

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chair Bianchi, on February 18, 1993, at 6:04 p.m.

ROLL CALL

Members Present:

Sen. Don Bianchi, Chair (D)
Sen. Bob Hockett, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Ed Kennedy (D)
Sen. Bernie Swift (R)
Sen. Chuck Swysgood (R)
Sen. Henry McClernan (D)
Sen. Larry Tveit (R)
Sen. Cecil Weeding (D)
Sen. Jeff Weldon (D)

Members Excused: None

Members Absent: None

Staff Present: Paul Sihler, Environmental Quality Council
David Martin, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: None
Executive Action: SB 388, SB 282, SB 340, SB 363, SB 401,
SB 280

EXECUTIVE ACTION ON SB 280

Discussion:

Sen. Grosfield submitted a letter from the Water Policy Committee supporting SB 280 (Exhibit #1). He said this dealt with page 3, subsection G, stating that the water of an appropriator would not be affected. SB 280 would also include geothermal values in the definition.

Motion:

Sen. Grosfield MOVED DO PASS ON SB 280.

Discussion:

Sen. Swysgood handed out proposed amendments to SB 280 (Exhibit #2) and asked Ted Doney to explain them.

Ted Doney said these amendments would "strike some middle ground". He said the contentious part of SB 280 was page 3, subsection H. He said amendment #6 would change the order of the presentation of evidence with the objector going first, followed by the applicant.

Sen. Weeding refuted bracketed "G" on line 3. He said that the prior appropriator had to prove an adverse effect and it seemed as though the burden ought to be on the applicant. Mr. Doney said the burden of proof would flip to the objector in these amendments. The applicant would have to prove "g, h, and i". He said there may have been a better way to write the amendments but there was not enough time. Mr. Doney said an objector already has the initial burden to come in with an objection. SB 280 would increase the burden of coming in with a valid objection. Then if it goes to a hearing, the burden of proof would increase further.

Sen. Weldon said time was spent developing the language in SB 280 and would like Karen Fagg and Stan Bradshaw to comment on these amendments.

Karen Fagg said she received the amendments as she walked through the door. She said her interpretation was that the burden would be placed on the person filing the objections and the burden was already there. This was one of the compromises of the bill. Rather than having the applicant come in with the information, the burden would be on the objector. The applicant would only have to worry about water quality information if an objection was filed. A valid objection requires substantial technical information. She said she did not understand the changes because they had been addressed in other legislation that had passed before the committee.

Ms. Fagg said she had an objection to amendment #6 referring to what an applicant would do, only if a hearing was held. This would force every valid objection into a hearing process rather than allowing the Department of Natural Resources (DNRC), with its technical expertise, to determine if a valid objection can be remedied through the prepared information. Currently only 25% of objections go through the hearing process, but these amendments would force every valid objection into a hearing. She said the other amendments were asking for a clarification of SB 280 and did not change the intent.

Stan Bradshaw, Trout Unlimited, agreed with Karen Fagg concerning amendment #1. He said it was his understanding that the language in the current bill was protecting existing uses which was different from not preventing uses. For example, a new use might deplete enough water from the stream to change the temperature during critical times of use by fish. Fish may be able to survive at the new temperatures but there may be fewer fish because there are fewer pools to survive in. Some fish may still use the stretch of water and thus the stream would fall under the classification. He said this was distinctly different from what had been dealt with throughout this process. He said amendment #2 would not change the intent and made no difference. Amendment #3 expressed the burden that an objector has in any event and would be changed by having the objector goes first which may force hearings. He said it was disturbing that the criteria in subsections 1g through 1h have not been met and would change the burden of proof. Mr. Bradshaw said other prior appropriators, raising water quality issues, do not have to "jump through hoops" like these. He said additions had already been made to SB 280 to insure applicants do not have to employ water quality experts on every application. He said the first amendment was a distinct departure from the intent of SB 280, but that the department could handle the other amendments although they are a little strange.

Sen. Swysgood said SB 280 was a radical change from current water law.

Sen. Grosfield asked Ted Doney if it was his intent to trigger a hearing with every objection. Mr. Doney said "absolutely not", and did not agree that SB 280 would do that. The only change it would make is the order of appearance in a hearing. The question of whether not or a hearing occurred was up to the applicant and the objector. Changing the order of appearance would insure that there were serious objections.

Sen. Grosfield asked Gary Fritz of the DNRC to reply to the same question. Mr. Fritz said there were objections on 25% of applications, of which a very small number go to hearing. The amendment would change the original intent of SB 280. He said Ms. Fagg's observation was correct, if an application was received with a subsequent objection. The only way the DNRC could force the applicant to provide information was to through a hearing. Otherwise the Department would have to collect the information.

Sen. Swysgood asked if the parties are forced to present evidence under the present system. Mr. Fritz said that the applicant and the objector had to come forward with evidence. Sen. Swysgood asked what would be changed. Mr. Fritz said, under this amendment, the applicant does not have to present evidence unless they are in a hearing situation. The Department needs to have information from both parties to make a decision. This would occur only during the hearing process.

Sen. Weeding said the objector would be forced to build a case by proving there was an impact. The applicant, by law, was supposed to demonstrate there was no impact in the first place. He said it is inherent to all water law that the applicant not violate any prior user. SB 280 would place the burden of proof on the prior user.

Mr. Bradshaw said this change was a compromise to alleviate the fears associated with bringing in water quality issues. The consensus of the Committee was it was important to include water quality in this process and to avoid having an applicant hire a water quality expert on every case. SB 280 would not raise the issue of water quality unless it was a problem. He acknowledged the process was out of the ordinary, but it would be a good approach in this instance.

Sen. Keating referred to page 3, line 14, and asked if it meant the applicant would not initially be required to provide proof. He also asked if the objector would have to present proof, after which the applicant would then have to submit proof. Mr. Fritz said that was correct and the amendment would throw an additional kink in the "already upside down situation" described by Sen. Weeding and Mr. Bradshaw. The amendment would require the applicant to meet the criteria only if the objector first makes a prima facie showing at a hearing. The hearing would be mandatory since only one side of the information had been previously presented.

Sen. Keating said, without the amendment, the department would have evidence from both parties. He asked if both parties would have the right to a hearing, and if the department could settle the issue. Mr. Fritz said the objector would have the right to ask for a hearing.

Gary Fritz said SB 231, submitted by Sen. Yellowtail, described "substantive" evidence and the Committee could rely on that definition. He said "substantive" evidence would present a plausible case. He said amendment #1 had a different intent than the water plan and read a draft statement by Curt Martin (Exhibit 2A).

Sen. Weldon said his concern with the amendments related to the methodology by which SB 280 was constructed. He was impressed by the Montana Water Plan which was developed by the consensus method. The amendments would tip the balance at this point and discourage consensus decision making.

Vote:

The amendments to SB 280 by Sen. Swysgood FAILED in a Roll Call Vote with Sen. Swysgood voting Yes.

Sen. Grosfield replied to the draft letter Gary Fritz read. He said non-degradation, ambient water standards and water pollution were specifically left out of SB 280.

Sen. Swysgood said he would like to present the other side of the issue. He said he understood the process, respected it, but did not agree with it. SB 280 was a radical change in water policy in Montana and some people were uneasy with it even though the concept was good.

Vote:

The motion that SB 280 Do Pass CARRIED with Senators Swysgood and Tveit voting No.

EXECUTIVE ACTION ON SB 340

Motion/Vote: Sen. Doherty MOVED SB 340 DO PASS. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 282

Motion/Vote: Sen. Swysgood MOVED TO STRIKE SECTION 3 OF SB 282 AND RENUMBER THE SECTIONS. The motion CARRIED UNANIMOUSLY.

Motion/Vote: Sen. Swysgood MOVED SB 282 DO PASS AS AMENDED. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 363

Motion:

Sen. Bianchi MOVED SB 363 DO PASS.

Discussion:

Sen. Grosfield said there was a statutory process to close streams, which was not used very often. He said statutory closure had occurred. He said there was also an administrative method, which seemed to be slower. He said it would be dangerous to jump to the conclusion of closing water development in the entire state. He said he supported looking at individual basins when appropriate.

Sen. Swysgood said there was a big difference between this bill and SB 282. He said SB 363 did not contain enough information to make those kind of adjustments.

Motion/Vote: Sen. Grosfield made a SUBSTITUTE MOTION TO TABLE SB 363. The motion CARRIED with Sen. Bianchi voting No.

EXECUTIVE ACTION ON SB 388

Motion/Vote: Sen. Swysgood MOVED TO TABLE SB 388. The motion CARRIED with Senators Keating, Swysgood and Swift voting No.

EXECUTIVE ACTION ON SB 401

Motion: Sen. Doherty MOVED TO AMEND SB 401 (Exhibit #5). He said this would make SB 401 a revenue bill and would provide an opportunity to work on other amendments to SB 401.

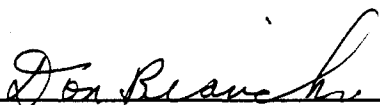
Vote: The motion to amend SB 401 CARRIED with Senators Swift and Tveit voting No.

Discussion:

Sen. Weeding presented a draft for a Joint Resolution (Exhibit #4) to have the Environmental Quality Council (EQC) to do an interim study of the nondegradation provisions of the Montana Water Quality Act. The Committee discussed the merits of this proposal and took no action.

ADJOURNMENT

Adjournment: Meeting adjourned at 7:17 p.m.



SENATOR BIANCHI, Chair



DAVID MARTIN, Secretary

JR/dm

ROLL CALL

SENATE COMMITTEE NATURAL RESOURCES DATE 2-18-93

NAME	PRESENT	ABSENT	EXCUSED
Sen. Bianchi	✓		
Sen. Hockett	✓		
Sen. Bartlett	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Keating	✓		
Sen. Kennedy	✓		
Sen. Swift	✓		
Sen. Sunsgaard	✓		
Sen. McCernan	✓		
Sen. Treitz	✓		
Sen. Weeding	✓		
Sen. Weldon	✓		

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
February 18, 1993

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration Senate Bill No. 280 (first reading copy -- white), respectfully report that Senate Bill No. 280 do pass.

Signed: Don Bianchi
Senator Don Bianchi, Chair

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
February 18, 1993

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration Senate Bill No. 340 (first reading copy -- white), respectfully report that Senate Bill No. 340 do pass.

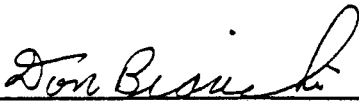
Signed: Don Bianchi
Senator Don Bianchi, Chair

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
February 18, 1993

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration Senate Bill No. 282 (first reading copy -- white), respectfully report that Senate Bill No. 282 be amended as follows and as so amended do pass.

Signed: 
Senator Don Bianchi, Chair

That such amendments read:

1. Title, lines 8 and 9.

Strike: "NULLIFYING" on line 8 through "BASIN;" on line 9

2. Page 3, lines 1 through 7.

Strike: Section 3 in its entirety

Renumber: subsequent sections

3. Page 3, lines 9 and 12.

Strike: "through 3" on line 9

Insert: "and 2"

Strike: "through 3" on line 12

Insert: "and 2"

-END-

ROLL CALL VOTE

SENATE COMMITTEE NATURAL RESOURCES BILL NO. 280

DATE _____ TIME _____ A.M. P.M.

NAME	YES	NO
Chairman Bianchi		1
Vice Chairman Hockett		1
Sen. Bartlett		1
Sen. Doherty		1
Sen. Grosfield -		1
Sen. Keating		1
Sen. Kennedy		1
Sen. McClellan		1
Sen. Swift		1
Sen. Suysgood	1	
Sen. Treit		1
Sen. Weeding		1
Sen. Weldon		1

Leanne Kurtz
SECRETARY

Sen. Bianchi
CHAIR

MOTION: Amendments SB 280 Exhibit #2



WATER POLICY COMMITTEE

Montana State Legislature

SENATE MEMBERS

Esther G. Bengtson, Vice Chairman
Tom Beck
Lorents Grosfield
Lawrence G. Stimatz

HOUSE MEMBERS

Hal Harper, Chairman
Vivian M. Brooke
Russell Fagg
Thomas N. Lee

COMMITTEE STAFF

Environmental Quality Council
Capitol Station
Helena, Montana 59620
(406) 444-3742

February 17, 1992

Senator Don Bianchi
Chairman, Senate Natural
Resources Committee
State Capitol
Helena, MT 59620

SENATE NATURAL RESOURCES
EXHIBIT NO. 1
DATE 2-18-93
BILL NO. SB 280

Dear Senator Bianchi:

I am writing on behalf of the Water Policy Committee in support of SB 280. Apart from our statutory involvement with and support of the water planning process, the Committee believes that passage and full implementation of SB 280 is crucial to a successful conclusion of the Committee's Geothermal Resource Study.

The 1991 Legislature, through Senate Joint Resolution 25, requested the Committee to conduct an interim study of the need for and feasibility of state regulation of Montana's geothermal resources. Specifically, the Committee was asked to determine:

- i. the need for and feasibility of state regulations to control the development of energy that may be extracted from the natural heat of the water and the development of any geothermal byproduct;
- ii. if regulation of geothermal resources exists in other states with substantial geothermal resources; and
- iii. if water users and entities with an interest in geothermal resources in Montana need and want state regulation of geothermal resources.

Based on the information presented throughout the study, the Committee made the following findings:

- * Geothermal values are a parameter of water quality.
- * Under current statutes, rules, and DNRC policy, it is unclear whether or not the DNRC may deny or condition water use permits on the basis of impacts to water quality, including impacts to geothermal values. It is clear that the DNRC has never denied or conditioned a water use permit on this basis.

- * Geothermal resources have a value in addition to those associated with other, non-geothermal, water resources.
- * Current geothermal resource users strongly express a desire to ensure that their geothermal resources are fully protected under Montana water law.
- * Protecting existing and future geothermal resource users necessitates increasing the protection of the geothermal resource itself.

Based on these findings the Committee made the following recommendation to the Legislature.

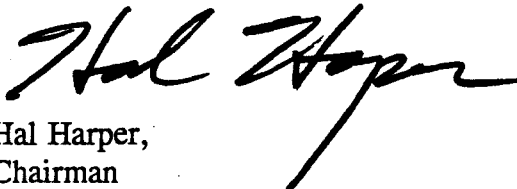
Final Committee Recommendations

The Committee recommends that the DNRC be granted clear authority to deny or condition new water permits or applications for changes to water use permits on the basis of impacts to geothermal values. This determination should be based on beneficial use and adverse impact criteria currently used by the DNRC in processing new permit or change of use applications.

Additionally, the Committee recommends that state law be amended to allow for designation of a controlled ground water area on the basis of future or existing adverse impacts to a geothermal resource.

The Committee closely followed the State Water Planning Process and believes that the changes recommended in that Plan, and now contained in SB 280, will adequately implement the Committee recommendations for the Geothermal Resources Study. The Committee believes that the term "water quality" includes the specific parameter of geothermal values. It is the intent of the Committee that geothermal values be added to the "bundle" of rights protected under the SB 280.

Sincerely,



Hal Harper,
Chairman

Amendments to Senate Bill No. 280
First Reading Copy

Requested by Sen. Swysgood
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
February 18, 1993

1. Page 3, lines 8 and 9.

Strike: "be" on line 8 through "with" on line 9

Insert: "not prevent the uses provided in"

SENATE NATURAL RESOURCES

2. Page 3, line 17.

Following: "substantive"

Insert: "documentary or analytical"

EXHIBIT NO. 2

DATE 2-18-93

BILL NO. SB 280

3. Page 3, line 20.

Following: "met."

Insert: "If a hearing is held on an application in which a valid objection has been filed, the applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been met only if the objector first makes a prima facie showing at the hearing, with documentary or analytical evidence or expert testimony, that the criteria in subsections (1)(g) through (1)(h) have not been met."

4. Page 10, lines 21 and 22.

Strike: "be" on line 21 through "with" on line 22

Insert: "not prevent the uses provided in"

5. Page 11, line 5.

Following: "substantive"

Insert: "documentary or analytical"

6. Page 11, line 8.

Following: "met."

Insert: "If a hearing is held on an application in which a valid objection has been filed, the applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been met only if the objector first makes a prima facie showing at the hearing, with documentary or analytical evidence or expert testimony, that the criteria in subsections (1)(g) through (1)(h) have not been met."

7. Page 17, lines 20 and 21.

Strike: "be" on line 20 through "with" on line 21

Insert: "not prevent the uses provided in"

8. Page 18, line 4.

Following: "substantive"

Insert: "documentary or analytical"

9. Page 18, line 7.

Following: "met."

Insert: "If a hearing is held on an application in which a valid objection has been filed, the applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) have been met only if the objector first makes a prima facie showing at the hearing, with documentary or analytical evidence, or expert testimony, that the criteria in subsections (1)(g) through (1)(h) have not been met."

Amendments to Senate Bill No. 282
First Reading Copy

Requested by Sen. Swysgood
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
February 17, 1993

1. Title, lines 8 and 9.

Strike: "NULLIFYING" on line 8 through "BASIN;" on line 9

2. Page 3, lines 1 through 7.

Strike: Section 3 in its entirety

Renumber: subsequent sections

3. Page 3, lines 9 and 12.

Strike: "through 3" on line 9

Insert: "and 2"

Strike: "through 3" on line 12

Insert: "and 2"

SENATE NATURAL RESOURCES
EXHIBIT NO. 3
DATE 2-18-93
BILL NO. SB 282

Draft Copy

Printed 3:33 pm on February 18, 1993

LC1575

*** Joint Resolution No. ***

Introduced By *****

By Request of *****

THE NATURAL RESOURCES
 EXHIBIT NO. # 4
 DATE 2-18-93
 BILL NO. XX

A Joint Resolution of the Senate and the House of Representatives of the state of Montana directing the Environmental Quality Council to study the nondegradation provisions of the Montana Water Quality Act and the implementation of those provisions; and requiring the Environmental Quality Council to report its findings and recommendations to the 54th Legislature.

WHEREAS, the 53rd legislature has considered two bills relating to nondegradation provisions of the Water Quality Act that have generated unresolved issues; and

WHEREAS, the implementation of the nondegradation provisions of the Water Quality Act involve complex issues of law, technology, and public policy; and

WHEREAS, the implementation of the nondegradation provisions are of significant interest to all Montanans; and

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That the Environmental Quality Council be directed to give priority to the study of the nondegradation provisions of the Montana Water Quality Act and the implementation of those provisions.

(2) That the study include a review of:

1
 OVER

LC1575

Draft Copy

Printed 3:33 pm on February 18, 1993

(a) the definitions of "nondegradation" and "high quality waters";

(b) the balancing of economic development and the public interest in maintaining high quality waters;

(c) the procedures for the review of proposed exemptions from the nondegradation provisions;

(d) the designation of mixing zones;

(e) the application of nondegradation provisions to all point and nonpoint sources of pollution to both ground and surface water;

(f) the effects of allowing degradation to high quality ground and surface waters;

(g) the relationship between the Montana Water Quality Act's nondegradation policy and the Montana Constitution;

(h) the capabilities of state agencies to implement the nondegradation policy and an assessment of the resources that will be needed to implement the policy equitably for all segments of society; and

(i) the identification of possible statutory and regulatory changes that would help clarify the nondegradation policy and provide for a more effective and efficient implementation of the policy.

(3) That the Environmental Quality Council consult with federal, state, and local officials, industries, citizens, and other persons or groups with expertise or interest in water quality protection.

-END-

Amendments to Senate Bill No. 401
First Reading Copy

Requested by Committee on Natural Resources

Prepared by Paul Sihler
March 24, 1993

SENATE NATURAL RESOURCES
EXHIBIT NO. #5
DATE 2-18-93
BILL NO. SB 401

1. Title, line 13.
Following: "AUTHORIZATION;"
Insert: "ESTABLISHING A FEE;"

2. Page 12.
Following: line 11
Insert:

"NEW SECTION. Section 6. Fee required. A request to degrade state waters pursuant to 75-5-301 must include a \$25,000 nonrefundable fee payable to the department upon application."
Renumber: subsequent sections

3. Page 12, line 13.
Strike: "[Section 5] is"
Insert: "[Sections 5 and 6] are"

4. Page 12, line 15.
Strike: "section 5"
Insert: "sections 5 and 6"