

HJR 10 Compliance and Enforcement  
Study  
Final Report  
to the *55<sup>th</sup>* Legislature

Environmental Quality Council  
December 1996

## **Environmental Quality Council**

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The Council also wishes to thank the approximately 100 representatives of the regulated community, environmental groups, and the general public who provided testimony on their experiences and concerns related to environmental and natural resource regulation in Montana. Without those perspectives, this effort would have been meaningless.

In addition, the Council would like to thank the representatives of federal and local environmental agencies who have delegated or oversight authority related to Montana’s state agencies; their perspectives and information provided valuable context to this inquiry.

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## SECTION I: INTRODUCTION

Over the last three years, members of the Environmental Quality Council (EQC) have heard various concerns over state agency enforcement of environmental regulations. Specific issues raised included questions over the ability of the state to oversee proposed hazardous waste incineration, lack of or inconsistent enforcement of water quality violations, and inequity in air quality regulation.

The Council took a closer look at water quality enforcement during their 1993-94 SJR 29 water quality nondegradation study, and devoted two meetings in 1994 to further discuss environmental compliance programs.

Based on the scope and complexity of the issues, the EQC recommended a comprehensive study of all state natural resource agencies. The 1995 Legislature agreed, passing House Joint Resolution (HJR) 10 in March 1995. A copy of the resolution is included as Appendix A.

HJR 10 requested that the EQC review and analyze the state's natural resource and environmental compliance and enforcement programs and submit its findings and recommendations to the 1997 Legislature.

To carry out the mandates of HJR 10, the EQC created a 10-person bipartisan subcommittee whose work was submitted to the Council for review and approval. This summary report, as well as a Technical Appendix that contains a more detailed analysis of the specific programs, are the products of the Council's efforts over the past year.

### **EQC Response to HJR 10**

The legislature listed a number of tasks in HJR 10 for the EQC to complete. These tasks, and how the EQC responded to them, are described below.

1. Task: *Review and analyze the state's existing enforcement and compliance framework and how it is implemented.*

Response: Agency staff, representing 28 different Montana programs within 3 agencies, responded orally and in writing to standardized questions regarding their compliance and enforcement programs. EQC staff worked with agency staff to summarize the results in a standard format. Agency staff reviewed and commented on the results, included in the Technical Appendix as Section 2. Council members used a standardized evaluation sheet to assist them in tracking and analyzing the 28 programs reviewed.

2. Task: *Review and analyze the constitutional and statutory goals of these programs, whether these goals are consistent and appropriate, and whether these goals are being met.*

Response: A summary of the constitutional and statutory goals related to the programs reviewed is included in the Technical Appendix, Section 6. The Council assessed each programs' achievement of their goals but determined that an evaluation of the

consistency and appropriateness of those goals could not be accomplished during this interim.

3. Task: *Review and analyze the proper balance among enforcement tools (e.g. technical assistance, penalties, incentives, etc.) in an effective and efficient enforcement program.*

Response: The Council specifically evaluated this subject during their review of each program. Their conclusions are provided in Section II of this report.

4. Task: *Review and analyze other states' attempts to improve and measure natural resource and environmental compliance and enforcement.*

Response: The Environmental Quality Council investigated methods other states may have used to improve or measure environmental or natural resource agency compliance and enforcement efforts. EQC staff conducted telephone interviews with eight interstate or national policy analysis groups and thirteen state agency managers.

States and the federal government have struggled with the issue of trying to measure the success of environmental regulatory programs and continue to experiment with various initiatives to improve compliance rates. Program success, if not intuitive or obvious, is usually measured in one of two ways: the traditional measurement of program efforts and activities (number of inspections, number of violations, staffing and funding levels, etc.) which have typically been the measures of fiscal accountability to Congress and state legislatures, and the measurement of the actual resource that the environmental or natural resource regulatory efforts are trying to improve or protect. This latter method--measures of environmental indicators, can be difficult to quantify and qualify. It also competes for the same limited program resources needed to administer programs. Program pollution prevention efforts by government and industry is difficult to quantify by either method. The connection between efforts to prevent (cost) and quality of the resource (value) becomes the very focal point of public policy.

A variety of federal and state initiatives designed to improve or expedite compliance with environmental or natural resource requirements were identified. Many involved the recent "devolution" philosophy of the federal EPA which purports to allow states more flexibility in setting environmental program goals through block grants and multi-media (air, water, waste, etc.) federal/state agreements.

Staff did not find any state or regional study which had conducted a comprehensive program review and analysis similar to that requested of the EQC in HJR 10. Further information regarding the January presentation is available in the Technical Appendix.

5. Task: *Consult with federal, state, and local officials, the regulated community, citizens, and others regarding natural resource and environmental compliance and enforcement.*

Response: The study included the following efforts at public outreach and coordination with other agencies and the regulated community:

- an informational flyer;
- invitations to each Council meeting sent to all names on the EQC mailing list (approximately 240 persons);
- a separate mailing to individuals specifically interested in the study--those listed received meetings invitations, as well as a summary of each subcommittee meeting;
- state agency oral and written presentations to the subcommittee;
- for each program reviewed, panels of selected representatives from the environmental and regulated community shared their opinions of state compliance and enforcement programs (state agency staff were usually in attendance to respond);
- consultation with other states regarding their efforts to measure and improve compliance and enforcement;
- documentation of all issues raised through testimony and subcommittee discussion;
- a 30-day public review of the *Draft State Program Review* (over 160 copies mailed);
- oral and written presentations from federal agencies (the U.S. Environmental Protection Agency and U.S. Office of Surface Mining) charged with oversight of state natural resource and environmental programs to explore jurisdictional and coordination issues;
- a panel of local health officials, to explore jurisdictional and coordination issues between those state programs that had local implementation elements;
- 30-day public review and comment on the Draft Subcommittee Report. Two comment letters were received by the closing date; both expressed agreement with the process, findings, and recommendations; (note: the review copy did not include the self-audit information, which was incorporated into this report in November);

- documentation of program information for future use by agencies, legislators, the regulated community, and the public.

6. Task: *Vigorously pursue alternative funding sources to carry out the study.*

Response: In order to protect the integrity and objectivity of the study process, the Council did not pursue alternative sources of funding. Instead, EQC members and staff pursued a grant to fund another EQC project, thereby freeing up almost \$10,000 in state funds.

7. Task: *Report study findings and recommendations to the 1997 Legislature.*

Response: This document summarizes the study's findings and recommendations. The Technical Appendix details the study by program and further discusses the tasks outlined above. The EQC and its staff will conduct a legislative briefing regarding this study in January of 1997.

In addition to the specific mandates of HJR 10, Governor Racicot recommended that the EQC conduct "a study of and recommendation with respect to a policy on environmental self-evaluation and self-disclosure" as part of their HJR 10 effort. In response, the EQC added the following goal to their work plan for the 1996 Interim:

Goal: *Investigate the role that environmental audits play in the compliance and enforcement issue, including an analysis of the immunity and confidentiality issues raised by HB 412, which failed in the last legislative session.*

Response: The Council convened a working group comprised of representatives of industry, environmental groups, the Governor's office, the Attorney General's office, regulatory agencies, the legislature, and trial lawyers. The group met four times during the interim, discussed their various opinions regarding a self-audit policy for Montana, and has reviewed a draft modification of South Dakota's policy for self-auditing. There is agreement within the group on some aspects of the draft proposal. The working group agreed that the concept of encouraging voluntary environmental self-audits would be beneficial; it could not agree on what incentives need to be provided to encourage self-auditing. (See Section II for more detail.)

The Council also incorporated a recommendation from the 1995 Water Quality Division audit into its work plan for the HJR 10 study.

Goal: *Conduct an analysis of the water quality statutes to ensure consistency and continuity.*

Response: The Council process included a review of all natural resource and environmental statutory goals, including those related to water quality. Also, the Council included

“consistency” in implementation as one of the eight criteria used in evaluating program implementation.

During initial meetings, members of the Council added another goal to the HJR 10 study.

Goal: *Assess “appropriateness” not only program by program, and related to statutory goals, but also across programs, to ensure consistency statewide.*

Response: The Council included this consideration in their program evaluation criteria. Their conclusions related to this topic are summarized in Section II of this report.

## **Conclusion**

In summary, the study process was comprehensive, systematic, and open. In order to fully discuss issues with the EQC, the study process was structured to maximize collective agreement of Council members, yet document areas of disagreement.

The programs reviewed and a diagram of the study process are provided on the following pages. Section 1 of the *Technical Appendix* also provides a detailed description of the study process.

## HJR 10 Programs Reviewed

### Montana Department of Environmental Quality\*\*:

Air Quality

Energy

Environmental Remediation:

    Superfund

    Underground Tank Corrective Action

Reclamation (Mining):

    Open Cut

    Coal and Uranium

    Hard Rock

Waste Management:

    Solid Waste

    Motor Vehicle Recycling and Disposal

    Hazardous Waste

    Underground Storage Tank Release Prevention

Water Quality:

    Public Water Supply

    Subdivision Sanitation

    Operator Certification Program

    Ground Water

    Surface Water

### Montana Department of Natural Resources and Conservation:

Conservation and Resource Development:

    Conservation Districts

    Grazing Districts

Forestry:

    Service Forestry

Fire and Aviation

Oil and Gas Conservation

Water Resources:

    Board of Water Well Contractors

    Dam Safety

    Floodplain Management

    Water Measurement

    Water Rights

### Montana Department of Agriculture:

Agricultural Sciences:

    Pesticides

Agricultural Chemical Ground

    Water Protection Program

\*\* due to DEQ reorganization, programs no longer have the same names as listed above.

## **HJR 10 STUDY PROCESS**

*The study process diagram is not available electronically.  
For a paper copy, please contact the EQC Office.*

## SECTION II: COUNCIL FINDINGS

HJR 10 requested that the EQC present its findings and recommendations to the 1997 Legislature. This section of the report contains the Council's findings (i.e. conclusions). Recommendations are discussed in Section III.

The Council chose not to document findings specific to each program reviewed, but to summarize their findings across programs according to the evaluation criteria they adopted in June.

### **Ability to Assess Programs**

Several factors affected the ability of the EQC to analyze the state's programs. First, the sheer number and complexity of the programs made review and analysis challenging. Each has a different history, a different mandate, varying sizes and composition of their regulated community, differing ways programs interpret their goals, and different sources and levels of resources. Though the EQC standardized the review and evaluation process, the above factors hindered the ability of the Council to draw many conclusions across the board.

Also, the 1995 elimination of one resource agency and subsequent internal reorganizations of the others, meant that, in some sense, the EQC was attempting to assess a "moving target." It is uncertain at this time how the agency reorganization will affect compliance and enforcement practices and policies.

Last, the compliance and enforcement activities of the executive branch agencies have not had consistent legislative oversight in past years. For this reason and others, the failure by some agencies to compile data in an accessible, understandable, and usable format made it difficult to determine if the programs are doing their jobs. In many cases, inadequate baseline data existed regarding compliance history, which is necessary to assess trends. In many cases, programs still track project information by hand, making assimilation of data difficult.

### **Method**

The Council chose to use a selection of factors mentioned in HJR 10 (timeliness, equity, consistency, effectiveness, efficiency) as tools to analyze the state's natural resource and environmental programs. They incorporated the above factors, as well as three questions: 1) Are the programs using an appropriate balance of tools?; 2) Are approaches consistent across programs?; and 3) Are programs achieving their statutory goals?; into an evaluation form, one for each program. This form provided a tool for individual Council members to systematically consider program presentations and record their thoughts in a succinct format, rather than specifically "rating" the programs. The Council's conclusions, in general and by topic, are presented below. A copy of the Council's evaluation form is included in the Technical Appendix, Section 5.

## General Conclusions

In the testimony heard by the EQC, no evidence existed of over-zealous state regulation. The state's natural resource and environmental agencies have made major efforts to remedy previously identified problems related to their compliance and enforcement programs. However, lack of communication, education, and outreach with the regulated community and the general public leads to a lack of understanding of, dissatisfaction with, and mistrust of state government agencies and programs.

The Council expressed concern that, in some cases, there may be an undue emphasis on certain formal enforcement activities, relative to the risk to the environment and public health.

According to the Council, in addition to state agency and regulated community responsibilities, individual citizens of Montana need to understand and consider the impact of their own actions on the environment. A greater understanding by all involved of the science behind environmental and public health issues would be enhanced by more information, technical assistance, etc.

The EQC agreed that programs with well-defined, written compliance and enforcement policies were more likely to be doing well than programs that were operating more informally. They also agreed that voluntary compliance programs may reduce the need for more formal enforcement procedures, and that public outreach and information and training for the regulated community are important. Incorporating all the affected parties (including the public) in decisionmaking is important as well.

It was clear that the interplay of several factors help determine whether compliance and enforcement programs are effective. Although the Council could not agree on whether programs in general were adequately funded, they did agree that, often, how the funding is used is as important as the overall level of funding in achieving adequate compliance and enforcement.

In considering how state programs allocate resources and tasks between state staff and the private sector, the EQC was very encouraged by the ongoing efforts of the DEQ and DNRC in pursuing an effective balance between privatization and contracting and in-house retention of necessary state government functions. They also noted that the legislature has no formal mechanism to evaluate the cost implications to the state of whether state tasks are contracted or performed in-house.

Some factors are currently inhibiting the effectiveness of Montana's natural resource and environmental programs. Jurisdictional issues (those over which federal, state, or local agencies calls the shots in various instances) need to be resolved. Also, although adequately funded federal mandates can enhance compliance and enforcement, the federal role will decrease in some programs, which may affect the availability of funding for those programs.

## Conclusions, by Topic

### Timeliness

Timeliness can apply to a variety of aspects of a state natural resource or environmental program. It may include the time necessary to carry out one or more of the following: process a permit, conduct a site investigation related to a complaint, notify an operator of an alleged violation, and/or completely resolve a violation or complaint situation.

Evaluating overall timeliness of the state's programs was difficult, due to the wide variety of response mechanisms and procedures. Even tracking this parameter through the State Program Review (technical appendix to this study report) proved difficult due to the numerous programs and procedures. Those programs that keep thorough and accessible records of their compliance and enforcement activities were the easiest to review, as were those with specific measurable time frames for providing services. In general, timeliness varied by program, and most programs were rated in the fair to good range.

Primary factors influencing whether a program is operating in a timely manner include the program's policy, history, resources, and personnel. Other factors include program priorities based on workload, relative emphasis on compliance, and risk associated with noncompliance.

Regarding personnel, timeliness is directly related to staffing--an appropriate amount of staff, adequate staff experience, and the ability to retain them. It was clear to the Council that timeliness, or lack thereof, is often a function of staffing levels, and a function of program priorities in cases where staffing may be inadequate. There are some cases, at least on a temporary basis, where staffing is inadequate. In some cases, legal expertise may be lacking or overworked.

Timeliness often improves with the implementation of an internal tracking system or a written policy that demands a timely response. In some cases, installation of field offices helps programs achieve more timely responses.

The EQC observed that timeliness is most likely to be an issue with those programs that do not have well-developed and formal compliance and enforcement policies and procedures in place.

In some cases, there appeared to be a lack of internal coordination and documentation that included faulty internal tracking of violators and time frames for resolution. The regulated community and members of the public expressed concerns about whether lack of timely agency responses related to political will to respond to complaints and violations, or to other factors. Some members of the regulated community feared that testifying before the Council could affect the level of timeliness they could expect to achieve with state regulators.

### Equity

There has been a sincere effort to establish methods to provide fair treatment to Montana's regulated communities. Efforts to achieve equity are also evident in program implementation. There were accusations of unfair treatment, but no clear evidence during the study process to demonstrate a major

problem in this area. Equity does not and should not mean “equally”; there need to be appropriate controls, but also freedom from controls.

Contrary to some claims, the financial status of the violator did not appear to be inequitably considered when determining penalty amounts.

The EQC concluded that equitable and fair application of state laws is aided by clear regulations, help for small operators in understanding reporting and monitoring requirements, good communication between the regulators and regulatees, formal and written policies and procedures, emphasis on violations that pose the greatest risk to human health and the environment, and clear chains of command within and among agencies.

The Council had several conversations regarding tradeoffs between treating everyone equally and ensuring that agencies had the flexibility to respond in a manner appropriate to the situation. The Council agreed that on-site, incident-specific flexibility in enforcement can be a plus or a minus; it allows differences to be accommodated, but differences in results can be perceived as inequitable. Clear guidelines for the selection of compliance and enforcement response options are necessary to reduce perceptions of inequitable treatment.

In looking at equity in a broad sense, the Council felt there was some evidence of inequity resulting from how the law determines who will be regulated. Programs that deal with a licensed, permitted, regulated public, where considerable unlicensed and unpermitted activity takes place outside of their purview, are inherently inequitable in the sense that those likely to come under compliance and enforcement actions are the operators who are at least trying to comply with the law in the first place. It may be the unregulated (i.e. not licensed) that are creating much of the problem, yet those that are regulated get pursued.

An obstacle to the regulated community perceiving the state’s programs as equitable may be their perception that environmental regulators “go after” (i.e. assess penalties against) those with greater financial resources. They agreed that a positive factor, however, is knowing that “the little guy” does not have to be assessed the same penalty as an entity with greater resources. Flexibility also allows consideration of those companies that have environmental compliance personnel and should know better than to violate environmental regulations, as opposed to entities where violations are more likely to be accidental.

Specific program concerns related to potential inequity included: too much reliance on citizen complaints for discovering violations, more attention to large rather than small operators, reluctance to pursue violations because of potential impact locally, and perceived lack of will to respond.

The Council specifically discussed the problems of small operators who may have a more difficult time complying with regulations. Some members felt this could result in unfair treatment; others felt such the inequity was perceived rather than real.

The EQC felt there was, in regard to a few programs, at least a perception that reliance on contractors, particularly those that are also consultants to the regulated community, may result in inequitable

application of laws. There was evidence of a conflict of interest arising from using consultants in the permitting review process, when others from the same firm are preparing submittals to the same program.

Last, the Council questioned whether penalties are determined in a systematic manner at all times.

## Consistency

Consistency in program implementation varies with programs and staff training and experience. Those programs with well-defined, written compliance and enforcement policies, and program leadership that gives priority to compliance and enforcement-related activities are more likely to achieve consistent enforcement. Also, those programs that are mature (have been around a while), and static in growth (their regulated communities are not changing much), probably do a better job. Programs that are experiencing rapid growth or statute changes have some problems.

Consistency can be improved through greater provision of technical assistance, clearer policies (monitoring and enforcement), clearer definitions of “violation” and “significant violation”, and simplified reporting.

When discussing consistency, technical assistance and staffing were common themes. In addition to the above factors, consistency depends upon the level of technical assistance provided to the regulated community. High-quality and readily available technical assistance to the regulated community promotes consistency in compliance and enforcement activities. Consistent staffing leads to consistent technical assistance, which leads to better compliance and consistent enforcement.

Achieving overall consistency when other jurisdictions are involved (federal, local, and tribal) is even more challenging. There is a stronger need for better communication and coordination, and clear policies, so the regulated community and the public are not caught amidst confusion and competing authorities.

Inconsistencies are more likely to occur when there are problems with timely follow-up, significant and recurring changes in staffing (especially technical staff), and rapid growth affecting workloads. These issues can create real problems for the regulated community who must base business plans and decisions on the consistency of regulatory action.

## Effectiveness

The EQC agreed that a mere count of the number of violations processed is not a clear measure of program effectiveness. In fact, the opposite could be argued--that a low number of violations means that a program is effective. Programs that can prioritize their response based on the significance of the violation are the most effective in protecting public health and the environment.

As with other parameters, the most effective programs are those with clear goals, well-defined and written compliance and enforcement policies, programs, and measurement criteria. Those programs which include strong information and technical assistance components designed to make it easier for the

regulated community to understand and comply with all requirements are the most effective, and have the least enforcement problems over time. Other factors enhancing program effectiveness included public outreach, an internal tracking system, liaisons with the regulated community and the public, promotion of voluntary compliance, and the programs' ability to retain staff.

An effective program dedicates maximum effort to avoid formal enforcement through the use of outreach, technical assistance, forums, field contacts, and a clear and consistent process when formal enforcement is necessary. The Council felt that ombudsman type of programs were very effective, and there should be more opportunities to incorporate this type of service into Montana's natural resource and environmental programs.

## Efficiency

As with other factors, efficiency is highest in programs that have well-defined policies, enforcement processes, and communication mechanisms. Agency reorganization should, in theory, increase program efficiency in many areas.

The Council discussed how the legislature's activities affect program efficiency. They concluded that some tinkering with laws can be necessary (including those requested by agencies) to improve efficiency, but frequent and major statutory changes can decrease efficiency, as agencies are continually having to react to new directives.

Program funding (both amount and sources) affects program efficiency. Also, agencies with clear and relatively unchanging statutory directives and good communication with the regulated community can provide prompt responses, which contribute greatly to program efficiency.

The Council also discussed the pros and cons of the use of contractors to carry out program activities. Contracting out may be necessary, especially when programs have mandatory response time frames. If there are appropriate criteria in place, contracting out work may increase program efficiency. Inefficiencies are introduced, however, when contracting out ends up costing more than accomplishing the work in-house, when doing so results in conflicts of interest, and when program staff must contact a contractor in order to answer a question from the public.

As mentioned for other factors, efficiency can be improved through better communication, incorporation of more incentives (i.e. fee reductions), written policies, and simplified reporting forms. Program rules need to be clear and concise, and closely match the laws they were intended to implement, so the regulated community knows what to expect.

Some inefficiencies the Council noted included deficient tracking systems, too much time spent on paperwork (rather than substantive issues), excess need to train new staff (due to high turnover), and having to wait on actions by other agencies in order to fully implement programs.

## **Are programs using an appropriate balance of tools?**

The mix of tools to achieve compliance varies greatly, but it appears those programs that emphasize education, public involvement, and close coordination with the regulated community through workshops, forums, and maximum field contact have better compliance with less frequent enforcement. A useful first step in achieving an appropriate balance of tools is an outreach and technical assistance program with well-defined goals.

As with other factors, program components contributing to an appropriate balance of tools include clear guidelines, tempered by flexibility in response. Program effort should be expended in promoting compliance through outreach, information, and technical assistance; when violations occur program emphasis should be on the enforcement of violations that pose a significant risk to public health and the environment.

The Council frequently discussed the role monetary incentives and penalties play in the state's compliance and enforcement programs. They concluded that some incentives and penalties are not meaningful or realistic. Also, some penalty amounts set in statute may not be appropriate and there is some question as to whether they should be set in statute at all. They also felt that pursuing the maximum penalty on first discovering a violation is typically inappropriate, but may be necessary if no success has been achieved through a graduated response, or if the situation is dire. In any case, an appropriate balance of tools requires a meaningful, consistent, and useable penalty policy.

Multiple jurisdictional issues can be obstacles to achieving an appropriate balance of compliance and enforcement tools. Tools may not be available for use until another agency approves them. This results in imbalance and confusion.

Overall, the Council felt that an increased effort should be made on front-end efforts--information, outreach, training, technical assistance, and encouragement of voluntary compliance.

## **Are approaches consistent across programs?**

Lack of accessible historic data on compliance prohibited an intensive comparison between programs. However, there was enough evidence to note some duplication of effort, cross-program inconsistencies, and simple lack of communication between programs and/or agencies. In some cases, such problems can result in inappropriate and inadequate compliance and enforcement responses.

The Council also determined, however, that because of varying levels of risk, total consistency may not be desirable, and an "exception" process may be necessary in some cases. Also, reorganization of the Department of Environmental Quality should help address some of the problems noted.

## **Are programs achieving their statutory goals?**

Two major topics arose during these discussions. First was whether state programs felt they were achieving compliance and meeting their statutory goals. The second was whether they had specific mechanisms in place to demonstrate this.

In general, many programs reviewed appear to be achieving their statutory goals to a fair or good level, based upon Council evaluation criteria, with achievement varying widely within that range. Due to lack of data, however, it was difficult for some agencies to demonstrate they are meeting their goals.

In fact, there is a great discrepancy across programs on how they measure success--for some it is the number of violations, for others, it is simply assuming they are meeting their statutory goals.

Another method to measure success is to evaluate the condition of the resource. This year, the EQC, with the help of state agency staff, completed an environmental indicators project, which may assist in developing information related to resource conditions in Montana, and, if repeated, might provide a useful connection between resource condition and statutory goals.

The Council found that problems in meeting statutory goals often were the result of statutory changes, growth in the size of the regulated community, and inability of the program to adapt to that change, some staff retention problems (particularly in key regulatory functions), internal conflict, lack of tracking of violations, lack of established priorities for compliance, lack of communication between programs and departments, and some evidence of inappropriate internal prioritization of employee functions.

The EQC also noted some problems related to the connections between statutes and the rules developed to implement them. In some cases, the connections are flimsy, if not absent altogether. In other cases, rules do not exist, making achievement of the program goals impossible, and fostering uncertainty for the regulated community and the public.

### **Three (very different) programs that work.**

As mentioned above, the state's compliance and enforcement programs are very different in their mandates, the communities they interact with, the challenges they face, and the methods in which they carry out their work. A specific combination of tools may work well in one program, but be inappropriate in another. Three examples of regulatory programs that work well, but are very different, include the state's involvement in coal mining, timber harvest practices, and the air quality ombudsman program. These programs are described below, along with what the Council felt were the reasons they work well.

In the case of coal mining, the following contribute to the program's success:

- The regulated community is small in number and knowledgeable of regulatory requirements.

- There is a good mix of federal/state resources.
- It is a mature program, with well-developed rules.
- There is limited discretion on whether to issue a violation or not.
- All entities involved agreed the program has adequate staff and funding.
- The staff members who do permitting continue working with the permittees, carry out compliance inspections, and are involved in enforcement, thus building and maintaining continuity and communication, with those they regulate.
- The program has documented policies and procedures for compliance and enforcement activities and well-defined chains of command.

The Forestry BMP program is quite different, but also effective, for the following reasons:

- The regulated community took the lead in developing the program.
- It is voluntary, yet has high compliance rates.
- Results are inspected, but by a combination of representatives of the regulated community, conservation groups, and other technical specialists.
- The agency works cooperatively with the regulated community to develop the criteria for inspections (audits).
- The regulated community is becoming more knowledgeable concerning program requirements, forest harvest effects on the resource, and methods to improve forest stewardship.

The state's Air Quality Ombudsman office is yet another example of an effective addition to compliance and enforcement efforts. The office:

- Provides free and confidential advice to small businesses about environmental regulations, pollution prevention, pollution control equipment, and the permitting process.
- Gives small businesses a chance to comply with environmental laws without resorting to enforcement penalties.

- Provides staff to visit small businesses to assess their environmental conditions and recommend ideas for pollution prevention and control.
- Employs an environmental engineer to provide technical solutions to environmental problems and to write air quality permits.
- Sponsors meetings and workshops to inform small businesses about environmental issues.
- Offers advice about financing pollution prevention or pollution control equipment.
- Acts as an advocate for small businesses in the development of state and federal regulations.

## **Results of the efforts of the self-audit working group**

Since December 1995, a group of interested citizens has been meeting to discuss and analyze the concept of voluntary environmental self-audits as a method to improve compliance with environmental regulations in Montana. The working group reviewed at length the incentives of providing immunity from prosecution for violations discovered through self-auditing and the provision of privilege for environmental audit report information. The process was designed as a round table discussion of the policy concept and the incentive issues. The issues are complex and have significant public policy implications.

After considerable effort and dedicated involvement, the participants affirmed the concept of encouraging voluntary environmental self-audits. No common agreement could be reached as to how to implement a public policy and no consensus legislation was proposed. A brief summary of pertinent information related to this inquiry is provided below.

### A. Findings and areas of “agreement”

- 1) Voluntary environmental self-audits should be encouraged
  - a) regulatory inspection agencies need cooperation from businesses
  - b) earlier detection can prevent pollution
  - c) it is a proactive business effort on its own behalf for public benefit
- 2) As an incentive, penalties should be negotiated, reduced, and/or eliminated (with exceptions) for those violations discovered as the result of environmental audits and which are reported and promptly corrected.

### B. Issues of contention

- 1) Whether an environmental self-audit policy should be accomplished by statute or by administrative policy
  - a) if by statute, whether or not a sunset provision is needed

- b) if by policy, whether or not the December 1995 federal EPA self-audit policy is sufficient.
- 2) Total immunity or partial immunity as incentives to self-audit
    - a) whether or not civil, administrative, and criminal penalty immunity is required
    - b) whether or not identifiable economic benefits gained by noncompliance should be waived
    - c) whether or not criminal penalties should be waived, or should be waived except for what specific circumstances
  - 3) Privilege of audit information as an incentive to self-audit
    - a) whether or not audit information should be retained by the facility, made available to the agency only or made available to the agency and the public
    - b) under what circumstances could information be withheld

With varying degrees of support from the members of the working group, EQC staff identified the following elements which need to be addressed in any self-audit public policy:

- 1) Environmental audits should not be used fraudulently as shields from prosecution (bad actor clause).
- 2) Audit policy should not jeopardize state primacy relationships with the federal government for delegated federal programs. Language considered to be a “statutory bar to enforcement” may be problematic for federally-delegated programs.
- 3) A determination should be made whether audit information should be subject to routine information requests by regulatory agencies.
- 4) Reported violations should be corrected and remediated to the satisfaction of the regulatory agency and verification should be possible. Timeliness is an issue.
- 5) Reported violations which result in significant damage to human health or the environment should not be subject to the policy.
- 6) A self-audit policy should not prevent third-party litigation to recover damages to person or property caused by violations of law.
- 7) The impact of the policy should be measurable.
- 8) Definitions of “audit” and “audit report” must be clear and concise.

## SECTION III: COUNCIL RECOMMENDATIONS

The recommendations provided below are a direct result of the findings developed by the Council (see preceding section). The numbering system does not connote any priority. The recommendations are directed to the agencies with compliance and enforcement programs reviewed herein and for consideration by the legislature.

### **A. Enforcement Policies**

1. Each program or agency with compliance and enforcement responsibilities should be required to prepare and implement a written compliance and enforcement policy and procedures manual which clearly defines responsibilities of staff, decision points, decisionmakers, and response criteria. The program should be flexible enough to allow for "common sense" responses and consultations in the field, while retaining enough "backbone" to assign meaningful penalties when appropriate.
2. Natural resource agencies should develop and follow written compliance and enforcement policies that are easily understood by the public and the regulated community. Their monitoring and enforcement efforts should be tracked and reasonable time lines followed. This information should be made readily available to the legislature and the public on a regular basis.
3. Internal tracking of violations from the first Notice of Noncompliance (NON) through enforcement should stem from written policy within each department; adequate staff training to assure complete familiarity with that policy is essential.
4. The enforcement policy should include a clear and consistent chain of command for each agency. Decisionmakers at each step in the process should be identified. The basis for each decision should be documented.
5. Policies should have formal, documented components related to education (regulated community), technical assistance, public outreach, incentives for compliance, penalties, monitoring, and tracking of agency actions.
6. During the 1997-98 Interim, the EQC and DEQ should consider evaluating the penalty and enforcement authorities specified in the various state environmental statutes, with the goal of increasing consistency.

## **B. Use and Balance of Enforcement Tools:**

1. Compliance should be the goal, with effort expended on the "front end" to provide technical assistance, outreach and public information so that the role and expectations of the program or agency are clear to the regulated community and to the interested public as well. Informal activities in this regard are helpful, but formal written, assistance, outreach and training goals should be required for all programs, as part of the overall compliance and enforcement scheme. Cooperative efforts, like BMP programs, self-audits, etc., should be examined and built into any one of these agency programs where appropriate. The regulated public should be encouraged to achieve some ownership in the success of the compliance/enforcement program.
2. Education, technical assistance, simplified reporting, better communication, and perhaps community or program liaisons, should receive more emphasis.
3. Public outreach and outreach and assistance to the regulated community should be encouraged and resources allocated to bolster that encouragement.
4. State enforcement and compliance agencies should minimize the need for formal enforcement actions to the greatest extent possible by the education of the affected publics, creating forums for public and regulated community, and maximizing contact with the regulated community.

## **C. Record Keeping/Measuring Success/Legislative Oversight**

1. Each program or agency should be required to establish record keeping procedures that allow for quick public access to matters related to compliance and enforcement activities. Yearly summaries of this information should be routinely maintained.
2. In conjunction with record keeping, each program or agency should be encouraged to identify what information might best be used to judge the effectiveness or success of each compliance and enforcement program, in relation to their statutory goals. Recommendations should then be prepared on how that information might most efficiently and cost-effectively be collected, maintained and reported. The goal should be to identify "indicators" that could be incorporated in future EQC and/or agency or program publications.
3. The state should continue to track indicators of Montana's environmental conditions. Programs should review these indicators, and improve data where necessary to help assess their success in meeting their statutory goals.
4. The state's natural resource and environmental agencies should provide compliance data on an annual basis to the EQC. Those that can easily provide historic (1991-1995) data should

do so as time permits. Agencies should compile data on enforcement actions so that it is understandable and it gives an accurate picture of what is happening on a historical basis. Based on the results of annual reporting, the EQC can choose to evaluate the data and take action and/or communicate the information to the legislature. (The Council recommends legislation be drafted to require mandatory annual agency reporting (to the EQC) on compliance and enforcement activities. Topics and the extent of the data will be coordinated between agency and EQC staff.)

5. The HJR 10 report should be updated with a biennial review of how the agencies and programs have succeeded at implementing each of the recommendations of this study. If not, why not?, etc.
6. The EQC should receive a report during the next interim on the development and implementation of enforcement manuals by programs reviewed in this study.

#### **D. Seriousness (Risk) of Violation**

1. Program and policy emphasis should stress preventing and correcting violations that pose the greatest risk to human health and the environment.

#### **E. Staffing/Resources/Contracting**

1. When considering contracts, the state of Montana should retain in-house all regulatory decisionmaking and quality control functions.
2. The agencies should include contract stipulations that protect against conflict of interest.
3. Appropriate funding for state agencies to carry out their statutory obligations is needed (see explanation, below).

Explanation of Recommendation #3: The legislature deals with this issue continually. Everyone has their own definition of "appropriate." It is important to reflect that funding is necessary to implement statutory mandates. The Council could not agree on an acceptable revision of the above recommendation, due to fundamental philosophical differences regarding whether, under budget constraints, additional funding is needed and should be provided, or mandates eliminated.

4. Where severe staff retention problems exist within programs, the executive branch should prepare recommendations to deal with these problems and present such suggestions to the next legislature.

## **F. Primacy**

1. Primacy issues were a major topic during this study. EQC should facilitate a process to further identify and address primacy problems.
2. The Department of Environmental Quality should pursue its proposed study of the “primacy” situation in Montana. Proposals may include:
  - Expedite and simplify the authorization or endorsement process;
  - Improve state/EPA Annual Agreements by moving toward block grants and “Performance Partnership Agreements”;
  - Consolidate the state/EPA Enforcement Agreements, including specifying criteria for EPA-initiated actions and for state requests for EPA actions;
  - Develop and follow consistent and predictable enforcement procedures; and
  - Improve communication.
3. Overlapping jurisdiction between the state and EPA, and between state and local jurisdictions, should be eliminated, or at least clarified to ensure predictability of enforcement action.
4. Evaluation of primacy issues on Indian reservations should be continued.

## **G. Further Recommendations**

1. State agencies should improve coordination with local jurisdictions regarding delegated or overlapping regulatory functions.
2. State agencies should provide timely follow-up with citizens who filed complaints (about the resolution of those complaints).
3. Rulemaking should be completed for all legislation requiring rules.
4. Solutions/efforts to protect environmental quality in Montana should be recognized, including public/private cooperative efforts, and other tools (besides the court) should be encouraged to resolve problems.
5. The EQC should further investigate opportunities for the use of voluntary BMPs to achieve compliance and enforcement goals.

6. State regulatory agencies should develop Ombudsman-like programs for pollution prevention (currently in effect in the Air Quality arena) for other media (i.e. water, hazardous waste, etc.).
7. During the 1997-98 Interim, the EQC should review the effects and implications of state natural resource/environmental agency reorganization on compliance and enforcement.