

## MINUTES

### MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION

#### COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairman Thomas F. Keating, on February 15, 1989, at 1:00 P.M. in the State Capitol.

#### ROLL CALL

Members Present: Senators: Thomas F. Keating, Chairman, Larry Tveit, Fred VanValkenburg, Loren Jenkins, Darryl Meyer, Lawrence Stimatz, Bill Yellowtail, Elmer Severson, Cecil Weeding, Dorothy Eck and Jerry Noble.

Members Excused: None

Members Absent: Pete Story

Staff Present: Bob Thompson and Helen McDonald

#### HEARING ON SENATE BILL 371

Presentation and Opening Statement by Sponsor: Thomas Hager, District #48, introduced SB 371 and stated he would let the Department of Health and Environmental Sciences carry it.

#### List of Testifying Proponents and What Group they Represent:

Robert Dozier, Northern Plains Resource Council  
Janelle Fallon, Montana Petroleum Assn. (amend)  
Art Wittich, Montana Power Company (amend)  
Janet Ellis, Audubon Society

#### List of Testifying Opponents and What Group They Represent:

Ben Havendahl, Montana Motor Carriers Association

#### Testimony:

Katherine Orr, Department of Health and Environmental Sciences, said this bill is intended to implement some housekeeping measures and some language changes. This bill will keep the department's program parallel with changes that are occurring at the federal level.  
(Exhibit #1)

Robert Dozier stated that the technology of hazardous waste management has been a growing field. He thinks that is why this bill was introduced. There will probably be bills similar to this in the next session because the technology is constantly changing. NPRC supported the bill.

Janet Ellis supported this bill because it will bring Montana laws up to date. She added that Montana's wildlife areas are affected by hazardous waste, and there are superfund sites on Flathead Lake.

Art Wittich indicated that Montana Power didn't mind the state program being consistent with the federal program. But when the state goes beyond federal law it is difficult, especially in interstate business, to keep up with the various state requirements. He added that there are a couple things in this bill that go beyond the federal program.

One item is on page 8 where the department asks for subpoena power. The department has some subpoena power now but it wants to expand it from power over violators to power over anybody.

On page 8, line 9, "and any other person having information regarding the alleged violation," infringes with the industry's duty of confidentiality with generators. It would be a difficult situation if the district court ordered Montana Power to divulge information, but if the department can do it by themselves, that goes too far. That would go beyond the federal Resource Recovery and Conservation Act.

Under imminent hazard, page 9, line 23, past or present generators, could be more clearly covered under the statute for cleanup orders for past violators. The department already has authority to issue cleanup orders.

On page 11, under criminal penalties, the department wants the ability to post criminal penalties in the act. In the federal law, these penalties attach only to material permit conditions. That makes a difference especially when you look at page 12, line 14 where the department would have no discretion to impose a criminal penalty of less than \$5,000. That is not consistent with the federal program. The federal program has a \$50,000 limit generally and \$250,000 limit for knowing endangerment by a person, or a million dollars by an organization. But it also allows for lower penalties. What the department's language

does is impose a floor that is not appropriate. Even though criminal penalties are extreme, they are for knowing violations and sometimes the violations are small. There should be some discretion there. Art Wittich ended his comment by stating he would like to work with the department to get some amendments in this bill that are consistent with the federal program.

Janelle Fallon stated that the industry would not oppose efforts to control "midnight dumping" of hazardous wastes and to ensure safe disposal of hazardous wastes. She added that the problems with the bill were outlined by Mr. Wittich. She concluded that when industry starts looking at all of the criminal penalties, it appears just about any aspect of doing business in the state has a criminal penalty.

Ben Havdahl was concerned with the extensive penalties outlined in this bill. The question that he raises is why? The enforcement of hazardous waste law allows the department to impose these criminal penalties on violators. He wondered what the problems were in the industries that merit these kinds of penalties. He also pointed to page 11 under criminal penalties, which says "a person who is guilty...", and stated that this wording prejudices guilt.

Questions From Committee Members:

Senator Noble stated that there are a lot of new laws concerning oil storage and what people keep in their garages. He added that improper labeling could result in a fine of \$5,000.

Katherine Orr stated these programs are becoming more and more complicated. One aspect of the hazardous waste program, as opposed to the underground storage tank program, is what substances are you talking about and what amount. In Senator Noble's circumstances, the substance would probably be exempt because of the small amount.

Senator Noble stated there are a lot of regulations on just motor oils. How about battery acid?

Katherine Orr stated that battery acid would be a hazardous waste and would have to be handled very carefully.

Senator Noble asked about things that people put in their garages. This bill seems to have a very stiff penalty.

Katherine Orr emphasized that the state department would not

be able to go out and look in every person's garage for an accumulation of battery acid or other kinds of hazardous waste.

Katherine Orr emphasized the criminal penalties apply to the "knowingly fails" violator. The department does not have direct authority to bring criminal action. The matter would be referred to the Attorney General's or the County Attorney's office and would be handled at their discretion.

Senator Keating wanted to know if this legislation had been in force if the department would have been able to catch the "midnight dumper."

Katherine Orr stated it would have helped the department because sometimes DHES gets an incomplete picture of a puzzle. DHES inspectors ask the managers, as opposed to an employee, about where the solvents in the ground came from.

Senator Weeding wondered who spoke about the material language on page 11.

Art Wittich stated that federal standards are a little higher than what the state proposed because they reference permit conditions.

Senator Keating stated this bill doesn't deal with accidents at all. When does a violation start?

Katherine Orr stated it depended on whether it was a violation by a generator or a transporter. If it was a generator making hazardous waste as a by-product of its industrial process, then the hazardous waste is subject to immediate regulation. They are supposed to make sure the hazardous waste doesn't enter the environment and that there is follow-through and documentation as it's handled.

Senator Keating was wondering if there is a violation and fine for non-labeling.

Katherine Orr wanted to caution again about the "knowing violator". It would be very hard to seek criminal penalties on an unknown violator, and the penalty would be smaller assuming the department could find a violation.

Senator Keating wondered what happens if an employer gives direction to label something properly, the employee mislabels it and the employer was unaware of it until

there was an inspection. Is the employer given time to correct an error of that sort or would he be fined under this legislation?

Katherine Orr stated that in the real world a lot of the DHES programs amount to issuing cautionary letters or at the extreme administrative orders to ensure persons get their act together. Filing a civil action would be a more extreme move that the department undertakes very infrequently.

Closing by Sponsor: Katherine Orr stated on behalf of Senator Hager it would be productive for the department and industry to decide what is most problematic and make some drafting changes. A fact sheet was handed out with a schedule of the federal laws and the state's proposed language. In response to Mr. Wittich's observations on page 8 that the department would give itself more authority than the federal reference, the comparison [75-10-413(3) and RCRA 3012(b)] would be noted in the schedule. Under the federal act, agencies have authorization to implement the entire discovery procedure. The department is just asking for early investigation of the situation to out if there might be a potential impact on public health.

DISPOSITION OF SB 271

Discussion: The hearing on this bill was closed.

EXECUTIVE ACTION

SB 238 Senator Keating stated that SB 238 is the coal board bill to suspend the coal board and not spend for employees and space, etc.

Senator Weeding made motion DO NOT PASS The motion passed, with Senator Keating opposing it.

Senator Keating stated SB 211 was moved to second reading by floor action.

SB 327 Senator Keating added that SB 327 is the bill that would amend the Montana Environmental Policy Act by making all permitting actions of government minor actions unless deemed major actions by the department. It allows the professionals in the various agencies to make the determinations as to major or minor actions and if challenged on their decision, there would still be due process in the district court. If the department permits something to remain a minor action, then the burden of proof would be on the appellant in the

district court and not on the defendant.

Senator Jenkins moved this bill DO PASS.

Senator Weeding stated that MEPA would be the guideline for the decision-making body to use in determining whether the action affects the environment. In the absence of MEPA, what would guide that decision-making body under this discretionary language?

Senator Keating stated that through the statutes the departments would be required to protect the environment and all the agencies and various boards would be aware of their duties and obligations in the rules and regulations. This doesn't change their procedures because they continue to make the determinations according to the rules and regulations.

Senator Eck stated that this bill discards all the work done previously. There used to be a preliminary environmental review which was a process that allows MEPA to work in a minor way but enabled the department do an environmental review. Some cases might be more difficult and need some mitigation action. They would have a hearing first where they would bring in all the parties and after that hearing, they could work out the process. This would allow them even where there is a possibility of severe problems take care of environmental impacts through mitigation and to not go through a full MEPA review. The industry, the departments, and environmentalists have worked to develop rules. This bill would wipe all that out, which means that if you don't like the agency decision, you have to go to court.

Senator Keating stated the protection of the environment and the rules and procedures would still be there and the obligations of the agencies would remain in place. A number of industries that have been in operation under the law for the past eight years have found it difficult to undertake various projects. It has been difficult to start projects as indicated in the letters handed out. (Exhibit #3) People in various industries have been reluctant to start a project if after they put their seed money into it, they are impacted with a delay and a challenge that they are not prepared to meet. The bill would still leave controls and protect the environment. But the bill offers an opportunity for more industries to look at Montana as a place to do business. The legislature should do everything we can to encourage outside and in-state investment in Montana to build our economy.

Senator Eck contends that this bill doesn't ease the law but would mean a higher probability of environmental

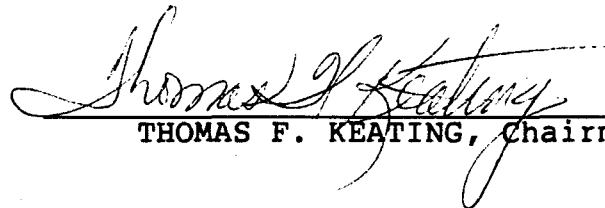
confrontation than we have now. Montana has worked in the past to develop a system to avoid problems with government.

Senator Keating stated that apparently various industries disagreed because they came in support of this measure stating it would be easier for them to function and would be more apt to help improve the economy.

A motion was made for a DO PASS on SB 327. Roll call vote resulted in endorsement of the DO PASS motion for SB 327 (Exhibit #2).

ADJOURNMENT

Adjournment At: 1:50 pm

  
THOMAS F. KEATING, Chairman

TFK/hmc

senmin.215

ROLL CALL

NATURAL RESOURCES COMMITTEE

5054 LEGISLATIVE SESSION -- 1989

Date 2-15-89

NAME	PRESENT	ABSENT	EXCUSED
Chairman Tom Keating	✓		
Vice-Chairman Larry Tveit	✓		
Senator Fred VanValkenburg	✓		
Senator Loren Jenkins	✓		
Senator Darryl Meyer	✓		
Senator Lawrence Stimatz	✓		
Senator Pete Story		✓	
Senator Bill Yellowtail	✓		
Senator Elmer Severson	✓		
Senator Cecil Weeding	✓		
Senator Dorothy Eck	✓		
Senator Jerry Noble	✓		

Each day attach to minutes.



SENATE STANDING COMMITTEE REPORT

February 15, 1989

MR. PRESIDENT:

We, your committee on Natural Resources, having had under consideration SB 238 (first reading copy -- white), respectfully report that SB 238 do not pass.

DO NOT PASS

Signed: *Thomas F. Keating*  
Thomas F. Keating, Chairman

*W.C. 189  
2:16  
3:20 p.m.*

SENATE STANDING COMMITTEE REPORT


February 15, 1989

MR. PRESIDENT:

We, your committee on Natural Resources, having had under consideration SB 327 (first reading copy -- white), respectfully report that SB 327 do pass.

DO PASS

Signed:

  
Thomas F. Keating, Chairman

H.C.  
2/16/89  
3: P.M.

Fact Sheet LC # 853

This bill implements changes which help insure consistency with the federal Resource Recovery and Conservation Act, as amended ("RCRA") and which improve the administrative effectiveness of the Montana hazardous waste program. Increasingly complex circumstances face the State in the regulation and control of hazardous wastes. Hazardous waste generation and handling occurs in multiple types of environments in connection with varying business needs across the State and often on an interstate basis by large and small handlers alike. Therefore, the Department believes that changes in the bill are necessary both for maintenance of equivalency to the federal program and for consistency so that the State is not viewed as an easy dumping ground for hazardous wastes nor as a haven for polluters.

The proposed amendments in the bill adopt statutory language which consists of wording similar to that which is contained in the federal act, which clarifies existing authority or remove ambiguity in interpretation and which strengthens existing state authority. A section by section analysis is provided below:

° The first amendment to Section 75-10-402, MCA, is intended to clarify that administration of the hazardous waste program is a matter for statewide concern and regulation.

° The amendment to Section 75-10-404, MCA, clarifies the Department's implied authority to abate a public nuisance. A public nuisance is any nuisance injurious or offensive to the senses or an obstruction to the free use of property which affects, at the same time, an entire community or neighborhood or a significant number of persons, see Sections 27-30-101 and 27-30-102, MCA. Abatement authority involves the ability of the Department to seek relief from a court which will abate a public nuisance. For example, when an entire community is suffering property damage from mishandling of hazardous wastes, it is important for the Department to have abatement authority as an option for enforcement.

° The amendment to Section 75-10-406, MCA, involves the ability of the Department to require owners and operators holding permits to take corrective action for releases beyond facility boundaries. This is a requirement which parallels federal language and is a requirement which helps to ensure that the Department retains federal authorization to administer the Montana program independently.

° The amendments to Section 75-10-411, MCA, pertaining to monitoring, testing and analysis when there is a substantial hazard presented to the public or the environment also parallel language contained in the federal RCRA. The amendments aid the Department in obtaining as much information as possible about the hazard or presence of hazardous wastes or waste constituents from any persons responsible for the release.

° The amendments to Section 75-10-413, MCA, implement language similar to that which is contained in the federal RCRA; the changes clarify the Department's administrative subpoena authority. The language also helps the Department during a hearing or in an investigation to obtain information about alleged violations and the impacts to public health, welfare or the environment.

° The amendments to Section 75-10-415, MCA, pertain to circumstances where handling, storage, treatment, transportation or disposal of hazardous wastes presents an imminent and substantial danger to the public health and environment. The amendatory language in the bill is very similar to the language in the federal RCRA. The wording changes clarify that persons contributing to the endangerment include past or present generators, transporters or facility owners or operators and that the Department can order such persons to do what is necessary to stop the endangerment and to protect the public health, safety and environment.

° The small wording change in Section 75-10-417, MCA, is intended to make more express or to clarify the fact that violations of a section in the statute, a rule, an order or a permit issued by the Department are separate and distinct and that the penalty may be applied to each kind of violation.

° The amendments to Section 75-10-419, MCA, first distinguish which kinds of intentional acts are the most serious and which therefore warrant a more severe punishment.

The hazardous waste management program is designed to be self-executing and must necessarily be such because of scarce governmental resources; the most serious violations are those which ignore the self-regulatory mechanism of the program or which undermine the other basic objectives of the regulatory program. For example, intentional disposal of hazardous wastes without a permit both destroys the self-executing function of the regulatory program and it fundamentally ignores the objectives of the program which are to carefully control the entry of toxic chemicals into the environment and to ensure that the handling of these materials may be tracked from start to finish.

Acknowledgment by the legislature that these intentional acts are serious violations which warrant a significant punishment goes a long way toward deterring violators from committing the most serious kinds of violations. In many cases without a significant penalty or prison sentence, violators will build the penalty for the violation into the cost of doing business.

The penalty and prison term are expressed in terms of a range so that a judge may weigh the individual circumstances and have discretion in assessing the penalties.

For those violations considered to be of a lesser impact than those in the first category of violations, a smaller punishment is specified in the amendatory language.

° Section 10 is added to the bill in order to clarify that the prohibition against unlawful disposal exists in the hazardous waste act itself in addition to being contained in the rules. Since there are many references in the hazardous waste act to "violations of this part" it is important to include this prohibitory phrase.

Ex. #1  
2-13-89  
PS. 485

SENATE BILL 371  
STATE HAZARDOUS WASTE MANAGEMENT ACT

February 15, 1989

STATE PROVISIONS

75-10-406(7) "In permits... the department shall require corrective action for all releases of hazardous waste ... including corrective action for releases that extend beyond the facility boundaries if necessary to protect public health or the environment."

75-10-411(2) "... the department may issue an order requiring the owner or operator of the facility or site or any other responsible party... to conduct reasonable monitoring."

75-10-413(3) regarding subpoena authority to appear before board or department.

75-10-415 (regarding imminent hazard) "... enjoin any person (including any past or present generator, past or present transporter, and past or present owner or operator of a treatment, storage or disposal facility) who has contributed to or who is..."

RCRA - Similar Provisions

(RCRA §3004)(v) "... to require that corrective action be taken beyond the facility boundary where necessary to protect human health and environment."

RCRA §3013(d) "If Administrator determines that no owner or operator is able to conduct monitoring, testing analysis ... the Administrator ... authorizes a State or ... other person to carry out any such action ... and require by order the owner or operator [past or present] to reimburse Administrator..."

RCRA §3012(b) "... the Administrator shall conduct a public hearing ... the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, book and documents, and may promulgate rules for discovery procedures."

RCRA §7003(a) "...Administrator may bring suit ... against any person (including any past or present generator, past or present transporter or past or present owner or operator of a treatment, storage, or disposal facility who has contributed or who is contributing to the alleged disposal ... or to order such person to take such other action as may be necessary or both."

75-10-417 (regarding civil penalties) "(1) Any person ... is subject to a civil penalty not to exceed \$10,000 per violation. Each day of violation constitutes a separate violation."

RCRA §3008 "(a)(3)... Any penalty assessed in the [administrative] order shall not exceed \$25,000 per day of noncompliance for each violation or a requirement..." see also RCRA §3008(g).

75-10-418 pertains to criminal penalties. For knowing violation the maximum fine is \$25,000 per violation or imprisonment for a period not to exceed 3 years or both.

RCRA §3008(d) pertains to knowing violations and a maximum fine of \$50,000 or imprisonment not to exceed 5 years. For second conviction the maximum punishment is doubled. In knowing endangerment maximum fine for an individual is \$250,000 and for an organization it is \$1,000,000.

ROLL CALL VOTE

*No Packet*  
SENATE NATURAL RESOURCES  
EXHIBIT NO. #2  
DATE 2-15-89  
BILL NO. SB 327

SENATE COMMITTEE NATURAL RESOURCES

Date 2-15-89 Bill No. 327 Time \_\_\_\_\_

NAME	YES	NO
Vice-Chairman Larry Tveit	✓	
Senator Fred VanValkenburg		✓
Senator Loren Jenkins	✓	
Senator Darryl Meyer	✓	
Senator Lawrence Stimatz		✓
Senator Pete Story	✓	
Senator Bill Yellowtail		✓
Senator Elmer Severson	✓	
Senator Cecil Weeding		✓
Senator Dorothy Eck		✓
Senator Jerry Noble	✓	
Chairman Tom Keating	✓	
	7	5

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: do pass - passed



SENATE NATURAL RESOURCES

EXHIBIT NO. #3

DATE 2-15-89

BILL NO. SB 327

892-3252



## F. H. STOLTZE LAND & LUMBER CO.

### *Lumber Manufacturers*

Box 1429 COLUMBIA FALLS, MONTANA 59912

February 10, 1989

The Honorable Tom Keating, Chairman  
Senate Natural Resources Committee  
Capitol Station  
Helena, Montana 59620

Dear Senator Keating,

I am writing to you in support of the Senate Bill 327 which proposes to amend the Montana Environmental Policy Act (MEPA).

MEPA should be used very carefully to assure that major development of our natural resources is done in an environmentally sound manner. MEPA should not be used to simply stop or hinder economic development, although there are some who have used and will continue to use MEPA to this end. In individual cases where any suspected impact will be negligible, state agencies must have the ability to respond quickly and efficiently.

This proposed amendment to MEPA will enable state agencies to be more responsive to the private sector and should go a long way toward cutting the bureaucratic red tape that often acts to strangle economic development in our state.

We fully support this bill and urge you to push for its passage.

Respectfully,

*Mark A. Simonich*

Mark A. Simonich  
Forester

SB 327

2-15-89

# County of Yellowstone



COMMISSIONERS

(406) 256-2701

Box 35000  
Billings, MT 59107

SUBJECT: Senate Bill 327  
TO: Montana Legislators  
DATE: February 14, 1989

We would like to express our support for SB 327. We do not feel that this proposal weakens the needed State environmental review provisions under MEPA that are presently in operation and applied to proposed developments.

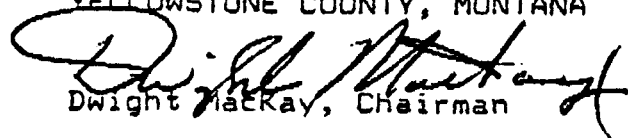
By allowing State review agencies to designate major environmental impact projects, the provisions of SB 327 should help prevent the filing of frivolous lawsuits which are designed to delay projects. No company can plan economic activities in the State if, after meeting all existing review and environmental requirements, delay tactics in the form of lawsuits--that won't be settled until months later--can still be used against such economic development plans.

Environmental review is an important part of our business development and regulation process. If some segments of our populace feel environmental provisions are being violated, such groups must be willing to participate in some of the costs of defending their position--unlike the present situation.

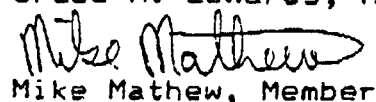
SB 327 addresses some of this underlying inequity faced by industries trying to do business in Montana.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS  
YELLOWSTONE COUNTY, MONTANA

  
Dwight Mackay, Chairman

Grace M. Edwards, Member

  
Mike Mathew, Member

CC/pw

cc: Cal Cumin, Economic Development

