQC staff.

Mr. Lane said that if the EQC decides to do that, he would hope for some guidance language of what defines a significant project or plan.

MR. STRAUSE asked if the issue of agency compliance and enforcement reporting had been resolved. **MR. MITCHELL** said that it had been, and he reminded the subcommittee of the decision.

IX ADJOURN

There being no further business, the meeting was adjourned.

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