MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 14, 1997, at 4:00 P.M., in Room 405.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: None

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: **HB 524**
HB 154
Executive Action: **NONE**

HEARING ON HB 524

Sponsor: **REP. SHIELL ANDERSON, HD 25, Livingston**

Proponents: **Mr. Leo Berry, Attorney at Law, Browning, Kaleczyc, Berry and Hoven.**
Ms. Denise Mills, Remediation Division Administrator of the Dept. of EQC, State of Montana.

Opponents: **Mr. Nielsen, Acting Director of Environmental Health, Missoula City Health Department, Missoula, Montana.**
Mr. Jim McGrath, Missoula City Council

Opening Statement by Sponsor:

REP. SHIELL ANDERSON, HD 25, Livingston. I bring to you a bill that we think is put together by a consensus of environmentalists, the Department of Environmental Quality and industry. It changes the way that we go about cleaning up unintended releases into the environment.

This bill gives a responsible party, for an environmental release, the opportunity to do their own clean up before the Department steps in with its court orders. It gives the person who is liable, or potentially liable, the opportunity to expeditiously perform appropriate remedial action. As you can see throughout the bill there are references to administrative orders on consent which can be entered into by the responsible party and the Department. It develops a scheme of facilitating cleanup as opposed to the adversarial scheme.

Proponents' Testimony:

Mr. Leo Berry, Browning, Kaleczyc, Berry and Hoven, appeared on behalf of **Pegasus Gold Company and Rhone-Poulenc (a Chemical Company located outside of Butte, Montana**). He requested **REP. SHIELL ANDERSON** to introduce this legislation. The purpose can pretty well be found in the Statement of Intent on Page 1. The purpose of the bill is to make sure the potentially liable parties, those people who are responsible for clean up, are given the opportunity to clean up before the Department takes action. In the past, we have all assumed that was the intent of the original Superfund Law. At times that has been drawn into question by some of the attorneys in the Department of Environmental Quality, so we wanted to clarify the legislature's intent. If the private party is willing to step forward and handle the cleanup in a responsible manner, still under the control and approval of the agency, they indeed would give them that opportunity.

The second change is found on page 4 on lines 8 and 9. In the past, when a private party enters into an agreement with the Department and it voluntary stepped forward to do a clean up, the law requires that, the agreement be filed with the District Court. There is only one way to file something with the District Court and that is by a law suit. The District Court doesn't accept agreements. So there is an implication in the law that it was necessary for the Department to file an action. If you have a private party who is willing to step forward and do it voluntary and in an expeditious manner, a law suit should not be necessary. We struck that requirement. When you enter into an agreement with the agency, either a voluntary agreement or a consent agreement, that no longer has to be filed with the District Court.

The third thing that the bill does, is found on page 5, lines 9 and 10. It provides an appeal for the Board of Environmental Quality, if the Department does not think that the site is eligible for a voluntary clean up. You will notice that the

change is contained in Section 3. Some of these sites have a criteria for determining when a site is eligible for a voluntary cleanup plan. Currently if the Department determined that a site was not eligible for a voluntary cleanup plan, the decision was final. We requested that the bill include a provision that if the Department denied a site for voluntary cleanup eligibility, there could be an appeal to the Board of Environmental Quality to have them review the Department's decision.

The fourth change in the law is found on page 6, line 26. The Voluntary Cleanup Act, that was passed last session in **SB 382**, required that any site be cleaned up in a 24 month period. We have discovered, by working on sites during the interim, that there are several of these sites that really should be handled under a voluntary cleanup program. Sometimes there is difficulty accomplishing this in a 24 month period, especially if there are ground water problems. We have requested that that be extended to 60 months, which would be five years. The Department still has the authority to approve a time table for the cleanup of a site. When you submit an application for one of these sites, you need to include a time table for cleanup which the Department needs to approve. It might be three or four years. Two years, given the construction season in Montana, was too restrictive. The Department requested they be given more time to review those sites. That change is found on page 5, wherein the Department has 30 days to review a plan that would take 24 months or less and 60 days for a plan that would take more than 24 months.

Unfortunately, we missed one change that should be made to the bill which is found on page 7, line 4, where you see a reference to 24 months. The Department's approval plans, under the bill as currently written, would expire after 24 months. If we allow sites to be cleaned up over a 5 year period, when approved by the Department, then this should be changed to 60 months also. We would recommend that an amendment be included in the bill to change that to 60 months.

Ms. Denise Mills, Remediation Division Administrator of the Department of Environmental Quality, State of Montana. The DEQ administers a Comprehensive Environmental Cleanup and Responsibility Act (CECRA) and will administer the amended act if it passes. For this reason we appreciated that the proponents shared the concept of this bill, that early drafts of it were provided to DEQ, and that our input was sought on the amendments to CECRA.

House Bill 524 provides explicit flexibility for potentially liable persons, or PLPs, to conduct remedial actions without administrative order consent decrees. This flexibility should foster more cooperation between DEQ and PLPs and should provide for more expeditious remedial actions that might occur under an administrative order which could take months to negotiate. This explicitly allows flexibility for a PLP to proceed with remedial actions without an administrative order and retains the DEQ's ability to use discretion on a case-by-case basis in determining whether the work should be performed by a PLP. This

discretionary authority is already in the law and the DEQ will continue to use this authority if there is a concern that a PLP cannot do the work properly and expeditiously or effectively address public concerns. To clarify the DEQ's administration of CECRA in the past, administrative orders have been issued for only 13 of more than 200 CECRA sites and orders for three of these sites were recently negotiated. Orders have been issued for only the highest priority sites in Montana, each of which poses a potential threat or a clear threat to human health and the environment. Most are in communities with quite a public interest and concern for preventing exposure to contaminants from Superfund Sites. In most cases PLPs have been and will continue to be given an opportunity to initiate remedial actions. Occasionally, the DEQ will determine whether the PLP should conduct remedial action or if the work should be done by the Department.

In expressing support for this bill, it is important to clarify the DEQ's expectations for remedial actions by a PLP. To receive a no further action determination from the DEQ on Superfund Sites, or potentially de-listing of the site, as is desirable in real estate transfers, or land development projects, or to remove the stigma of the site being listed from property ownership, widely accepted methods must be used to site characterization, data analysis and remedial design. Remedial measures which are put into place must be protecting the standards both for human health and the environment.

Opponents' Testimony:

Mr. Peter Nielsen, Acting Director of Environmental Health, Missoula City Health Department, Missoula, Montana (EXHIBIT #1), spoke in opposition to the bill. We are able to support the majority of the bill but are opposed to one provision of the bill which allows the responsible party to proceed with remedial actions on their own. Our problem lies in the definition in the Act which includes health studies and health risk assessments. Health risk assessments are used to determine the nature of cleanup and the degree of cleanup that must be done at the site. Therefore, there is incentive there for a company that used to pay for a cleanup to do the Health Risk Assessments that are going to determine how much cleanup is required and how much money they are going to have to spend to cleanup the site. Owners of facilities have a lot of incentive to do those studies. In our county we have a total of 21 sites. Only a few of those are of sufficient magnitude that they will require these health risk assessments. So, for most sites this really isn't an issue. But for those that it is an issue, it is important to the health of the members of our community. We feel that it is very important that a fairly impartial party review these Health Risk Assessments that will determine the nature of the cleanup. The costs of cleanup can be very high, but the cost of not cleaning up a property can also be very high especially if the facility is closed and residual contamination is left in place which present some barriers for the full use of the property.

We have a site in our community, the White Pine Sash Site, which is a 41 acre site. It is a recently closed property located in an out-of-way residential neighborhood on the north side. It's prime property for re-development at this time for a variety of reasons including manufacturing, commercial, and residential. If the cleanup of the site results in substantial residual contamination being left in place, that is going to deter potential investors. It is going to deter the financial institutions. They are required to participate in that project, and that is going to hurt the community. So we suggest that the bill simply be amended to exclude Health Risk Assessments from those remedial actions which may be performed by liable parties at State Superfund Sites. With that amendment, we would be pleased to support the remainder of the bill.

Mr. Jim McGrath, Missoula City Council, stated he brought with him a letter from the Westside and Northside Neighborhood Associations, those are the two neighborhoods on either side of White Pine. He read the following:

"Dear Senate Natural Resources Committee:

The residents of the Westside and Northside Neighborhood would like to comment on **HB 524** which revises SuperFund Remediational Law. The bill has already passed the House. **House Bill 524** would allow any potential responsible party, of the SuperFund Site, to hire their own consultant to determine the risk to human health, without Risk Assessment evaluation of the cleanup at a Site. **Mr. Peter Nielsen, Missoula's Acting Environmental Health Director,** says, 'It is better to leave the Health Assessments in the hands of the State Department of Environmental Quality with the consultants responsible to the State.' We agree.

White Pine Sash is contaminated with both pentachlorophenol and dioxin, known carcinogens. This pollution is in the surface soil which blows around the neighborhood. It is also in the subsurface soil on site and the plumenary stems beneath the site to the sole source aquifer. The citizens of the Northside and Westside want to cleanup based on protection of our health and that of our children, not the owner's willingness to pay. White Pine Sash has already packed up and left town. The site is abandoned. The company publicly pledged to clean the site, now that it is being called into question by this bill and those responsible for correcting it. It's not going to be cheap or easy to clean this site. However, the cleaner it is, the easier it will be to attract new businesses and put another business on our tax rolls. Our neighborhoods are working to develop plans for that site that will make it a future benefit to the neighborhood, the city and local business.

Two developers have already met with members of our neighborhoods and expressed interest in this site. Back in December of 1994, the local Health Department had to go to the State Department of Health and Environmental and Sciences with a list of complaints about the quality of work that White Pine Sash has contracted for doing at the site. At that time the Health Department asked

DHES, now the Department of Environmental Quality, to oversee the cleanup rather than leave it in the hands of the Department of Agriculture. We do not want the cleanup botched.

Signed Kathy Szvetecz, President of the Westside Neighborhood Association, and Bob Oats, President of the Northside Neighborhood Association."

As I said, White Pine Sash is in the middle of my district. I represent 8,000 people in the City of Missoula. White Pine recently closed its doors due to changes in the window industry, and we were all sorry to see those jobs go. We have been undertaking discussions about how we can bring some of those jobs back in and redevelop that site. The two neighborhoods around it are traditional working class neighborhoods. They like business on the edge of the neighborhood. Many of the workers that worked at the mill lived in the neighborhood, right next to it. Its been a long tradition. Those neighborhoods are in the process of a renaissance of sorts. I'm really excited to see my neighbors getting together and trying to pull together, gather pride in a neighborhood that has been on decline and pull themselves up by their bootstraps. It's has been an exciting process. Currently they are undertaking a neighborhood planning process and they are looking at what would be a good use of that site. Many would like to see another business move in, or a mixture of uses. Some potential parties have talked with the neighborhood about coming in and reinvesting, as is mentioned in this letter. It is important to understand that the neighbors here welcome business and opportunity and welcome jobs from industry. They would like to have that tradition continued even as the course of the county changes.

We are also exploring the new Environmental Protection Agency Brownfield Program which helps package redevelopment enterprises to encourage them to move into sites that have been abandoned and contaminated just like White Pine. It is a very new program at the federal level. It is very encouraging. My concern is that without the assurance of state and public assessment, any evaluation of future parties will be unwilling to take the risk of moving back into a site. A vacant, abandoned ramshackled and potentially contaminated site in the middle of the community, will not help this neighborhood and this community to develop.

Regardless of what happens at White Pine, I would be concerned about future sites around the State, whether it be in Billings or Miles City or Lewistown. Although our economy will be changing constantly, new businesses will leave and new businesses will come in. So we encourage you to make the amendments that **Mr. Nielsen** suggested, just to give the assurance, so that we can help some new businesses come into these sites and assure that the public is protected.

Questions From Committee Members and Responses:

SEN. VIVIAN BROOKE commented there has been a lot of testimony about the effect this will have on White Pine Sash land and asked **Mr. Berry** to respond.

Mr. Berry. The Missoula White Pine Sash site is subject to a unilateral order issued by the Department about two years ago on March 17, 1995. Part of that order, about on page 12, states "The Department of Environmental Health and Environmental Sciences will prepare all necessary draft and final risk assessments for the Missoula White Pine Sash." So it is my interpretation of this order, that the Department will prepare that Risk Assessment. It's my understanding that they are currently undertaking that process at this time and that the Missoula White Pine Sash facility would be unaffected by this piece of legislation.

SEN. BROOKE asked **Mr. Nielsen** what his perception was of this bill and also the order that White Pine Sash is under now?

Mr. Peter Nielsen. It is my understanding that White Pine Sash has made some considerable effort in the past to obtain permission to do this assessment and that was successfully resisted by the State. We thought that was a good position to support. It is not the only site in the community in which the remedial risk assessment has been done, but it certainly is one that's probably important and on our mind at this time. There is an order and I guess I would question whether or not it could be applied retroactively and modified, in an existing order. I've been told today, that it would not. That doesn't necessarily give us that full accounting of being real sure that that is going to be the case in Missoula. That's the concern. That the order may be modified. It is just now at the stage of cleanup where the remedial investigation has been completed and the risk assessment is about to be heard. It is not my understanding that any substantial activities along these lines have taken.

SEN. DALE MAHLUM asked **Mr. McGrath** if he understood him correctly in that White Pine Sash had pulled out and he didn't know where they were currently located?

Mr. McGrath responded, I think you misunderstood me slightly. What I said is they have closed that mill and are no longer operating.

SEN. MAHLUM commented that if he didn't know where to contact them, he could probably go to **Mr. Berry**, because he sounds like he knows.

Mr. McGrath. The point is that it is no longer an operating plant. The local agents are no longer there and of course the jobs are gone, so that is the primary concern and the facility is not able to be used right now. It's just empty buildings and we'd like to see that situation changed. I didn't mean to imply that we can't find the major company headquarters.

SEN. FRED VAN VALKENBURG asked **Ms. Mills** if the White Pine plant cleanup here is subject to an Administrative Order of the Department?

Ms. Mills, DEQ responded, the site is under Remedial Order by the Department.

SEN. VAN VALKENBURG asked, does that order provide that the Health Risk Assessment be done by the Department of Environmental Quality?

Ms. Mills, DEQ answered, that's correct. There's explicit language in the order that provides for the Department to conduct the Health Risk Assessment on this particular site.

SEN. VAN VALKENBURG questioned, would the passage of this bill change that at all, or make it possible for White Pine to have the Health Risk Assessment done by anyone other than the Department?

Ms. Mills, DEQ answered that the Department's interpretation of the bill is that this bill doesn't rescind any part of that order. Our understanding is that if any part of the order were to be put out of effect, it would actually have to be repealed. My understanding from **John North**, is that there could be a statement of intent introduced into the bill to keep that protection in there.

SEN. VAN VALKENBURG asked, **MR. CHAIRMAN**, in that regard maybe **Mr. North** may be able to answer this other on their behalf. But, if we were to amend this bill to put in an applicability clause in it, so to the effect that it would not apply to any sites in which the Department currently had an administrative order in effect requiring the Health Risk Assessment to done by the Department, would that present any problems for the Department?

Mr. John North, Chief Legal Council for the Department of Environmental Quality, State of Montana answered, no.

SEN. VAN VALKENBURG continued, are there any sites that the Department currently has jurisdiction over, other than the White Pine Sash site in Missoula, that might be caught up in such an applicability clause?

Ms. Mills, DEQ answered, yes. I'll just read a list of the sites that we currently have orders on, action sites that have not been closed. Big West Oil, which is a high priority site, we have a unilateral order on.

CHAIRMAN GROSFIELD asked, could you tell us what communities these are located in too?

Ms. Mills, DEQ responded as follows:

Big West Oil Refinery is in Kevin.

The Bozeman Solvent Site, of course in Bozeman. We have a unilateral order on that for an alternate water supply system. That order was issued to the City of Bozeman.

The Burlington Northern Havre Fueling Facility. We have recently negotiated an administrative order on that site, it hasn't been signed yet, but they've submitted a work plan in February and we expect that order to be signed in about two months. The work plan will be attached to the work plan approved by the Department.

The Burlington Northern Livingston Facility. That work is being done under a consent decree.

The Burlington Northern Missoula Fueling Facility. That again has an administrator order that was only recently negotiated with the Havre order.

The Burlington Northern Whitefish. This has the same status as the Missoula and Havre Facility.

The Comet Oil Company, Billings. We have an Administrative Order there.

The Missoula White Pine Sash. We have a unilateral order. That is the maximum priority site in the State.

Precious Metals Plating Facility in Bonner has a unilateral order.

Texaco-Sunburst Works Refinery on the high line has a unilateral order issued to it.

Currently given that site list and sites that we are doing Risk Assessments on, there are only three - Missoula White Pine Sash, Big West Oil Refinery and Bozeman Solvent Site. For the Bozeman Solvent Site, we have a memorandum of agreement with the City of Bozeman for the work. An order was not issued and that agreement provides that the City would do the remedial actions and as correctly stated by **Mr. Neilsen** in his testimony, remedial action doesn't address the assessments. At this point the Department has proceeded with developing a scope of work for the Risk Assessment and I don't believe that there has been any objection to that work being done. That's probably the only site that might be affected by this bill. But at this time we think there's general acceptance that the Department would do the work in Bozeman. There is a large community effected by the pollution there and we think in that particular case we would use our discretion to anticipate that we would do the work rather than the City.

SEN. VAN VALKENBURG stated, so as I understand it, there are only three of these sites in the State where Health Risk Assessments are required?

Ms. Mills answered, I have a list of eight sites for Health Risk Assessments. We currently have three that are either going to happen very soon, or are being done. There are five additional sites where the Risk Assessments have been completed and those were completed by the Department. There are an additional, actually four sites, where Risk Assessments have been or will be completed under an agreement with a PLP. Those are the BN Facilities. The BN Mission Wye facility that the PLP did the work with DEQ oversight and that was mutually acceptable. We are giving them an opportunity to do the work on the Whitefish Facility.

SEN. VAN VALKENBURG asked, who did the work?

Ms. Mills responded, the principal, or the potential liable party, Burlington Northern.

So given those numbers, we have 12 sites that Health Risk Assessments have been required on. Again, those are sites that we view as having a high health risk, or if there appears to be a risk, we need to evaluate it. For the others, we are using what might be referred to as prescriptive numbers. This could be the federal water drinking standards, or the Montana WQB7, the Water Quality Standards for the State of Montana, soil cleanup standards which might be determined as various health risks, or anticipated land uses.

SEN VAN VALKENBURG. With respect to **Mr. Nielsen**, and counsel and **Mr. McGrath's** concerns as to the appropriateness of the PLP doing or contracting out Health Risk Assessment to some consultant, apparently the Department is not concerned about that. In the same vein, I guess that these Missoula people are. Why is that?

Ms. Mills answered, as I explained in my testimony, and I believe that **Mr. Berry** expressed as well, although this bill gives an explicit opportunity, we've been giving this opportunity to PLPs, but this opportunity makes it more explicit in the law, to do remedial actions and Risk Assessments. The work has to be done and the language in the bill is properly and expeditiously. The Department will continue its oversight of that work. If we received a report on health risk assessment, for example, that for some reason has a data gap in it, or hasn't addressed an exposure pathway, maybe it hasn't addressed drinking water that's contaminated that is an obvious pathway at a site. We would probably do one of two things (1)provide comments to that PLP that there are these inadequacies in the report and they need to be addressed. These reports also go out for public comments, so when we receive comments from the public there is generally a 30 day comment period, and we need to be responsive to that public comment. (2) Another alternative that the Department might take if the risk assessment which has been submitted to us is clearly inadequate, or we don't feel for some reason that this party is able to do the work properly or address the concerns from the Department, we may decide at that point it needs to do the work and take it back. I don't believe this bill takes away that authority from us.

SEN. VAN VALKENBURG asked if there were any significant cost or policy differences to the Department as far as reviewing the work that the PLP has done with regards to the risk assessment as opposed to doing it itself?

Mr. Mills answered, as far as the costs go, when the Department does the work, it generally hires a contractor anyway and we have people on staff who can help crunch numbers and help do some of the write ups. We do get a peer review by a contractor, and they help us to make sure that the numbers are scientifically accurate. So there's a cost if we are doing the work. If we are not doing the work and DEQ is still doing the oversight, I believe that we would still be retaining a contractor, particularly on a site like Missoula White Pine Sash or Bozeman Solvent Site where there's a large affected public and there are health risks involved in the people drinking the water. We would want to make sure that we have all our ducks in a row, and we would continue to retain a contractor. Now what the difference of the costs would be in an oversight roll versus actually doing the work, I am not prepared to respond to that.

SEN. MIKE TAYLOR. Obviously you don't have concurrence with this bill. How did you arrive at the 60 months versus 24 months, voluntary cleanup ?

Ms. Mills answered, that was actually in the draft bill proposed by **Mr. Berry** and his clients. We discussed that and debated whether maybe it should be three years, or four years, 60 months is just about five years and there is actually a concession made in the bill. There is a clause in the bill, on page 5 of the bill, subsection 3, which was one of the concessions that **Mr. Berry** made when we discussed this. It provides that, "The Department may determine that a facility that is potentially eligible for voluntary cleanup exhibits complexities regarding protection of public health, safety and welfare." That was actually a part of the bill that was struck out of an early draft. There was concern about sites that might take longer to cleanup, and that was one of the reasons that the clause was put in there. We preferred the clause not be stricken, and even if a site is supposed to take five years to cleanup, there might be a phase process to get all the way through into the mountain areas, and by submitting a plan over five years, rather than a plan over two months, might enable a party to bring in a more comprehensive process. Lets say instead of a more general overview of what might happen and how to link the pieces together better than a plan that does one step this year under a 24 month plan and the next plan covers the next step of the process. So going back to the complexities, that was where we wanted to be able to retain our discretion and we didn't feel that it was appropriate for volunteer cleanup, we would advise the PLP of that determination.

SEN. TAYLOR responded, you say you feel comfortable with the language that is in there now, is that what you are saying?

Ms. Mills answered, we do. **MR. CHAIRMAN and SEN. TAYLOR**, that was the reason that we proposed additional time for the

Department to be able review a plan that might take longer than 24 months.

SEN. BILL CRISMORE asked, could you just explain to me about the White Pine Sash Site. What are we talking about here? I mean does anybody know this Site? What kind of contamination are we talking about?

Ms. Carolyn Fox, Remediation Division of DEQ, State of Montana. The Missoula White Pine Sash was a wood treating facility that used pentachlorophenol for a very brief period of time along with some petroleum based solvents. The contamination problems are in the subsurface soils. There is petroleum contamination, as well as pentachlorophenol and dioxin that is associated with the impurities in the pentachlorophenol manufacturing. There is also ground water contamination. There is a drinking water aquifer that has not been impacted with the contaminates from the Site, but above that there is a push off portion that has been impacted with these contaminates.

SEN. TAYLOR commented, so we are talking about removing dirt.

Ms. Mills answered, we are probably talking about more than just removing dirt, because there is some ground water contamination at the site. At this point, it is not in the aquifer that is used for drinking water. So we are talking about both soil cleanup, as well as ground water cleanup. That's the purpose of the studies that are going on right now, to determine the extent of the contamination and find a way to clean it up.

SEN. TAYLOR asked, does the State bond companies like this, if there is a potential problem with the materials that could be harmful?

Ms. Mills responded, the work is being done by consultants for the responsible party. It is an issue for the State to be involved in prodding those parties. We have identified who is liable for the site. They have gone out and are basically at almost a completion of their investigation phases, and so it has not become a larger issue.

{Tape: 1; Side : b; Approx. Time Count: 4:20 P.M.}

SEN. VAN VALKENBURG asked for a more overall back ground about the work. What are we talking about with the White Pine Site? Is it something that happened 40 or more years ago, when there were underground tanks involved?. I think when **SEN. TAYLOR** asks, "does the State require bonding?" he means, that when White Pine went into business, 30, 40, 50 years ago, and starting doing this, did we have some kind of bond in place that would require them to take care of any problems that could come about as a result of the business that they were in, is that clear?

Ms. Fox responded, when most of these facilities were operating, there were no bonding requirements. There are some of them that have insurance provisions and they have gone to their insurance

companies to get some of their costs reimbursed, but my general observation is that there is no bonding reclamation requirements for these historical contaminated sites.

SEN. BROOKE asked, if this bill becomes law and we discover what we discovered with White Pine Sash, what would happen?

Ms. Fox answered, her understanding is the law gives the opportunity to responsible parties to do the work first. In that respect, it is kind of been the way things have been since this law was passed in 1989. I don't see where a responsive party's liability to cleanup sites changes with this legislation.

SEN. BROOKE stated, what I understand is, with this piece of legislation, the Department would no longer issue unilateral orders, is that correct?

Ms. Fox responded, what this legislation says, is that we should give the opportunity to back up work done by letter first before issuing orders. That has been the norm more than the exception. We have very few orders. We have issued orders mainly on very high priority sites and this is saying, give the opportunity by letter first, before issuing orders. So that is the change here. Most of our sites are actually not under order, but the very large big impact sites are.

SEN. BROOKE commented, if in fact, you offered the White Pine Sash owners the opportunity to go forward with this on their own, without the order and then they left, what would we have to hold them to that responsibility?

Ms. Fox answered, I believe we have enforcement vehicles that are in CECRA to go after those parties. The question becomes, will they still be there, when we go after them? That's always a question that's out there. We can issue unilateral orders, when consent orders don't work out. We have the ability, under our State SuperFund Law, to go in and do the work, if a company has not done it properly. That doesn't get at the issue. There is always a possibility even in the existing scenario without these changes that a company may go bankrupt. That's the time when the State starts having to consider finding a way to cleanup those sites, when there is no longer funding. We have very strong enforcement tools in the law, and those particular sections of law are not being changed here.

SEN. BROOKE stated, we are now in the process of changing joint and several liability and given the scenario, if there is a high profile cleanup site, or SuperFund Site to cleanup and then that particular piece of property is up for sale and a new owner comes in, would that new owner take on any liability?

Ms. Fox answered, there is a possibility that somebody who buys a contaminated site can also be held liable because one of the categories of liable parties, is current owners. There's a way that they can defend themselves through an innocent land owner defense. There is another way that some of these prospective

purchasers can actually enter into agreements with the Department concerning their liability. Sometimes there is an exchange. Maybe they agree for $30,000.00 that they are reducing their liability. Those agreements are just now starting to come out at the federal level, we don't have one in place at the State level, but that's an alternative for a prospective purchaser. With the changes in strict several and joint liability, if it were to go through the allocation process that's in that bill, SB 377, the current owner who buys that property may have less liability in that allocation process than they would without that allocation process. Because the factors for liability are broad based in that allocation process. So that's what that other bill, SB 377, might have to do with the current owner, bare liability may be less if that site is undergoing the allocation process.

SEN. BROOKE questioned if she saw any concern with the fact that, at this point in time, the 41 acres in Missoula is up for sale? We have identified the responsible party and they are under an order. Does a new owner take any of that responsibility at all, or liability?

Ms. Fox responded, the timing of this question is very timely. We got a call from the prospective purchasers of the Missoula White Pine Sash, yesterday. They would like to enter into a prospective purchaser agreement to protect their risk and we are talking to them. The only thing that would change Missoula White Pine Sash and Doerr Company's ability, is if they were to go bankrupt. They are a company. We have no reason to believe that they will not continue with their obligations to investigate and cleanup that site.

SEN. TAYLOR. If they go bankrupt and somebody else buys the land, are you telling me that they're responsible if you don't give them a waiver?

Ms. Fox answered, there are four categories of liable parties. One is the current owner. There is a defense of the current owner before they buy the property they can go through and make sure it is not contaminated before they buy it. But if it is contaminated, yes, they can be held liable in the future. They could be noticed. I have to say, although some people may say the record is that most current owners are held liable, the record is, that even though this is on the books, the people who have made the mess are the entities that are cleaning it up. So where a company could go bankrupt and sometimes the other parties have to pick up their share, or what's being anticipated in SB 377, is that the State will pick up the share of the bankrupt and defunct parties.

SEN. TAYLOR said, with that logic, it makes a good business practice to set up a shell corporation and go bankrupt. When you don't have to do it, obviously.

SEN. BROOKE asked **Ms. Mills**, when you were answering the question to **SEN. VAN VALKENBURG**, did you say that, **Mr. Berry's** clients initiated this bill?

Ms. Mills answered, we were approached by **Mr. Berry** at the inception of this bill back in December and I guess I may have spoken out of turn, but I made the assumption that he was representing a certain client and an interest, **Mr. Berry** might be a better person to answer that.

SEN. BROOKE. This is not a bill that's coming from the Department of DEQ?

Ms. Mills responded, that is correct.

CHAIRMAN GROSFIELD commented that this bill amends a couple of temporary sections of law, I believe it's SB 382, that we passed last session, that expires in the year 2001. One of the things that we are doing, is extending the authority of this bill from 24 to 60 months, which goes past the year 2001. Is the talk of extending that voluntary cleanup authority that we passed last session beyond 2001, and is the Department looking at that. How is this going to play?

Mr. North answered, that's not an issue that I thought about at this point. I would need to think about it, before I could give you an answer.

CHAIRMAN GROSFIELD. Is the Department finding that this program is working? Is it a good program? Are we getting cleanup as the program was intended?

Ms. Fox answered **SEN. GROSFIELD**, since this law was passed, we have received 13 voluntary cleanup applications. Eight have been approved. I can't remember how many are conducted of those eight approvals. We have an interest in 5 more sites at this time. Some draft applications are in. I would say it's been a successful implementation.

CHAIRMAN GROSFIELD stated, are you suggesting, that without the bill, you would not have had those 13, plus 8 more prospective?

Ms. Fox responded, that would be speculation for me to guess. We did voluntary cleanups before this law was passed with a little bit of a central process. This made the process known. I think it gave it more publicity. As to the numbers, we had a lot of voluntary cleanups, even before the law was passed.

CHAIRMAN GROSFIELD asked **Mr. Berry** to comment on the 60 month versus the termination date.

Mr. Berry answered, I have thought of that question. It's no different than if you left it at 24 months and somebody came in and applied in the year 2000 and the Department approved a plan if it had a 24 month cleanup period. My interpretation of the section would be that sites that are eligible under this Act that

have submitted written approvals and have approved plans, will have five years to clean those up, under those approved agreements with the Department, regardless of whether the law expires at that time. They will have been submitted and approved during that period of the time table established. I was involved in the drafting of SB 382 last time also, which created this voluntary plan. The Department wanted to make it temporary, that was one of the concessions industry gave to see how it did work. Hopefully it is working and if that continues, we would again approach the Legislature to make a voluntary program permanent in the law.

CHAIRMAN GROSFIELD commented that **REP. HALEY BEAUDRY** offered some amendments in the House Natural Resources Committee, several of which were adopted, but one of which wasn't. The one that wasn't goes to the issue raised by the people from Missoula, basically saying that in the case where there's any significant high degree of public interest or potentially high health risk that maybe we don't want the PLP to be helping with the Health Risk Assessment. What is your response on that amendment?

Mr. Berry responded, it was a late amendment and I could actually not contact my clients prior to the hearing on the bill. Since that time, I have had a chance to contact my clients. They are opposed to the amendment for this reason. The intent of the bill is to allow the PLPs to do the work. When you have one of these sites, you do a ground water assessment, you do an air assessment, you do a soil assessment, and you do a Health Risk Assessment on bigger sites, sites that may have a Health Risk associated with that. All that work, regardless of its nature, is done with the oversight of the Department. The Department has to approve the work plans, including the work plan for Health Risk assessment. It has to approve the work once it's done and as **Ms. Mills** indicated, if the Department has problems with the work that is done, or if the public comments and raises a point that the Department has a problem with, they can instruct you to go back and redo that part of the work. In addition, if they feel that it is so faulty, they can do their own Health Risk Assessment, or their own ground water assessment or any other part of the plan and under any of those scenarios, the private party pays for the State doing that work, both for the oversight and for actually doing the work. So I would disagree with **Mr. Nielsen** that there is an incentive somehow to do a less than good job. Because the risk the PLP runs in that instance is to pay for it twice. So I don't share his evaluation of how a private party would do that, because they will probably end at exactly the same place, only pay twice for it. The Department has to ultimately approve the work and has the resources to review the work.

There's nothing in this bill that either changes the liability of the party, or the ability of the Department to issue orders on sites where a party is not voluntarily cleaning up the site. There is nothing in this law that changes the liability of a party.

If a private party does not properly cleanup a plan, or a site, or does not perform properly, there is nothing in this bill, that prevents the agency, from either issuing an order, or cleaning up the site itself. This merely gives the private party the chance to do it right first. If they don't do it right, the agency can then step in.

CHAIRMAN GROSFIELD asked **Mr. Simonich** if he was comfortable that the Department has the staff and budget to check these things out?

Mr. Mark Simonich, Director, Director of the Department of Environmental Quality, answered that he was satisfied. He didn't know that the Department would approach their view of a Risk Assessment differently, whether we were responsible for doing it and hiring a contractor to do it, or whether they were anticipating the PLP doing it and then submitting it to them. They are still going to work with a contractor. They currently are in between toxicologists. But generally its the work that they have to do regardless and this bill doesn't change that all.

Closing by Sponsor:

REP. ANDERSON clarified, he thought part of the problem with the House amendment was, where it said a facility that involves a high degree of public interest. There would need to be a determination of what was a high degree of public interest, because that's a rather ambiguous term. It could be argued perhaps that all of these involve a high degree of public interest, and therefore, the purpose of allowing the PLPs to take the initial step to cleanup would be defeated by that amendment. He made a friendly reminder about the 24 month language on page 7, line 4, that would need to be changed to conform with the other language.

Additional exhibit - Missoula county Commissioners - **EXHIBIT 2.**

HEARING ON HB 154

Sponsor: **REP. LILA TAYLOR, HD 5, Busby**

Proponents: **Mr. John North, Chief Legal Counsel, Department of Environmental Quality, State of Montana.**
Mr. Jim Mockler, Executive Director, Montana Coal Council.
Mr. Ted Lange, Representative, Northern Plains Research Council.

Opponents: **None**

Opening Statement by Sponsor:

REP. LILA TAYLOR, HD 5, Busby, commented that this bill came from DEQ. This bill generally revises the Montana Strip and Underground Mine Reclamation Act.

The first Section 1, the new Section, the owner to permittee change in line 17, is just basically terminology. Its the permittee who does the operation not necessarily the owner. The biggest part of Section 1 deals with any domestic or residential water that may be licensed or changed during the mining process. She was concerned with this section, that this date goes back to October 24, 1992. The only mine that it would effect would be the underground mine, the one at Roundup and there are no such structures that would be affected.

On the second page, at the top of the page, in the House Hearing there was some concern that, by putting this section into deal with domestic or drinking water, we would somehow lessen any other rights granted any other of the mining laws, as far as diminished water right. **Mr. John North** can answer the question on that, but it was put in to say that this doesn't diminish any other right granted in any other provision of the law. So that's petty self-explanatory. When we go on to page 4 which deals with the definitions of operation, in situ mining was added. It was left out, and its just added in there because it was missed before. On page 6, the prospecting permit, I had a chart that **Mr. North** gave me about what is permitted, and what isn't. I'll just let him answer those questions. Basically it deals with the tons of coal taken out and the land disturbed. I would like to remind the committee that it doesn't lessen the fact that all this land has to be reclaimed. It just is what triggers the permit.

After this bill was drafted, we got the final letter from the Office of Surface Mining saying that what we did in the last session, as far as releasing the bonds on the re-vegetation on some of the reclamation, was questioned. We really didn't get the final ruling until after this bill was drafted, and that is the reason for the amendments. This deals with the re-vegetation on the reclamation that was done between 1978 and 1984. What we are trying to do here is, if all the other qualifications for the reclamation are met, and the only thing that is holding up the bond being released is the mix of seeds that were used, then through this we are releasing the bond. The Department approved the seed mix. There are three mines that are affected by this. Peabody Coal would have less than 25% introduced grasses. East Decker, which is my neighbor would have 35% introduced grasses. **Mr. North** said that Upland is less than 20% grasses. I am not sure of the differential there. Western Energy has less than 20%, so you can see we are not talking about great percentages. This doesn't mean that the land is not reclaimed and it is not re-vegetated. The total bond being held on these questionable acres is $430,000.00.

Proponents' Testimony:

Mr. John North, Chief Legal Counsel, Department of Environmental Quality, State of Montana, spoke in support of the bill. Our Strip Mine Act was passed in 1973. In 1977, the Federal Surface Mine Control Act was passed and it provides that the state is to regulate coal mining. It needs a program that is as strict as the Federal Program. There are four major things that this bill does, three of them come from the 732 letter. With regard to the subsidence provisions which are Section 1 and Section 8, those became necessary because of a 1992 amendment of the Surface Mining Act which Congress passed.

With regard to prospecting, the changes in the prospecting provisions are on page 7 and page 8. Those changes come from the 732 letter that we received from OSM on review of changes that we made in either the 1995, or the 1993 session. Their solicitors looked at that back in Washington and they identified three, what I think are very small points, only one of which is really substantive. That's the one that you see on the bottom line of page 7, where the word "natural" is taken out. Under the federal law, prospecting also includes un-natural mineral deposits which are waste piles. The other two amendments to prospecting are esoteric. They wouldn't have much application in Montana, but they are just necessary so that our law mirrors the federal law. I'd be happy to explain those if I got a question, but I am assuming that you don't want to hear all that.

With regard to sections 4 and 5, the new Sections, I have **Steve Welch** and **Neil Harrington**, here from the Department who could explain any technical things that you need answered. Let me simply say that before 1984, seed mixes were not as good as they are now. The Department felt that they were good enough. They were the best that were available at the time to meet the native species requirement. It turns out that the non-native species were more aggressive, and so we don't have a predominately native species out there on probably about 10% of the reclamation. The question is, what do we do about it? Do we tear it up? That could have environmental consequences. Do we make them re-seed it, or do we simply apply the other provisions of the Act and say that if it is permanent, diverse, effective, useful, it should be good enough. That's what the 1995 Legislature decided ought to be done, and the reasons that we are in here with sections 4 and 5, is when that was submitted to the Office of Surface Mining, they said, "It needed to be done a different way. You shouldn't have put it in the bond release section, you should have put it in the re-vegetation section." That's what this does.

Those are the three things that we have 732 letters on. The other one is the amendment to the definition of "operator." Not only is coal regulated under this Act, but also uranium, and the definition of "operator" is such that its questionable whether an in situ uranium mining operation would be covered. It was definitely the intent to do that. All this does is amend that, so that in situ uranium is covered under the Act. That is the only thing that doesn't result from a 732 letter.

Mr. Jim Mockler, Executive Director, of the Montana Coal Council, said, one of the great exasperations to us has always been that for whatever reason they decided to turn the powers over to the federal government to regulate how we will reclaim our lands. I think we can do a lot better job without them. Two years ago with the support I believe, of the environmental community, we passed a bill that allowed for bond releasing, even though they worked it out without the native plant. They decided in their wisdom that maybe there was some small thing that we had to change in it and that is pretty much all you're doing with the bill is complying to good old Uncle Sam's wishes. It doesn't really do a thing as far as changes that we are doing on the ground today.

Mr. Ted Lange, Northern Plains Resource Council. We do support this bill. Some of our members who ranch in the area have told me a little bit about the situation with the revegetation. Apparently it's not an ideal situation, but it is one of those deals where what's done is done. The particular type of grass involved, if we get a really bad drought some day, it is grass that will continue to propagate itself. I can get you more information if you are interested. But if we get a really bad drought one of these days it may actually die off and create a problem, until then, it will probably be fine. What's done is done.

Opponents' Testimony: None

Questions from Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 5:00}

SEN. TOM KEATING asked, is there any grass that doesn't die in a drought?

Mr. Lange answered, I would have to get you more detailed information of what I have been told. I'm not an expert on the situation. It is not a native species.

SEN. GROSFIELD asked **Mr. North** if he always uses mixes?

Mr. North answered, yes, **Mr. Chairman.**

SEN. GROSFIELD said, so there is a variety of grass seeds involved, some do better than others, and so on.

Mr. John North answered, yes, **Mr. Chairman.** That's right.

Closing by Sponsor:

REP. TAYLOR commented that one of the most important things for her is the re-vegetation. She didn't realize that once you plant it, the stand has to be there for 10 years, before you have a chance of having your bond even looked at to be released. If you

go in there anytime within the 10 years, to do anything, the 10 years starts all over again. If we saw one of the mines going in and digging up what we think is a very wonderful stand of grass on some of this re-vegetation, we'd think they'd probably lost their mind, because all of us work very hard at some of these stands of grass. Most of what's in these areas that isn't native is called "intermediate wheat grass." I think that's the biggest.

ADJOURNMENT

Adjournment: The meeting adjourned at 5:15 p.m.

SEN. LORENTS GROSFIELD, Chairman

GAYLE HAYLEY, Secretary

LG/GH

Transcribed by: Judy Keintz